18-P-1234 Appeals Court

DANIELLE LaFORCE[1] vs. JAMES E. DYCKMAN & another.[2]

No. 18-P-1234.

Plymouth. May 1, 2019. - September 9, 2019.

Present: Sullivan, Massing, & Lemire, JJ.

Negligence, One owning or controlling real estate, Open and obvious danger, Duty to warn. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on July 5, 2016.

The case was heard by Cornelius J. Moriarty, II, J., on a motion for summary judgment.

John F. Danehey for the plaintiff.
Kenneth F. Rosenberg for the defendants.

MASSING, J. The plaintiff, Danielle LaForce, filed a complaint on behalf of her minor son after he was injured

[1] As parent and next friend of Aaron Tutkus.

[2] Deborah L. Dyckman.

falling from a zip line that the defendants, James E. and Deborah L. Dyckman, had installed in their backyard. A judge of the Superior Court granted the defendants' motion for summary judgment. The plaintiff appeals, arguing that the zip line was unreasonably dangerous without a seat and that the defendants negligently failed to warn the child of this danger or to remedy it. We affirm.

Background. The undisputed facts, viewed in the light most favorable to the plaintiff, are as follows. The plaintiff's son, Aaron, was six years old. The night before the incident, the defendants had taken Aaron's older brother, Steven, to a Red Sox game, and Steven had spent the night at the defendants' home. Aaron's parents went to pick up Steven the next day, taking Aaron along with them. When they arrived, the Dyckmans met Aaron and his parents outside. Aaron noticed a zip line set up between two trees in the backyard and asked if he could use it. The zip line consisted of 200 feet of cable with a hand trolley used to glide along its length. James Dyckman had purchased all the parts and had installed the zip line himself. Dyckman knew that the hand trolley could accommodate a seat, but a seat was not included and he chose not to purchase one.

Aaron's father lifted Aaron up to the zip line. After helping Aaron grab onto the hand trolley, his father held him by the hips, guiding Aaron along the zip line for about five feet.

When Aaron arrived at a point that his father felt was safe enough for Aaron to hold on by himself, he told Aaron, "You're on your own, Buddy," and let go. Aaron traveled down the zip line a short distance before his hands began to slip and he started to fall. Although Aaron's father managed to grab him as he was falling, Aaron's arm hit the ground, resulting in complex fractures requiring multiple surgeries.

The plaintiff's negligence claim focused on the defendants' failure to install a safety seat attachment to the hand trolley, as recommended by the manufacturer. The plaintiff alleged that the zip line was unreasonably dangerous without a safety seat and that the defendants failed to warn Aaron of the danger that he might therefore fall. The plaintiff also claimed that the defendants negligently maintained, and failed to remedy, this unreasonably dangerous condition. The judge granted the defendants' motion for summary judgment, concluding that "the danger a six-year-old boy, dangling from a hand trolley, might lose his grip was so obvious that it was reasonable for the Dyckmans to conclude that a person of ordinary intelligence would perceive and avoid it, obviating the need for a warning directly to the plaintiff."

Discussion. "Summary judgment is appropriate where there is no genuine issue of material fact and, where viewing the evidence in the light most favorable to the nonmoving party, the

moving party is entitled to judgment as a matter of law." O'Sullivan v. Shaw, 431 Mass. 201, 203 (2000). See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). When the moving party does not bear the burden of proof, the party may succeed by demonstrating that the opposing party "has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "We review a grant of summary judgment de novo . . . ." Miller v. Cotter, 448 Mass. 671, 676 (2007).

1. Duty to warn. Owners or possessors of property owe "a common-law duty of reasonable care to all persons lawfully on the premises." O'Sullivan, 431 Mass. at 204. "This duty includes an obligation to maintain the premises in reasonably safe condition and to warn visitors of any unreasonable dangers of which the landowner is aware or reasonably should be aware." Davis v. Westwood Group, 420 Mass. 739, 743 (1995). However, "a landowner has no duty to protect lawful visitors on his property from risks that would be obvious to persons of average intelligence." Toubiana v. Priestly, 402 Mass. 84, 89 (1988). See Restatement (Second) of Torts § 343A (1) (1965) ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them . . ."). "Landowners are relieved of the duty to warn of open and obvious dangers on

their premises because it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards." O'Sullivan, supra at 204. A conclusion that the danger is open and obvious negates a defendant's duty of care. See id. at 206. The test is objective, and its application does not depend on a "particular plaintiff's subjective reasonableness or unreasonableness in encountering a known hazard." Id.

