

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Trumbull County.
April MAYLE, as Administratrix for the Estate of
Jamel A. Smith, Jr., et al., Plaintiff-Appellant,
v.
McDONALD STEEL CORPORATION, Defend-
ant-Appellee.

No. 2010-T-0090.
Decided Oct. 7, 2011.

Background: Mother brought wrongful death ac-
tion against landowner, alleging it was negligent in
failing to take reasonable steps to prevent her
twelve-year-old son from trespassing and accessing
the dam on owner's property, which resulted in
son's drowning death. The Court of Common Pleas,
County of Trumbull, No.2009 CV 646, entered
summary judgment in owner's favor. Mother ap-
pealed.

Holding: The Court of Appeals, Diane V. Grendell,
J., held that, as a matter of **first impression**, the
open and obvious danger of drowning associated
with the dam precluded application of the attractive
nuisance doctrine.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚡837(10)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in
General
30k837 Matters or Evidence Considered
in Determining Question

30k837(10) k. Consideration of Evid-
ence Not Introduced or Offered. Most Cited Cases

Witness's deposition would not be considered
by the appellate court in mother's appeal of sum-
mary judgment in wrongful death action, where
witness's deposition was never filed with the trial
court, and was not in the record before the appellate
court.

[2] Negligence 272 ⚡1177

272 Negligence
272XVII Premises Liability
272XVII(E) Attractive Nuisance Doctrine
272k1177 k. Pools and Other Bodies of
Water. Most Cited Cases

Water Law 405 ⚡1750

405 Water Law
405IX Artificial Ponds, Reservoirs, Channels,
Dams, and Other Works
405k1750 k. Right and Duty to Prevent In-
jury; Contributory Negligence. Most Cited Cases

In wrongful death action arising from child
trespasser's drowning after jumping from a dam's
abutment into water located near the dam on
landowner's property, the danger of drowning asso-
ciated with dam and frothy water surrounding the
dam was open and obvious, and should have been
appreciated by trespasser, precluding application of
attractive nuisance doctrine with its heightened
duty to child trespassers, where there was no evi-
dence that landowner's conduct was willful, wanton,
or reckless. Restatement (Second) of Torts, § 339.

[3] Negligence 272 ⚡1177

272 Negligence
272XVII Premises Liability
272XVII(E) Attractive Nuisance Doctrine
272k1177 k. Pools and Other Bodies of
Water. Most Cited Cases

Water Law 405 ⚡1750

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
 (Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

405 Water Law

405IX Artificial Ponds, Reservoirs, Channels, Dams, and Other Works

405k1750 k. Right and Duty to Prevent Injury; Contributory Negligence. Most Cited Cases

Landowner's alleged failure to prevent children from trespassing at its dam did not rise to level of willful, wanton, or reckless conduct, so as to permit application of attractive nuisance doctrine with its heightened duty to child trespassers in wrongful death action involving child trespasser who drowned at dam, even if landowner knew about children trespassing at the dam. Restatement (Second) of Torts, § 339.

Civil Appeal from the Trumbull County Court of Common Pleas, Case No.2009 CV 646. Michael J. Maillis, Peratinides & Nolan Co., L.P.A., Akron, OH, for plaintiff-appellant.

Rafael P. McLaughlin and Martin T. Galvin, Reminger & Reminger Co., L.P.A., Cleveland, OH, for defendant-appellee.

DIANE V. GRENDALL, J.

*1 {¶ 1} Plaintiff-appellant, April Mayle, appeals from the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial court granted defendant-appellee, McDonald Steel Corporation's (McDonald), Motion for Summary Judgment. The issues to be decided in this case are whether a dam is an open and obvious danger as a matter of law, and whether such a danger precludes the application of the doctrine of attractive nuisance. For the following reasons, we affirm the decision of the trial court.

{¶ 2} On October 13, 2008, Jamel Smith, a twelve-year-old boy, and his friends, Dustin Thailing and Josh Davis, were playing in the area near the Mahoning River and under the Girard-McDonald Viaduct (also called the Liberty Street Bridge), which runs over the river, in Girard, Ohio. Jamel and his friends entered property owned

by McDonald. This property is 1.7 acres and abuts the Mahoning River on its westerly side. Located on this property is a dam, which is also owned by McDonald. McDonald uses the dam to pool water from the Mahoning River. This pool is used for cooling McDonald's machinery.

