To: Quiroga Law Office, Partners
From: 99663, 2-3
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Re: Fentons, Attractive Nuisance Claim

Questions Presented: Under Washington state tort law, do parents have a cause of action for attractive nuisance, when their child is injured in their neighbors' swimming pool.

Short Answer: Possibly yes. The general rule for attractive nuisance is: 1) the instrumentality or condition must be inherently dangerous in itself, and it must be a condition that is likely to, and probably will, cause an injury to those who are attracted to it and come in contact with it; 2) it must be attractive and alluring to young children; 3) the children, by reason of their youth, must be incapable of comprehending the danger associated with the instrumentality or condition; 4) the instrumentality or condition must have been left unguarded and exposed at a place where children are expected to resort, or where it is reasonably expected that they will resort, for play or amusement, or for the gratification of youthful curiosity; and 5) it must have been reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended. In this case, the first four elements of the attractive nuisance doctrine are satisfied, but it is arguable whether the fifth element can be met.

Statement of Facts: Ben and Helen Swanson own a home near Ritzville, Washington. They have lived in their single family brick home at 3312 Pond Street for 27 years. Both Ben and Helen are 67 years old. They have two grown children, a son and a daughter, both of whom are married. Robert, their son, has two young boys, ages 3 and 5. Tracy, their daughter, has

three girls, ages 6, 8 and 11. The Swanson's grandchildren visit Ben and Helen often, at least once a week.

The Swanson's neighborhood is comprised of senior citizens, middle-aged couples with teenagers or young-adult children, and younger couples with children in elementary school or pre-school. Approximately one block down from the Swanson's home is Suncrest Elementary School. The Fentons are the Swanson's closest neighbors with children living at home, and they live three houses away. The Fentons have two children – a 5 year old son named Steven and a 7 year old daughter named Patricia. In their community, the Swansons are well known, and they are very friendly towards their neighbors.

The Swansons had an in-ground swimming pool installed in their backyard approximately 25 years ago. At one end, the pool is 3 feet deep. The depth then gradually increases to 10 feet deep on the other end. A large crack, 5 feet long by 2 inches wide, developed in the bottom of the pool in 1992. Due to the crack, all of the water drained from the Swanson's pool. The Swanson's elected not to have the crack repaired, as the estimated repair cost was $25,000. As a result, the pool has been empty since 1992. The grandchildren now use the pool to skateboard in when they visit their grandparents each week.

The grandchildren love to use the empty pool to skateboard in. However, when they are skateboarding, they try to avoid hitting the crack at the bottom of the pool, which has a raised concrete lip that is approximately one inch high. The pool's drain cover is also missing, which means there is a circular hole at the bottom of the pool that is about 6 inches in diameter. The reason the Swansons have not covered the drain is that they've wanted the rain water to be able to drain easily from the pool. The Swansons do have a fence that completely encases their backyard. In addition to the fence, the Swansons also have hedges and other shrubbery which partially blocks the yard (and therefore the swimming pool) from the view of neighbors or other

passerby. However, many of the neighborhood children know that the pool is there because they sometimes play with the Swanson's grandchildren in the Swanson's backyard, and skateboard in the pool. Many of the neighbors' children also visited the Swanson's house during a neighborhood barbecue several months ago, and therefore know about the existence of the pool.

On October 1, 2004, Peter, the Swanson's 5 year old grandson, invited Steven and Patricia Fenton over to the Swanson's house to skateboard in the pool. Steven and Patricia had been over to the Fenton's approximately twelve times to play in the pool, including this visit. Helen Swanson, in the past, had always told the children that they needed to get her or her husband's permission before playing in the pool. Helen always sat outside when the children were playing in the pool and supervised them. Helen also required that the children use a helmet and elbow and knee pads.

