

STATE OF MICHIGAN  
COURT OF APPEALS

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SHERI WESTFALL, as Next Friend  
of CODY WESTFALL, a Minor,

UNPUBLISHED  
January 31, 2006

Plaintiff-Appellant,

v

No. 255953  
Oakland Circuit Court  
LC No. 03-053991-NO

COMMERCE MEADOWS, a/k/a COMMERCE  
MEADOWS MOBILE HOME COMMUNITY,  
COMMERCE MEADOWS LIMITED  
PARTNERSHIP, COMMERCE MEADOWS  
VENTURE, INC., and COMMERCE  
MANUFACTURED HOME COMMUNITY,

Defendants-Appellees.

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Before: Sawyer, P.J., and Wilder and H. Hood\*, JJ.

PER CURIAM.

Plaintiff, Sheri Westfall, as next friend of Cody Westfall, a minor, appeals as of right an order granting summary disposition in favor of defendants, Commerce Meadows Mobile Home Community, Commerce Meadows Limited Partnership, Commerce Meadows Venture, Inc., and Commerce Manufactured Home Community. We affirm.

Plaintiff maintains that her son, Cody, was injured while riding his scooter on defendants' property. Apparently, Cody used a concrete block, which was propped up over the curb in the driveway next door to his mobile home, as a ramp for his scooter. Cody was injured when he attempted to ride his scooter over the concrete block. At the time of the injury, Cody was seven years old. On appeal, plaintiff first argues that the trial court erred in granting summary disposition in favor of defendants because the open and obvious doctrine does not apply to minor invitees. We disagree.

When reviewing a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court reviews the record de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "On review, this Court must consider the record in the light most favorable to the nonmovant to determine whether any genuine issue of material fact exists that precludes entering judgment for the moving party as a matter of law." *Laier v Kitchen*, 266

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Mich App 482, 486-487; 702 NW2d 199 (2005). “The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists.” *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

Plaintiff argues that the open and obvious doctrine does not apply to minors pursuant to *Bragan v Symanzik*, 263 Mich App 324; 687 NW2d 881 (2004). Plaintiff maintains that, according to *Bragan*, only a jury can determine whether a condition is open and obvious in the eyes of a child, and if open and obvious, whether the condition was unreasonably dangerous. However, despite plaintiff’s contentions, this Court has held that the open and obvious doctrine applies to minor invitees. *Stopczynski v Woodcox*, 258 Mich App 226, 231-232; 671 NW2d 119 (2003).

Although plaintiff relies on *Bragan* to support the argument that the open and obvious doctrine is inapplicable to minors, such reliance is improper. The *Bragan* Court did find that landowners owe a heightened duty of care to minor invitees, however, the Court did not find that the open and obvious doctrine was inapplicable to minors. *Bragan, supra*, p 324. In *Bragan* the Court found that it would “be illogical to find that child invitees are entitled to less protection than child licensees or trespassers . . . [A]s minors in Michigan are only held to the standard of care of ‘a reasonably careful minor,’ it would be similarly illogical to hold child invitees to the standard of an objective, reasonably prudent person, i.e., an adult.” *Bragan, supra*, p 335. The *Bragan* Court found that, in that particular case, there was a genuine issue of material fact and that only a jury could determine whether the condition that caused the minor plaintiff’s injury was open and obvious. *Bragan, supra*, p 336. However, the Court did not find that the open and obvious doctrine was inapplicable to minor invitees. The Court found that, under circumstances involving minor invitees, to determine whether the condition that caused the minor plaintiff’s injury was open and obvious, the Court “must consider whether a dangerous condition would be open and obvious to a reasonably careful minor; that is, whether the minor would discover the danger and appreciate the risk of harm.” *Bragan, supra*, p 335. Therefore, based on the decisions in *Stopczynski* and *Bragan*, we hold that the open and obvious doctrine applies to minor invitees, and therefore, the trial court did not erroneously grant summary disposition on this issue.

Plaintiff next argues that the condition that caused Cody’s injury was not open and obvious. Plaintiff maintains that the cause of Cody’s injury was not the concrete block, but rather, the lip of the concrete block. We disagree.