{¶ 3} Attached to the western side of the dam is a wall, or abutment, which is approximately fifteen feet high. The face of the dam has waterfalls and the water closest to the dam is white and frothy, as shown in pictures of the dam, presented by both parties in their summary judgment motions.

{¶ 4} On October 13, the three boys used the abutment to jump into the water located near the dam. Upon jumping in the water, Jamel struggled to swim and stay above the water. Thailing attempted to help Jamel and held onto Jamel's arm until the two became separated. At this time, Jamel went under the water and could not be seen by his friends. Thailing called 911 and rescue divers subsequently recovered Jamel. Jamel was taken to the hospital, where he was pronounced dead.

{¶ 5} On March 9, 2009, Mayle, Jamel's mother and administratrix of his estate, filed a Complaint for wrongful death and personal injury. The Complaint asserted that Jamel's death was a result of McDonald's negligence. The Complaint asserted that McDonald knew or should have known that children played in the area of the dam, should have known that the dam was a dangerous condition, that it was an area where children would likely trespass, and that children would not realize the risk involved. The Complaint also alleged that McDonald failed to take reasonable steps to prevent children from accessing the property.

{¶ 6} On March 30, 2009, McDonald filed its Answer and Affirmative defenses. McDonald argued, among other things, that Jamel was comparatively negligent, that the damages were caused by an open and obvious hazard for which McDonald did not owe a duty of care, and that McDonald lacked knowledge that injury to Jamel was reasonably

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

foreseeable.

[1] {¶ 7} Depositions were taken by the following individuals and filed with the trial court: April Mayle, Jeffrey Palmer, Richard Jamrozik, Timothy Egnot, Floyd Weitzel, Jr., Tom Kantor, Bernhard Kailer, Dustin Thailing, Alexander Ruitter, Josh Davis, Mark Kazmark, John Barone, and Michael Robinson.^{FN1}

FN1. While Mayle cites the testimony of a witness, Kenneth Wright, in her Reply Brief, the trial court record and docket indicate that Wright's deposition was never filed with the trial court. Moreover, the deposition is not in the record before this court. Therefore, it cannot be considered.

*2 {¶ 8} Thailing, Jamel's friend, testified that he jumped in the water near the dam with Jamel and Davis. Thailing testified that he jumped from the abutment into the water twice. After Thailing's first jump, Jamel asked, "Is it hard to do?," to which Thailing responded that it was not. After Thailing jumped the second time, Jamel jumped into the water from the abutment. After Jamel jumped, he surfaced and began yelling, "help, help, help!" Thailing started "grabbing on to" Jamel, and Jamel "kept climbing on top of" Thailing. Thailing testified that eventually the current "ripped [Jamel] out of my hands." Thailing testified that Jamel then floated away and Thailing did not see him come back up from under the water.

{¶ 9} Thailing testified that when he jumped in, he was aiming to jump away from the face of the dam, toward calmer water. Thailing testified that before Jamel jumped in, he told Thailing, "I can't swim that well." Thailing also testified that he told Jamel where to jump so that Jamel would enter the calmer part of the river. Thailing stated that, while he was in the water trying to help Jamel, there were currents "going all different ways" and that the current felt like he "had someone pulling on [his] legs while [he was] trying to swim the other way."

{¶ 10} Thailing also stated that he knew it would be harder to swim in the "white water" close to the dam and that "there would be more rapids" in that area. He explained that he felt it would be "harder to swim" in this area and that "you would get pulled under probably." He stated that it would likely be more difficult to swim in the water near the dam.

{¶ 11} Davis, another of Jamel's friends, testified that he also jumped from the abutment with Thailing and Jamel. He testified that when jumping, he wanted to jump as far away from the "falls" around the dam as possible because "the falls would take [him] under." He stated that he did not feel any "current at all" and did not feel that the current was pulling him under.

{¶ 12} Robinson, who has a Ph.D. in civil engineering and teaches at the RoseHulman Institute of Technology in Indiana, testified regarding the hydrological conditions at the dam. He had visited the dam in order to prepare for the deposition. He testified that the McDonald dam was a low-head dam. He explained that the abutment attached to the dam is used to prevent erosion.