One week after this visit, on October 8, 2004, the Fenton children, Steven and Patricia, decided that they wanted to skateboard in the Swanson's pool after school. Steven did ring the Swanson's doorbell to ask them for their permission to skateboard in the pool, but the Swansons were not home as they were away playing bingo. Steven and Patricia opened the gate on the Swanson's fence, thereby gaining entry into the Swanson's backyard. First, Patricia entered the pool. When Patricia was done skateboarding, she asked Steven if he wanted to take a turn. Steven then took his skateboarding in the pool and decided to try a full mid-air flip. However, he lost control of the skateboard when he was landing and the wheel on his skateboard got stuck on the drain opening of the pool. As a result, Steven fell on his back, fractured his spine, and is now partially paralyzed. Steven did take some precautions as he was wearing his helmet and knee and elbow pads at the time of the incident.

Discussion: For the Fentons to proceed with their claim against the Swansons, the Fentons need to show that the Swanson's swimming pool was an attractive nuisance. In order for an instrumentality or condition (in this case, a swimming pool) to be considered an attractive nuisance, the following five elements must be met:

> 1) the instrumentality or condition must be dangerous in itself, and it must be a condition that is likely to, or probably will, result in an injury to those attracted by, and coming in contact, with it; 2) the instrumentality or condition must be attractive and alluring, or enticing, to young children; 3) the children must have been incapable, by reason of their youth, of comprehending the danger involved; 4) the instrumentality or condition must have been left unguarded and exposed at a place that children of tender years will resort, for play or amusement, or for the gratification of youthful curiosity; and 5) it must have been practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended.

Ochampaugh v. Seattle, 91 Wash. 2d 514,518,588 P.2d 1351, 1355 (1979); Shock v. Ringling Bros. & Barnum & Bailey Combined Shows, 5 Wash. 2d 599,616, 105 P.2d 833, 850 (1940); Holland v. Neimi, 55 Wash. 2d 85, 88, 345 P.2d 1106, 1109 (1959). In this case the first four of the five elements have been met. Whether the fifth element has been satisfied or not is arguable. In order for a claim in attractive nuisance to be successful, all five of the elements must be satisfied. However, in this case there is a good possibility, about 80 percent, that a claim for attractive nuisance against the Swansons will be successful.

The first element of attractive nuisance is that the instrumentality or condition must be dangerous in itself, and it must be a condition that is likely to, or probably will, result in an injury to those attracted by, and coming in contact, with it. Ochampaugh, 91 Wash. 2d at 518,588 P.2d at 1355; Shock, 5 Wash. 2d at 616, 105 P.2d at 850; Holland, 55 Wash. 2d at 88, 345 P.2d at 1109. In regards to landowners, Washington courts have ruled that attractive nuisance liability is limited to artificial conditions only when the child is a trespasser. Landowners cannot be held liable for injuries

that occur to trespassing children in natural occurring conditions, such as natural bodies of water (ex. ponds and lakes). See Degel v. Majestic Mobile Manor, 129 Wash. 2d 43, 914 P.2d 728 (1996)(a young child sustained injuries after sliding down in an embankment into a creek), Ochampaugh, 91 Wash. 2d 514,588 P.2d 1351(liability non-supported after two young boys drown in a pond). Even if a condition is artificial, the courts have differed in their opinion of what artificial conditions are inherently dangerous. Some conditions, even if they are attractive to children and do invite contact with them, are not inherently dangerous in and of themselves. See Holland, 55 Wash. 2d 85, 345 P.2d 1106 (liability was not supported as the court ruled that a boat was not in and of itself inherently dangerous).

In the present case, the pool can be seen as inherently dangerous because the pool is drained, which exposes the large crack at the bottom of the pool and the uncovered drain opening. Due to those factors, it is likely that someone coming in contact with the pool will be injured. Also, since the pool is no longer filled with water, it cannot serve the purpose for which it was intended for – swimming. Instead, the pool is being used for skating which is a misuse of it, and this misuse therefore increases the chances that someone will be injured in it.

The Swansons will most likely argue that the pool in and of itself is not inherently dangerous, and that it's only dangerous if precautions are not taken. They will probably also say that the pool by itself does not make it likely or probable that those coming in contact with it will incur an injury. However, as stated above, the pool is not being used for what it was intended for, and therefore the likelihood of the pool being inherently dangerous is increased. Also, it can be argued that Steven Fenton did take precautions to prevent injury as he was wearing a helmet and knee and elbow pads. The only other precaution he could have taken would have been to wait until Mrs. Swanson was at home before skateboarding in the pool. However, even if Mrs.

