NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 18a0425n.06

CASE NO. 17-1850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JADE KINDERMANN, Next Friend of L.K., a Minor,	)	
Plaintiff-Appellant,	)	
v.	)	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**
LFT CLUB OPERATIONS CO., INC.,	)	
***Defendant-Appellee*.**	)	

Before: BATCHELDER and CLAY, Circuit Judges; and SARGUS, Chief District Judge.*

ALICE M. BATCHELDER, Circuit Judge. The plaintiff appeals the summary judgment for the defendant in this diversity action alleging premises liability. We AFFIRM.

Jade Kindermann was carrying her 22-month old son when she tripped over some uneven pavement in the parking lot at the Lifetime Fitness Center in Rochester, Michigan. The fall left her uninjured but she seriously injured her son when she landed on him. She sued the property owner (LFT Club Operations Co., Inc.) in federal court, on her son's behalf, alleging premises liability under Michigan law. *See Cudney v. Sears, Roebuck & Co.*, 21 F. App'x 424, 427 (6th Cir. 2001) ("Because we are sitting in diversity, Michigan substantive law applies.") The property owner moved for summary judgment, claiming that because the parking lot defect was open and obvious, the owner had no duty to protect against the condition and Kindermann could not prove

*The Honorable Edmund A. Sargus, Jr., Chief United States District Judge for the Southern District of Ohio, sitting by designation.

liability. The district court agreed and granted the motion. *Kindermann v. LFT Club Operations Co., Inc.*, No. 16-cv-11749, 2017 WL 2868542, at *5 (E.D. Mich. July 5, 2017).

We review the grant of summary judgment de novo, construing facts and inferences in the light most favorable to the non-moving party. *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 565 (6th Cir. 2016). Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Stryker Corp. v. Nat'l Union Fire Ins.*, 842 F.3d 422, 426 (6th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)).

A property owner's duty to protect an invitee from harm "does not generally encompass removal of open and obvious dangers." *Kessler v. Visteon Corp.*, 448 F.3d 326, 331 (6th Cir. 2006) (quotation marks omitted). Under Michigan law, "[t]he possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner v. Lanctoe*, 821 N.W.2d 88, 94 (Mich. 2012) (quotation marks, citations, and footnote omitted). "[A] danger is open and obvious [when] it is reasonable to expect that [the] average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 94-95. For example, a Michigan court applied the doctrine to a blind man who slipped on a wet floor in a restaurant because, even though he "was unable to see this condition because of his blindness, [] this condition would have been open and obvious to an ordinarily prudent person." *Sidorowicz v. Chicken Shack, Inc.*, 2003 WL 140127, at *3 (Mich. Ct. App., Jan. 17, 2003).

Moreover, when an adult is transporting a child, such that the child is not in control of his or her own actions, the determination of whether a condition is open and obvious is based on the adult's ability to perceive the situation, not the child's, regardless of whether the child is the actual plaintiff. *See Robinson v. Lowe's Home Centers, Inc.*, 2010 WL 1463045, at *5 (E.D. Mich. Apr. 13, 2010). In *Robinson*, a father seated his two-year-old daughter in a shopping cart, which rolled

into a pothole, flipped over, and injured the girl. *Id*. at *1. The court did not consider whether the pothole was open and obvious from the child's perspective because it found that the child was under the father's control—the child was merely a passenger—and the pothole was open and obvious to an average person with ordinary intelligence upon casual inspection. *Id*. at *5. The same analysis applies here: the child was merely a "passenger" under his mother's control as she carried him across the parking lot and tripped on the open and obvious condition.

On appeal, Kindermann argues that *Robinson* was wrongly decided, urges us to instead hold that the open-and-obvious doctrine does not apply in this case because a two-year-old boy "certainly would not have the capacity to appreciate" an open-and-obvious danger, and insists that a "child should not be deprived his right of action due to the action of his mother." Apt. Br. at 7-9. But, Michigan's open-and-obvious doctrine applies to a blind man, *Sidorowicz*, 2003 WL 140127, at *3, even though he could not even see the danger, much less "appreciate" it. And, as *Robinson* clearly explained, whether or not a person has the capacity to appreciate an impending danger is irrelevant when that person has no control over his or her movements. Kindermann was carrying her son, she tripped, she fell, she landed on him, and she injured him—the child could not have prevented it, avoided it, or mitigated it. The assertion that the child could not have foreseen it because he could not appreciate an open-and-obvious defect in the pavement makes no difference because *he did not trip over it*. His mother did. And she caused his injuries when she failed to notice and avoid an open-and-obvious danger while carrying him.

We AFFIRM the judgment of the district court.