{¶ 13} Robinson testified that there are certain "dangers associated with hydraulics created by low-head dams." Robinson stated that low-head dams create a condition called a hydraulic or reverse roller, which creates an "entrapment zone." In a report filed with Mayle's Response to Defendant's Motion for Summary Judgment, Robinson described entrapment zones as areas where swimmers may be trapped and unable to escape. He stated that low-head dams also create hydraulic jumps, which are regions of high turbulence. He stated that, based on his observations and on the water flow conditions that existed on the date of the accident, both of these conditions would have been present on October 13. He explained that both conditions are "dangerous" or "hazardous." He testified that a hydraulic roller would carry a person "back towards the dam face." He also testified that an "average person [cannot] look at a dam and make the conclu-

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

sion that there is a reverse * * * roller there.” Robinson stated that these conditions could have also caused reduced buoyancy, which may have prevented Jamel from “properly swimming, properly navigating through the water.”

*3 {¶ 14} Robinson also testified about the report prepared for this case, attached to Mayle's Response. The report contained information regarding the conditions and safety of low-head dams in general and related to the McDonald Dam. In this report Robinson stated that, in his opinion, a hydraulic roller did exist at the dam on October 13, 2008. He stated that a hydraulic roller is a condition that an average person, especially a child, would not be aware of and that this roller creates an entrapment zone, which may prevent swimmers from escaping. Attached to Mayle's Response to the Motion for Summary Judgment was Robinson's Affidavit, in which he made similar statements.

{¶ 15} Mayle, Jamel's mother, testified that Jamel was smart and responsible. She also stated that he was careful, knew the difference between right and wrong, and was able to determine what is safe and unsafe “to a point.” She explained that she believed Jamel would have been unable to determine that the dam was unsafe. Mayle also stated that Jamel was able to swim but typically only swam in the shallow end of swimming pools and did not go to the deep end.

{¶ 16} Egnot, the president and chief operating officer of McDonald, testified that he was unaware of any adults or children gathering or “hanging around” the dam. He also testified that McDonald had taken no actions to prevent people from accessing the property in the area of the dam. Egnot stated that he was unaware of any hydraulic effect that may be created by the dam or any dangers that such an effect may present to children or adults.

{¶ 17} Kantor, chief executive officer and vice-president of McDonald, testified that he once observed a fisherman using the river downstream of the dam but that he did not believe the fisherman

was on McDonald property. He testified regarding a memorandum he had previously authored regarding the dam area. In the memo, he stated that “picnickers and fisherpeople frequent the site, both above and below the dam.” He testified that he made this statement based on seeing the one fisherman and remnants of campfires. He explained that these remnants were located upstream from the McDonald property. He testified that he was unaware of anyone trespassing on McDonald property. He also testified that he had no knowledge that the dam was creating a hydraulic effect.

{¶ 18} Weitzel, who served as the manager of engineering and maintenance at McDonald from 1998 through 2003, stated that he visited the dam around once a month during his employment with McDonald. He testified that he had never received reports of people being on the property surrounding the dam, but that he had placed a lock on a gate near the dam and that lock had been cut. He also stated that he had seen remnants of two campfires near the dam. He knew that one of the campfires was not on McDonald property but was unaware if the other campfire was located on McDonald property. Weitzel testified that he did recall placing no trespassing signs on the property near the dam at some point in the past. Weitzel also testified that he was unaware of hydraulic effects that may have been caused by the dam.

*4 {¶ 19} Weitzel also testified as to an internal memorandum he wrote for McDonald in 2001. The memorandum addressed potentially replacing the dam with a water recirculating system. The memo discussed “liabilities and problems the dam carries with it,” but did not further elaborate on such liabilities. Weitzel testified that liabilities discussed in the memorandum concerned potential failure of the dam and damage or problems this may cause. In this memorandum, Weitzel also recommended posting “no swimming” or “no boating” signs. He testified that he made such a recommendation because he did not want people using water that may be polluted. He testified that he had

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

not actually seen or been told about any people swimming or boating in the area of the dam.

{¶ 20} Palmer, Chief of the Girard Police Department, testified that the police investigation showed Jamel's drowning was not the result of foul play and Jamel entered the water of his own volition. Palmer also testified that he does not recall the police department receiving any calls regarding adults or children at the dam or the abutment but that they had received calls regarding children "down by the river" or in a field close to the river.

{¶ 21} Kailer, assistant chief diver for the Mahoning County Sheriff's Department, participated in the rescue/recovery of Jamel. He testified that while in the water searching for Jamel, he encountered "gentle current" near the abutment. He also testified that he experienced a current while swimming toward the dam, which he characterized as not strong. He testified that he located Jamel approximately ten to fifteen feet from the dam. Upon finding Jamel, Kailer had difficulty breaking through the surface of the water because "the current was very strong near the surface."