The plaintiff disputes the judge's conclusion that the danger of falling from a zip line without a seat was open and obvious. The plaintiff's argument is based on the premise that the duty to warn was owed to Aaron and, accordingly, that the question whether the risk was open and obvious should be analyzed from the perspective of the average six year old child rather than an adult of ordinary intelligence. On the facts of this case, the plaintiff's premise is flawed.

When a child is under an adult's supervision, no separate duty is owed to the child apart from that owed to the adult. For example, in Flynn v. Cities Serv. Ref. Co., 306 Mass. 302, 302 (1940), a father brought his plaintiff daughter, who was three years and nine months old, with him to get his car serviced. While the father conversed with a friend, the plaintiff walked away and fell into an open pit in the back of the gas station. Id. at 302-303. The court observed that the

defendant owed no duty to the father because the danger of falling into the pit was "obvious to any ordinarily intelligent person." Id. at 304, quoting Kelley v. Goldberg, 288 Mass. 79, 81 (1934). No greater duty was owed to the child, who was expected to remain under her father's supervision. Flynn, supra at 304. See Valunas v. J. J. Newberry Co., 336 Mass. 305, 305-306 (1957) (where thirteen year old boy accompanying mother was injured leaving defendant's store, plain and obvious danger from location and construction of store's glass doors and panels required no warning, and "same duty is owed to a minor accompanying an adult customer" as is owed to adult customer); Harlin v. Sears Roebuck & Co., 369 Ill. App. 3d 27, 34 (2006), quoting Stevens v. Riley, 219 Ill. App. 3d 823, 832 (1991) ("the landowner will be absolved of a duty where the child was injured due to an obvious danger while under the supervision of his or her parent, 'or when the parents knew of the existence of the dangerous condition that caused the child's injury'"); Laser v. Wilson, 58 Md. App. 434, 445-446 (1984) ("if a condition is open and obvious rather than latent or obscure, no greater duty is imposed upon a host of a child under parental supervision than would be owed to the parent"). Similarly, it was error to direct a verdict in favor of a department store when a mother brought her toddler son shopping with her and the boy was injured falling down a concealed staircase -- not because a

special duty was owed to the child, but because "[a] jury would be warranted in finding that the condition was not obvious to a reasonably intelligent person . . . ." Altman v. Barron's, Inc., 343 Mass. 43, 47 (1961).[3]

When adults are expected to supervise children, the duty to warn of a dangerous condition is owed to the adult rather than the child. Thus, where young children were known to play unsupervised in adjoining backyards and a defendant performing excavation work created "an unusual and unexpected hazard," a jury could find "that reasonable care required the defendant either to notify the owner or occupant of the house in order that proper precautions might be taken to restrain children," or to provide reasonable safeguards itself. Sample v. Melrose, 312 Mass. 170, 174 (1942). Once the adult is warned of the danger, the attendant risks are viewed from the adult's, rather than the child's, perspective. See Miller v. Fickett, 48 Mass. App. Ct. 654, 655-656, S.C., 432 Mass. 1028 (2000) ("reasonable person of ordinary intelligence" standard applied to parents' conduct of bringing four year old daughter with them to view property after

[3] Although the Massachusetts cases cited in this paragraph were decided before abolition of the traditional common-law distinction between tenants, invitees, licensees, and trespassers, see generally Papadopoulos v. Target Corp., 457 Mass. 368, 370-372 (2010), and Mounsey v. Ellard, 363 Mass. 693, 695, 707 (1973), all of these cases considered the children to be invitees, thus imposing the highest obligation of protection upon the property owner.

being warned "there were dangerous and vicious dogs on the property").