It is well established that a landowner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, “this duty does not generally encompass removal of open and obvious dangers.” *Lugo, supra*, p 516. In *Lugo*, the Court found that, as a general rule, “a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Lugo, supra*, p 517.

The condition that caused Cody’s injury was an open and obvious condition. Cody testified that the concrete block was big enough to see, so it is evident that he had no trouble

noticing the concrete block. Cody further testified that he used the concrete block as a ramp because it “looked like a good ramp, so [he] went for it.” Plaintiff admitted that the concrete block had been on the property for months before the accident. Therefore, it is undisputed that the concrete block was an open and obvious condition. Although plaintiff argues that the lip of the concrete block was not open and obvious and observable by casual inspection, the concrete block, as a whole, was open and obvious, and therefore, the danger of the using the concrete block as a ramp was open and obvious. A reasonably careful minor would know that the concrete block in the driveway next door was not intended to be used as ramp and that to do so would impose some danger. There is no evidence that shows that the lip of the concrete block was a dangerous condition not observable upon inspection, and plaintiff admitted that there was nothing intrinsic about the concrete block that made it dangerous. Even if the lip of the concrete block was not an open and obvious the condition, the danger of using the concrete block as a ramp was open and obvious.

Plaintiff further argues that, even if the dangers of the concrete block were open and obvious, the lip of the concrete block created special aspects that made the condition unreasonably dangerous. However, the evidence presented does not support this claim. This Court has found that “only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Woodbury v Bruckner*, 248 Mich App 684, 693; 650 NW2d 343 (2001). In *Lugo*, the Court noted that special aspects would include a situation where an open and obvious condition is “effectively unavoidable.” *Lugo, supra*, p 518. The Court further noted that a situation that imposed a severe high risk of harm, such as an unguarded thirty-foot deep pit in the middle of a parking lot, created a special aspect. *Lugo, supra*, p 518.

In the present situation, the concrete block was not “effectively unavoidable” nor did it “impose a severe risk of harm.” Cody admitted that he purposely used the concrete block as a ramp. The use of the concrete block is not “effectively unavoidable” because Cody’s use of the block was purely recreational and purposeful, unlike the illustration in *Lugo*. Moreover, the concrete block itself, or the lip of the concrete block, did not impose a “severe risk of harm,” as contemplated by the Court in *Lugo*. Plaintiff has failed to cite to any case law that finds that a concrete block, or lip of a concrete block, imposes a severe risk of harm, nor has plaintiff presented any evidence that shows that the lip of this particular concrete block created a severe risk of harm. The concrete block itself did not impose a risk of harm, but rather, Cody’s use of the concrete block as a ramp created a risk of harm that may have resulted. Therefore, we hold that the condition that caused Cody’s injury was open and obvious and there were no special aspects that made the condition unreasonably dangerous.

Plaintiff also argues that the condition that caused Cody’s injury was an attractive nuisance. We disagree. Landowners are “liable for harm caused by a dangerous artificial condition located where children are known to trespass if children would not likely realize the danger and the owner fails to use reasonable care to eliminate a danger whose burden outweighs its benefit.” *Bragan, supra*, p 328. To maintain an action under an attractive nuisance theory the plaintiff must prove five elements. *Pippin v Atallah*, 245 Mich App 136, 147; 626 NW2d 911 (2001). One element is that 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. *Pippin, supra*, p 147.

In the present case, plaintiff has failed to prove that defendants had knowledge of the condition that caused Cody's injury. The only evidence plaintiff offers to establish defendants' knowledge of the condition is plaintiff's deposition testimony. In plaintiff's deposition testimony, she maintained that defendants knew, or should have known, about the condition that caused Cody's injury since they perform bi-weekly maintenance of the property. Plaintiff maintained that she never informed management about the condition and was unaware if anyone else informed management about the condition. Even when viewing the evidence in the light most favorable to plaintiff, the evidence presented is insufficient to infer knowledge on behalf of defendants. Aside from plaintiff's testimony, no other evidence was presented demonstrating that defendants had knowledge of the condition. Plaintiff presented no documentary proof or any other evidence to support her testimony, and therefore, the evidence presented does not establish that defendants were knowledgeable about the condition that caused Cody's injury.

Affirmed.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Harold Hood