{¶ 22} Barone, a diver and dam inspector, had inspected the McDonald dam in 1995 and 2001. He testified that in 1995, he could not swim against the currents surrounding the dam because they were too fast. He explained that if a person were in these currents, they would be drawn back towards the dam. He also stated that during his inspections, he observed hydraulic rollers along the downstream side of the dam. He stated that in 1995, immediately under the dam, the pressure of the water was sufficient to push him under the water.

{¶ 23} Ruitter, a friend who was present at the river at the time of the drowning but who did not jump into the water, testified that on October 13, Jamel told Ruitter that he could not swim. Ruitter also testified that Jamel was encouraged into jumping by Davis and that he believed Davis talked Jamel into jumping.

{¶ 24} Ruitter also explained that he had fallen into the river near the dam about a month prior to Jamel's jump. He stated that the current pulled him towards the dam when he was trying to swim away from the dam and that the current "was just so strong that it wouldn't let me move anywhere." Ruitter had to receive help from his friends to exit the river.

*5 {¶ 25} Kazmark was another of Jamel's friends who was at the dam area on October 13. He testified that he did not jump into the water on that date but that he knew of other children who had jumped from the abutment into the water. He stated that he knew at least six children had jumped from the abutment prior to the date of the drowning.

{¶ 26} On May 24, 2010, McDonald filed a Motion for Summary Judgment asserting that Mayle could not establish a prima facie claim of negligence against McDonald. McDonald asserted that because Jamel was an undiscovered trespasser, McDonald did not owe him a duty of care other than to refrain from willful and wanton conduct. McDonald also asserted that Mayle could not recover under the attractive nuisance doctrine because Mayle could not prove all five elements necessary to establish liability. Specifically, McDonald argued that there was no evidence, and therefore no genuine issue of material fact, that McDonald knew children were trespassing onto its property or knew that the dam presented an unreasonable risk to trespassers. Moreover, McDonald argues that Jamel should have appreciated the risks of jumping from the abutment into moving water.

{¶ 27} Attached to the Motion were several depositions, as well as pictures showing the conditions of the water surrounding the dam. These pictures depict white, frothy water close to the face of the dam. Also attached was the Affidavit of Egnot, stating that McDonald was not aware of trespassers on its property where Jamel drowned and that it did not have knowledge of dangers on its property that could cause harm to trespassers.

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

{¶ 28} On June 16, 2010, Mayle filed a Response to Defendant's Motion for Summary Judgment. Mayle argued that Jamel was a "discovered trespasser" because there was sufficient evidence to establish that there were constant trespassers to the dam. Mayle asserted that the hydraulic roller created a latent and artificial danger in the dam. Mayle also argued that the attractive nuisance doctrine applied because there was evidence presented that McDonald knew of or should have known of trespassers visiting the property. Mayle also asserts that dangerous conditions existed, based on the testimony of Robinson and Barone, and that McDonald should have known of these risks. In addition, Mayle argues that there was sufficient evidence that Jamel would have been unaware of the risks. Mayle argues that because a genuine issue of fact was raised as to all five elements of the attractive nuisance doctrine, summary judgment was improper.

{¶ 29} Mayle attached to her Response the report of Robinson, relating to the dangerous condition of the McDonald dam, as well as seminar materials from a seminar Kantor attended. These materials discuss, in pertinent part, measures a dam owner should take to protect children from dams.

{¶ 30} The trial court issued a Judgment Entry on July 9, 2010, granting McDonald's Motion for Summary Judgment. The court held that "the hazard of the fifteen foot drop alone is open and obvious and that the risk of harm should have been foreseeable to Jamel." The court also found that "Jamel's inexperience and inability to swim, the water, and its proximity to the dam, should also have presented Jamel with a foreseeable risk of harm." The court found that because Jamel was trespassing and because of the dangerousness of the wall, the leap and the water "were readily apparent (or should have been readily apparent)" to Jamel and the other children, Jamel's drowning was not McDonald's fault. The court held that the hazard involved in the accident was "open and obvious as a matter of law."

*6 {¶ 31} Mayle timely appeals and asserts the

following assignment of error:

{¶ 32} "The Trial Court erred in granting Summary Judgment to Appellee McDonald Steel because the death of Jamel Smith was due to latent dangers created by the artificial structure of the McDonald Dam."