On the facts of this case, the judge correctly analyzed whether the danger was open and obvious from an adult's perspective. Aaron was on the defendants' property because his parents brought him with them, for their own convenience, to pick up his older brother. Aaron used the zip line with his father's assistance and under his father's supervision. Any duty to warn would be owed to Aaron's father, who was expected to keep his son safe, had the opportunity to prevent his son from using the zip line, and placed his son in the position that led to his injury. And because the danger was open and obvious to Aaron's father, the defendants had no duty to warn him. The judge did not err in applying the "person of ordinary intelligence" standard.[4]

2. Duty to remedy. The plaintiff further contends that the motion judge erred by entering summary judgment without

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[4] The judge did not state or imply -- and neither do we -- that any negligence or contributory negligence of Aaron or his parents played any role in assessing the duty of care the defendants owed in this case. Accordingly, the cases that the plaintiff relies on concerning the level of reasonable care expected from minor tortfeasors, see Mann v. Cook, 346 Mass. 174, 178 (1963) (although children are liable for their torts, "[t]heir conduct . . . is to be judged by the standard of behavior expected from a child of like age, intelligence, and experience"), and the contributory negligence of child trespassers, see Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 263 (1991), have no application here.

addressing the defendants' duty to remedy the open and obvious, but nonetheless unreasonably dangerous, condition of the zip line. "While the open and obvious doctrine may relieve the defendant of its duty to warn, the doctrine does not mean that the defendant can maintain its property in an unreasonably unsafe condition as long as the unsafe condition is open and obvious" (quotation and citation omitted). Dos Santos v. Coleta, 465 Mass. 148, 161 (2013). A landowner has a duty to remedy an unreasonably dangerous yet obvious condition when the owner knows or has reason to know that visitors might nonetheless proceed to encounter the danger for a variety of reasons, including being distracted, forgetful, or even negligent, or deciding that the benefits of encountering the condition outweigh the risks. See id. at 156-161; Papadopoulos v. Target Corp., 457 Mass. 368, 379 (2010); Docos v. John Moriarty & Assocs., 78 Mass. App. Ct. 638, 642 (2011); Restatement (Second) of Torts § 343A (1) (possessor of land not liable for known or obvious dangers, "unless the possessor should anticipate the harm despite such knowledge or obviousness"). For example, when property owners "set up a trampoline immediately adjacent to a two-foot-deep pool, with a ladder leading directly from the pool to the trampoline, for the very purpose of enabling people to jump from the trampoline into the pool," Dos Santos, supra at 161, even though the owners had

no duty to warn of the obvious danger, they had a duty not to maintain, and instead to remedy, this unreasonably unsafe condition. Id. at 161-163.

However, a property owner is "not obliged to supply a place of maximum safety, but only one which would be safe to a person who exercises such minimum care as the circumstances reasonably indicate." Barry v. Beverly Enters.-Mass., Inc., 418 Mass. 590, 593 (1994), quoting Toubiana, 402 Mass. at 88. To require otherwise "would be to establish an unreasonable standard of perfection rather than to enforce the recognized standard of due care." Greenfield v. Freedman, 328 Mass. 272, 275 (1952), quoting Rogers v. Cambridge Taxi Co., 317 Mass. 578, 580 (1945).

The plaintiff did not show, and had no reasonable expectation of showing, that the zip line as installed was unreasonably dangerous. The plaintiff produced no evidence that the zip line was defective in any way or that it was poorly constructed. The plaintiff points to the safety manual for the hand trolley, which warns that "when setting up a seatless zip line there is the potential for the rider to lose grip and fall. TAKE EXTREME CARE in the line design so that if the rider does lose grip that the fall is but a few feet." But the record contains no evidence that the zip line was unreasonably high above the ground; the only evidence in this regard is that the zip line was low enough for Aaron's father to lift him to the

hand trolley by the hips.[5] Because the record is devoid of evidence that the zip line was unreasonably dangerous, or that the defendants facilitated an "improper" or "highly dangerous use," Dos Santos, 465 Mass. at 161, the motion judge did not err in granting summary judgment.

Judgment affirmed.

[5] Aaron's father stated at his deposition, "[I]t was just me holding him, you know. It was the middle of my body and half his body length." The place on the zip line where Aaron fell was "[a]bout a foot shorter" than where he first took hold of the hand trolley.