Swanson would have been at home at the time of the incident, it would not have prevented the accident, as his wheel could have stuck on the drain opening just as easily even if Mrs. Swanson would have been present. Therefore, it is appropriate to say that this first element of attractive nuisance has been met as the pool is inherently dangerous in itself, and those attracted to it are likely to incur injury.

The second element of attractive nuisance is that the instrumentality or condition must be attractive and alluring, or enticing, to young children. Ochampaugh, 91 Wash. 2d at 518,588 P.2d at 1355; Shock, 5 Wash. 2d at 616, 105 P.2d at 850; Holland, 55 Wash. 2d at 88, 345 P.2d at 1109. Washington courts have usually defined conditions as attractive or alluring to young children if they are conditions where children have habitually played and resorted to in the past. See Holland, 55 Wash. 2d 85, 345 P.2d 1106(children habitually played in the area in which defendant's boat was located), Ochampaugh, 91 Wash. 2d 514,588 P.2d 1351 (pond was a favorite recreation spot for children living in the housing development).

In the present case, the Swanson's pool is attractive and alluring to young children as their pool has been a place where children have habitually played – both their grandchildren and other neighborhood children. The Swansons even encouraged this play (specifically skateboarding) in their pool by the young children, thereby increasing the attractiveness of the pool. Like the pond in Ochampaugh, the pool had become a favorite recreation spot for the Fenton children. Therefore, since the Swansons had previously let their grandchildren, and the Fentons, use the pool to skateboard in, they should have realized it was very appealing to young children and either removed the hazard or taken extra precautions to keep children out of the backyard (instead of encouraging the children to play in the hazard). This is especially true since the Fentons lived so close to the Swansons, as the

likelihood that the Fenton children, or other children, would trespass on their land, in order to get to the pool, was increased.

Concerning this element, I do not think that the Swansons will be able to make much of an argument to refute this claim, especially since they are the ones who had previously let the children skateboard in the pool. They will probably have to concede on this point. Therefore, the second element of the attractive nuisance doctrine will be met in this case.

The third element of attractive nuisance is that the children must have been incapable, by reason of their youth, of comprehending the danger involved. Ochampaugh, 91 Wash. 2d at 518,588 P.2d at 1355; Shock, 5 Wash. 2d at 616, 105 P.2d at 850; Holland, 55 Wash. 2d at 88, 345 P.2d at 1109. Washington courts have agreed that this is the main reason that we have the attractive nuisance doctrine, because children of tender years are not capable of reasonably comprehending the danger involved in certain conditions. See Shock, 5 Wash. 2d at 606, 105 P.2d at 845.

In the present case, this element is easily met since Steven Fenton was five years old at the time of the incident. Therefore, Steven was not capable of comprehending the danger that was involved with skateboarding in the pool. One possible argument that the Swansons could use against this would be that even though Steven wasn't capable of comprehending the danger himself, his parents are comparatively negligent since they were not keeping an eye on Steven at the time. Washington courts, along with other jurisdictions, have raised this point in similar cases in the past. See Mail v. M.R. Smith Lumber & Shingle Co., 47 Wash. 2d 477, 287 P.2d 877 (1955)(primary legal responsibility for the protection of children of tender years from accidents and injuries rests on the shoulders of the parents), Gregory v. Johnson, 289 S.E. 2d 232 (Ga. 1982)(landowners are not the insurers for the safety of children, even if they decide to build a pool). Therefore, even though the third element of the attractive nuisance doctrine

is met, the issue of whether Steven's parents might be comparatively negligent could be raised, however, if it is raised, it will be a fact for a jury to decide. Gregory, 289 S.E. 2d 232 (the court ruled that the issue of the plaintiff's negligence, like the defendant's negligence, was a question for the jury to decide), McWilliams v. Guzinski, 237 N.W.2d 437 (Wis. 1976)(the court ruled that whether the danger of a swimming pool was obvious to a four year old was a question for the jury to decide).