{¶ 33} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor."

{¶ 34} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 1996-Ohio-336. An appellate court must independently review the record to determine if summary judgment was appropriate. Therefore, an appellate court affords no deference to the trial court's decision while making its own judgment. *Schwartz v. Bank One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809, 619 N.E.2d 10; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786.

{¶ 35} Mayle argues that the trial court erred by finding that there was no genuine issue of material fact as to whether the dangers of McDonald Dam were open and obvious. Mayle asserts that the hydraulic rollers and water with decreased buoyancy were latent dangers created by the dam and that these conditions were not open and obvious. Mayle argues that because these conditions were not open and obvious, the attractive nuisance doctrine applies.

{¶ 36} McDonald argues that the dam itself

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

was open and obvious to Jamel and therefore, application of the attractive nuisance doctrine is precluded.

{¶ 37} Mayle's complaint alleged that McDonald was negligent. "[I]n order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, at ¶ 8, citing *Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

{¶ 38} Regarding Jamel's legal status on the day in question, the parties do not dispute that he was a trespasser on McDonald's property. "A trespasser is ' * * * one who unauthorizedly goes upon the private premises of another without invitation or inducement, express or implied, but purely for his own purposes or convenience * * *.' " *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 145, 539 N.E.2d 614 (citation omitted and emphasis sic). A landowner owes no duty to a trespasser "except to refrain from willful, wanton or reckless conduct which is likely to injure [the * * * trespasser]." *Bennett v. Stanley*, 92 Ohio St.3d 35, 38-39, 748 N.E.2d 41, 2001-Ohio-128 (citation omitted).

*7 {¶ 39} However, a heightened duty applies to child trespassers if the attractive nuisance doctrine applies. Ohio has adopted the attractive nuisance doctrine as found in the Restatement of Torts. "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon land if:

{¶ 40} "(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

{¶ 41} "(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

{¶ 42} "(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

{¶ 43} "(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

{¶ 44} "(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

{¶ 45} *Bennett*, 92 Ohio St.3d at 40, 748 N.E.2d 41, citing Restatement of the Law 2d, Torts (1965), Section 339.

{¶ 46} While Mayle asserted in her Response to Defendant's Motion for Summary Judgment that the dam was an attractive nuisance, we must first determine whether the condition or hazard was open and obvious. When a danger is open and obvious, the landowner does not owe a duty to individuals on the premises. *Armstrong*, 2003-Ohio-2573, at ¶ 14, 99 Ohio St.3d 79, 788 N.E.2d 1088 (citation omitted). The doctrine of attractive nuisance does not apply and the landowner owes a child no duty "in the event that the hazard is open and obvious and that the risk of harm is or should be foreseeable to the child." *Lisko v. Sharon Slag, Inc.*, 7th Dist. No. 08 MA 170, 2009-Ohio-6535, at ¶ 25, citing *Bennett*, 92 Ohio St.3d at 42-43, 748 N.E.2d 41 ("the landowner's duty 'does not extend to those conditions the existence of which is obvious even to children and the risk of which should be fully realized by them'") (citation omitted).

{¶ 47} "It is generally accepted that ponds, pools, lakes, streams, and other waters embody perils that are deemed obvious to children of the tenderest years." *Sharpley v. Bole*, 8th Dist. No. 83436, 2004-Ohio-5729, at ¶ 14, citing *Long v. Manzo* (1996), 452 Pa.Super. 451, 460, 682 A.2d 370. See, also, *Mullens v. Binsky* (1998), 130 Ohio App.3d 64, 71, 719 N.E.2d 599 ("generally the

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

danger of drowning in a body of water is considered an open and obvious risk which both minors and adults should be expected to be able to appreciate and avoid”) (citation omitted); *McIntosh v. Thompson*, 6th Dist. No. L-00-1323, 2001 Ohio App. LEXIS 1722, at *3 (holding that a pond is an open and obvious danger); Restatement of the Law 2d, Torts (1965), Section 339, comment j, Illustration 6 (“A has on his land a small artificial pond in which, to A’s knowledge, children of the neighborhood frequently trespass and swim. A takes no precautions of any kind. B, a boy ten years old who cannot swim, trespasses on A’s land, enters the pond, and is drowned. A is not liable to B.”)

