

# Premises Liability: Comparative Negligence Is Not a Defense in Child Trespasser Case

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In a premises liability action, the duty a landowner owes depends on the status assigned to the person upon the property. Generally, South Carolina acknowledges four categories; trespassers, invitees, licensees and children. While South Carolina's common law generally imposes no duty upon a landowner to protect a trespasser from hidden dangers, children have long been an exception. Historically, the vulnerabilities of children coupled with their tendencies to fail to perceive risks and fully comprehend dangers led to the recognition of two exceptions to the common law preclusion of liability to trespassers; attractive nuisance and unguarded dangerous condition. Attractive nuisance provided that one who creates an artificial condition on his or her land that attracts children, yet is dangerous to them, has effectively granted implied license to a child to enter the land. The theory of unguarded dangerous condition, however, disregarded the component of attraction, to both the property and the danger. The latter theory reasoned where conditions are so exposed that children are likely to come into contact with them and that contact is dangerous, the landowner should anticipate the likelihood of the injury that may occur and take reasonable steps to prevent it. Ultimately recognizing the inconsistencies between the two theories, South Carolina's courts concluded the more prudent approach is a single exception to the trespasser rule in premises liability actions; hazardous conditions that injure children. This conclusion led to the adoption of Restatement (Second) of Torts §339.<sup>[1]</sup>

Section 339 provides, in relevant part, (1) a possessor of land is subject to liability for injury to child trespassers resulting from an artificial condition on the land if the place at which the condition exists is one on which the possessor knows or has reason to know that children are likely to trespass; (2) the condition is one the possessor knows or has reason to know will present an unreasonable risk of death or serious injury to such children; (3) because of their youth, the children do not discover the condition or appreciate the risk thereof; (4) the benefit to the possessor of maintaining the condition and the hardship of eliminating the risk is slight when balanced against the risk; and (5) the possessor fails to exercise reasonable care to eliminate the danger or otherwise safeguard the

children. While considering South Carolina jurisprudence, the United States District Court for South Carolina recently rejected lingering vestiges of the two earlier exceptions to the preclusion of liability to trespassers and painstakingly applied §339 to determine the status of a child entering upon property and the availability of comparative negligence in defense of injury to that child. *Bishara Braziel and Lamont George, as Co-Personal Representatives of the Estate of Daimere S. George v. NOVO Development Corporation, d/b/a NOVO Properties*, 2019 WL 2717848 (June 28, 2019).

NOVO owned and operated property upon which it was readying its pool for the season opening and left gates and access points unlocked, unsecured or open such that Daimere George, three at the time, could gain entry. Daimere did not live upon the property, but was under the care of his grandmother and his aunt, who were residents, when he entered the pool area and drowned. His co-personal representatives filed suit alleging various theories of liability including negligence and gross negligence. The matter came before the Court upon motions in limine, and NOVO's motion for summary judgment. Plaintiffs argued NOVO was not entitled to summary judgment because it failed to address Restatement §339, which, they asserted, was the applicable law of the case. After supplemental briefing designed to assist the court in determining the law upon which it should rely in instructing the jury, the court issued this opinion.

Recognizing the South Carolina Supreme Court's adoption of Restatement §339 in 2007,<sup>[2]</sup> the court logically concluded the possessor's potential liability for harm to a child created by artificial conditions thereon is determined according to §339. Thus, the court concluded Daimere was a child trespasser. NOVO's pool was closed to residents and guests and was posted with signs indicating there should be no trespassing. Further, Daimere entered the pool without permission. Consequently, he was not a licensee, as NOVO argued, but a trespasser.

Having concluded Daimere's status, the court then turned to NOVO's articulated intention to enter evidence of the negligence of Daimere's grandmother and aunt, in failing to supervise him, and thereby allow him to enter the pool area. The court referenced South Carolina authority to support the position that one who assumes a duty to use care in respect to a child is not negligent in failing to maintain constant watch over children. However, the court found no cases following the adoption of §339 that address whether comparative negligence may be asserted as a defense in a case controlled by §339. Because there was no authority on point, the court borrowed from the Delaware Supreme Court, finding adherence to §339 renders the assertion of parental supervision, or lack thereof, immaterial to a landholder's liability. The Delaware court reasoned §339 logically precludes comparative negligence as an affirmative defense because it is designed to protect children who have trespassed and encountered dangerous artificial conditions, which, presumably, they would not be able to do if under a caregiver's constant supervision. In other words, if caregivers were to be held responsible for injuries sustained by child trespassers, §339 would not be unnecessary. Finding this reasoning persuasive, the court determined it would not instruct the jury on comparative negligence nor permit NOVO to argue Daimere's caregivers were negligent in failing to supervise him, thus leading to his death.

*Braziel* logically follows the adoption and application of §339 in determining Daimere's status as a child trespasser. Moreover, *Braziel* addressed the novel issue of whether comparative negligence may be asserted as an affirmative defense, finding that an assessment of a landholder's liability as to a child trespasser is exclusively determined by the application of §339, and not contingent upon whether the child's trespass is due to a caregiver's negligence allowing therefore.

<sup>[1]</sup> See *Henson ex rel. Hunt v. International Paper Co.*, 650 S.E.2d 74 (2007).

<sup>[2]</sup> *Id.*

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