The fourth element of attractive nuisance is that the instrumentality or condition must have been left unguarded and exposed at a place that children of tender years will resort, for play or amusement, or for the gratification of youthful curiosity. Ochampaugh, 91 Wash. 2d at 518,588 P.2d at 1355; Shock, 5 Wash. 2d at 616, 105 P.2d at 850; Holland, 55 Wash. 2d at 88, 345 P.2d at 1109. Washington courts have generally held that if conditions that have been proven to be attractive and enticing to young children are left unguarded and exposed, and an injury or death occurs, the landowner is liable. See Degel, 129 Wash. 2d 43, 914 P.2d 728 (owners of land were not exempt from the duty to exercise reasonable care to protect a child against potentially dangerous conditions on the land).

In the present case, the Fenton's will can assert that the pool was indeed left unguarded as Steven was able to easily gain access to the backyard through the unlocked gates. However, the Swanson's can make an argument that since their backyard was fenced and there were shrubs partially obstructing the view of the pool, they did take measures to guard the pool and not leave it exposed. Furthermore, it was impossible for them to physically guard the pool at the time of the incident as they were not home at the time of the injury. They will probably also argue that they did what they reasonably could to prevent an accident, and that they didn't foresee that a child would get into the backyard while they were gone and injure themselves. They could also again argue that the Fentons are comparatively

negligent because they didn't keep an eye on their child, thereby making it possible for him to gain access to the Swanson's yard without the Swanson's knowledge. Therefore, the fourth element of the attractive nuisance doctrine will probably be met because even though the Swanson's did fence their yard, they left the gates unlocked, thereby making access to the backyard possible.

The fifth element of attractive nuisance is that it must have been reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended. Ochampaugh, 91 Wash. 2d at 518,588 P.2d at 1355; Shock, 5 Wash. 2d at 616, 105 P.2d at 850; Holland, 55 Wash. 2d at 88, 345 P.2d at 1109. Washington courts have been varied in their decisions as to whether landowners are responsible for injuries that occur on their land in cases where it was not reasonably practicable and feasible to prevent access to the instrumentality or condition. See Ochampaugh, 91 Wash. 2d 514, 588 P.2d 1351 (landowners were not liable for drowning deaths that occurred in their unfenced pond because it was a natural body of water), Degel, 129 Wash. 2d 43, 914 P.2d 728 (landowner was liable for injuries that occurred in a partially fenced creek on his property). Other jurisdictions have held that a landowner only needs to take reasonable precautions to protect their land from trespassing by young children. It is not necessary for them to make it impossible to gain access to their property. See Gregory, 289 S.E.2d 232 (the landowner's duty is only to prevent foreseeable injury, not all injuries in general), McWilliams, 237 N.W.2d 437 (pool owners do not have to make it impossible for children to get into a pool, the safeguards only need to be reasonable).

In the present case, the Swansons could have either had the pool filled in, fixed the crack in the bottom of the pool, or at the very least, secured the gates on their fence with locks. All would have been reasonable ways to either prevent access to the pool or render it innocuous. Furthermore, the

Swansons were not using the pool for what it was intended for, and again this misuse (along with not spending the required amount of money to fix the problem) was what lead to Steven's injuries. Even if it was not feasible for the Swanson's to raise the costs for either repairing of filling in the pool, they could have avoided injuries by not allowing children in the pool to skateboard.

The Swansons will argue that the cost of repairing the crack in the bottom of the pool ($25,000) was not reasonably practicable or feasible. Also, they will argue that they did try to prevent access to the pool by erecting a fence around their backyard. Therefore, while a court might agree that it would not be feasible for the Swanson's to come up with $25,000 to repair the crack in the bottom of the pool, which would mean the fifth element would not be met, it is possible that they would find that this fifth element of attractive nuisance has been met because the Swansons could have done a better job of securing their yard with locking gates, or they could have never allowed children to skateboard in the pool in the first place.

In conclusion, in this case there is a good possibility, about 80 percent, that a claim for attractive nuisance against the Swansons will be successful.