*8 {¶ 48} The dangers of walking across or falling from a high structure have also been held to be open and obvious. See *Lisko*, 2009-Ohio-6535, at ¶¶ 27-28 (where a child trespasser fell while crossing a dam, the court held that the risks presented by the 50 foot high dam are open and obvious and summary judgment against the child was proper); *Dixon v. CSX Transp., Inc.* (E.D.Ke.1996), 947 F.Supp. 296, 298 (diving into water from a high abutment “only makes the hazard more open and obvious than the danger in the water itself”); Restatement of the Law 2d, Torts (1965), Section 339, comment j (“[t]here are many dangers, such as those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large”).

[2] {¶ 49} The facts offered by both sides present essentially the same picture of the dam. The parties agree that the face of the dam was surrounded by white, frothy water and that the dam created a pool of water, the depth of which was not discernable by merely looking at the water from above. Both parties agree that the abutment was approximately fifteen feet high and was used by Jamel and the other children to jump into the water surrounding the dam. The only issue related to the condition of the dam that is disputed is the existence of hydraulic rollers and currents that present a danger to

children who are swimming in the area of the dam. As noted above, bodies of water are typically found to be open and obvious dangers, such that children understand the inherent dangers of jumping into them. The water surrounding the dam, as described by both McDonald and Mayle, would have further alerted the children that the dam was an obvious danger. Similarly, the height of the abutment and the risk of jumping from such a height would also indicate danger. Such risks were open and obvious as a matter of law.

{¶ 50} Moreover, a search of Ohio case law raises no law ~~related to the particular risks of created current to children, especially in light of the fact that Ohio adopted the Restatement view of attractive nuisance only recently.~~ Therefore, we find the law of other jurisdictions following the Restatement view of attractive nuisance to be instructive. The risk of drowning in a body of water with created currents has been found by these courts to be open and obvious to children. *Lerma v. Rockford Blacktop Constr. Co.* (1993), 247 Ill.App.3d 567, 575, 187 Ill.Dec. 323, 617 N.E.2d 531 (where eleven-year-old and fourteen-year-old boys drowned after being pulled under by a current created by a dam, the court held that the trial court’s dismissal of the negligence action was proper and rejected the argument that undertows could be a basis for liability because “bodies of water are deemed to signal obvious danger to persons old enough to be at large *precisely because of their unknown surface or sub-surface elements*”) (emphasis added); *Old Second Natl. Bank v. Aurora Twp.* (1987), 156 Ill.App.3d 62, 69-70, 109 Ill.Dec. 31, 509 N.E.2d 692 (a culvert which created fast-moving flood water was open and obvious to children).

*9 {¶ 51} Mayle also attempts to distinguish *Long*, 452 Pa.Super. 451, 682 A.2d 370, by stating that under certain circumstances, a body of water may present an “unusual danger” that involves an “unreasonable risk to trespassing children.” However, this argument lacks merit. In *Long*, the court found that a pool that looked “deceptively

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
(Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

shallow” presented a danger to children that they would not recognize. No such circumstances exist in this case that would have deceived Jamel or led him to believe that the dam was not dangerous. In fact, Mayle agrees the water surrounding the dam was frothy, that the existence of rapid water was apparent, and that the frothy water is a sign of decreased buoyancy, one of the potential causes of Jamel’s drowning. The frothy water actually would have alerted Jamel even more to the dangers that exist within a dam. See *Torf v. Commonwealth Edison* (1994), 268 Ill.App.3d 87, 91, 205 Ill.Dec. 911, 644 N.E.2d 467 (fast-moving or churning water “could only have made the risk more, not less, apparent”) (citation omitted).

{¶ 52} Mayle argues that when there is a genuine issue of material fact as to whether a child was aware of the risk he encountered, the matter should be submitted to a jury and not dismissed on summary judgment. We cannot say that there is a genuine issue of material fact as to whether Jamel appreciated the risks associated with jumping into the dam. While Mayle asserts that Jamel would not be able to appreciate the risk, the evidence before the court shows otherwise. Thailing and Davis both testified that they understood the dangers of the currents and tried to avoid jumping in the white, frothy water near the dam. Jamel himself asked whether it “was hard” before jumping into the water. Testimony also indicated that Jamel was encouraged by his friends before entering the water. In addition, the testimony of Mayle, as well as Jamel’s friends, indicated that Jamel was intelligent and did well in school, indicating that he was capable of understanding such risks.

{¶ 53} Mayle does not present any evidence to contradict this, aside from her statement that she believed Jamel would not understand that the dam was dangerous. In fact, Mayle conceded in her testimony that “as adults, we see the current of the water,” but contended that Jamel would not have understood the risks. As addressed above, the law supports the conclusion that Jamel should have re-

cognized the danger, especially when the currents and frothy water were visible.

{¶ 54} Even if Jamel himself did not personally appreciate the risk, it is enough that he should have appreciated the risk. See *Bennett*, 92 Ohio St.3d at 42-43, 748 N.E.2d 41. Davis, Thailing, and Ruitter, children of the same age as Jamel, all testified that they knew of the danger associated with the dam and tried to avoid the frothy water near the face of the dam. In addition, the case law discussed above finds that risks associated with bodies of water should be obvious even to the youngest children. See *Sharpey*, 2004-Ohio-5729, at ¶¶ 14-15 (bodies of water and associated perils are generally not risks that children are unable to foresee).

*10 {¶ 55} While Mayle argues that Jamel could not be expected to understand that the frothy water was associated with hydraulic rollers and that the testimony of Robinson shows that a child would not understand the specific dangers associated with hydraulic rollers, no such understanding was required. “A general awareness of danger and that injury might result from a trespass is sufficient to defeat a claim under the attractive nuisance doctrine. It is not necessary to show that the youthful trespasser fully comprehended the specific risk that he encountered or that injury could result exactly as it did.” *McDaniels v. Sovereign Homes*, 10th Dist. No. 06AP-399, 2006-Ohio6149, at ¶ 16, citing *Bush v. Ohio Edison*, 9th Dist. No. 23077, 2006-Ohio-4465, at ¶ 14 (The doctrine of attractive nuisance “does not apply where a child knowingly encounters a risk that he generally understands. To hold otherwise would require landowners to be absolute insurers of the safety of trespassing children.”). Although Jamel and his friends may not have appreciated the specific way currents flow in a dam and affect swimmers, the frothy water, as well as the dangers of bodies of water in general, would be enough to alert them to the risk.

[3] {¶ 56} Even when viewing the evidence regarding the existence of hydraulic rollers and currents in a light most favorable to Mayle, we find

Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.), 2011 -Ohio- 5234
 (Cite as: 2011 WL 4791019 (Ohio App. 11 Dist.))

that, as a matter of law, the danger associated with the dam is open and obvious and should have been appreciated by Jamel. As the Ohio Supreme Court has held that the attractive nuisance doctrine does not apply to dangers obvious to children, the trial court was precluded from applying the attractive nuisance doctrine in this case. See *Bennett*, 92 Ohio St.3d at 42-43, 748 N.E.2d 41 (citation omitted) ("the landowner's duty 'does not extend to those conditions the existence of which is obvious even to children and the risk of which should be fully realized by them' "); *Lisko*, 2009-Ohio-6535, at ¶ 25 (the doctrine of attractive nuisance does not apply when a hazard is open and obvious and the risk of harm should be foreseeable to the child).

{¶ 57} Since we have determined that the doctrine of attractive nuisance does not apply, the only duty that McDonald owed Jamel, as a trespasser, is to avoid willful, wanton, or reckless conduct. See *Bennett*, 92 Ohio St.3d at 38-39, 748 N.E.2d 41. In this case, there is no evidence that McDonald's conduct was willful, wanton, or reckless. Even when viewing Mayle's contention that McDonald knew about children trespassing at the dam in a light most favorable to her, the failure to prevent trespassing is not enough to rise to the level of willful, wanton, or reckless conduct. *Sutton v. Wheeling & Lake Erie RR.*, 9th Dist. No. 22642, 2005-Ohio-6912, at ¶ 16 (even if individuals frequently used railroad property without permission, the railroad's failure to prevent trespassing is not willful, wanton, or reckless conduct and railroad did not breach its duty to trespassers); *Boydston v. Norfolk Southern Corp.* (1991), 73 Ohio App.3d 727, 731, 598 N.E.2d 171. In the absence of any other evidence that McDonald acted recklessly, we cannot find that McDonald violated its duty to trespassers.

*11 {¶ 58} The sole assignment of error is without merit

{¶ 59} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, granting McDonald's Motion for Summary

Judgment, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J., and THOMAS R. WRIGHT, J., concur.

Ohio App. 11 Dist., 2011.
 Mayle v. McDonald Steel Corp.
 Slip Copy, 2011 WL 4791019 (Ohio App. 11 Dist.),
 2011 -Ohio- 5234

END OF DOCUMENT