STATE OF MICHIGAN

COURT OF APPEALS

VALENTINE BRAGAN, a Minor, by his Next Friend, ROBERT BRAGAN, Plaintiff-Appellant, v EUGENE SYMANZIK, CAROLYN SYMANZIK, and SYMANZIK'S BERRY FARMS, Defendants-Appellees.	FOR PUBLICATION August 19, 2004 9:10 a.m. No. 247287 Genesee Circuit Court LC No. 02-073458-NO Official Reported Version

Before: Murphy, P.J., and Jansen and Cooper, JJ.

COOPER, J.

Plaintiff Valentine Bragan appeals as of right the trial court's order dismissing his claims of negligence, failure to supervise, and failure to warn against defendants Eugene and Carolyn Symanzik and Symanzik's Berry Farms, pursuant to MCR 2.116(C)(10) in this premises liability action. Plaintiff urges this Court to find that plaintiff 's age is relevant to the determination that a dangerous condition is open and obvious. We find that landowners owe a special duty of care to child invitees, and therefore, reverse and remand for further proceedings.

I. Facts and Procedural History

Plaintiff, an eleven-year-old boy, was injured at defendants' facility when he fell from a "Jacob's Ladder."[1] Defendants constructed the Jacob's Ladder in the "Fun Barn" by tying the top of the ladder to eaves ten feet in the air. The object of the Jacob's Ladder is to climb to the top and ring a bell, but 90% of climbers fall.[2] Recognizing the danger of a fall from such a height, defendants placed bales of straw under the ladder in the beginning of the busy season. As the

[1] A Jacob's Ladder is constructed of rope with wood plank rungs. The ladder is narrow at the top and widens as it reaches the ground. As described at the motion hearing held on February 10, 2003, the ladder is designed to twist and sway and be difficult to climb.

[2] Deposition of Carolyn Symanzik, November 1, 2002.

bales broke apart, defendants maintained piles of straw under the ladder two feet deep. Defendants testified that they checked the depth of the straw on an hourly basis to ensure the safety of the attraction.

On the day of the accident, plaintiff accompanied his parents, Robert and Suzanna Bragan, to the Symanzik Berry Farms. Unsupervised by his parents, plaintiff and a friend went into the barn to climb the Jacob's Ladder. After waiting in line, plaintiff climbed the ladder to the top and began to descend. About halfway down, plaintiff fell and fractured both wrists when he hit the barn floor. Plaintiff and his father testified that there was barely enough straw to cover the ground under the ladder. Furthermore, defendants had not posted an employee in the barn to supervise the children, and plaintiff and his father were unable to locate anyone for assistance.

Defendants moved for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(10), arguing that the danger from the ladder and the lack of straw underneath was open and obvious. Plaintiff contended that a child could either not appreciate such a danger or that defendants owed a special duty of care, as the ladder was created for their child business invitees. The trial court disagreed and granted defendants' motion. The trial court found that both the danger from the Jacob's Ladder and the lack of straw were open and obvious, and therefore not unreasonably dangerous. The court also declined to find that the use by children of the Jacob's Ladder was a special aspect removing the condition from the open and obvious doctrine.

II. Legal Analysis

We review a trial court's determination regarding a motion for summary disposition de novo.[3] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[4] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[5] Summary disposition is appropriate only if there are no genuine issues of material fact, and "the moving party is entitled to judgment as a matter of law."[6]

A. Duty of Care to Minors

It is well-established under Michigan law that minors are not held to the same standard of care as adults. Minors are required only to exercise "that degree of care which a *reasonably careful minor* of the age, mental capacity and experience" of other similarly situated minors

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[3] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[4] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[5] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[6] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

would exercise under the circumstances.[7] Likewise, reasonable care requires a person to "exercise greater vigilance" when he knows or should know that children are nearby as "children act upon childish instincts and impulses."[8]

Landowners owe a heightened duty of care to known child trespassers. Normally, the only duty owed to a trespasser is to refrain from wanton and willful misconduct.[9] Pursuant to the attractive nuisance doctrine, however, the landowner is 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.[10] In *Taylor v Mathews*,[11] this Court determined that "there is no fixed age at which a child does and can be expected to realize any particular risk, as a matter of law."[12] Accordingly, it was a question for the jury whether the child trespasser could realize the risk of diving into the defendant's gravel pit.[13]

Landowners also owe a heightened duty of care to child licensees. Normally, "[a] landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved."[14] In *Klimek v Drzewiecki*,[15] this Court found that landowners owe a duty of "reasonable or ordinary care to prevent injury to the child" licensee.[16]

This Court recently explained the necessity of imposing a heightened duty of care by landowners to child licensees as follows:

> "If the licensees are adults, the fact that the condition is obvious is usually sufficient to apprise them, as fully as the possessor, of the full extent of the risk

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[7] SJI2d 10.06 (emphasis added). See also *Fire Ins Exch v Diehl*, 450 Mich 678, 688; 545 NW2d 602 (1996), overruled in part on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003); *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

[8] SJI2d 10.07.

[9] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000) On Rem 243 Mich App 461; 624 NW2d 427 (2000).

[10] *Pippin v Atallah*, 245 Mich App 136, 146 & n 4; 626 NW2d 911 (2001), quoting 2 Restatement Torts, 2d, § 339. See also *Gilbert v Sabin*, 76 Mich App 137, 141-142; 256 NW2d 54 (1977).

[11] *Taylor v Mathews*, 40 Mich App 74; 198 NW2d 843 (1972).

[12] *Id.* at 91-92.

[13] *Id.* at 92-93.

[14] *Stitt*, *supra* at 596.

[15] *Klimek v Drzewiecki*, 135 Mich App 115; 352 NW2d 361 (1984).

[16] *Id.* at 120.

> involved in it. On the other hand, the possessor should realize that the fact that a dangerous condition is open to the perception of child licensees may not be enough to entitle him to assume that they will appreciate the full extent of the risk involved therein."[17]

In *Kosmalski v St. John's Lutheran Church*, the minor plaintiff was injured by shattered glass when a younger child opened a glass door against the plaintiff's extended arm.[18] Whether the glass door presented an unreasonable risk of harm depended on the age of the licensee.

> Because children could use this door to access the activity room and children are unlikely to appreciate the risk of harm that may result from the shattering of a nonsafety-glass door, we conclude that plaintiffs have established a genuine issue of material fact regarding whether the door at issue here involved an unreasonable risk of harm.[19]

Pursuant to the Restatement approach, landowners are liable to child licensees and invitees in any situation in which they would be liable to child trespassers.[20] Comments *b* and *c* to § 343B are especially instructive:

> *b.* Where the child is not upon the land as a trespasser, but is a licensee or an invitee, the possessor of the land is no less obligated to anticipate and take into account his propensities to inquire into or to meddle with conditions which he finds on the land, his inattention, and his inability to understand or appreciate the danger, or to protect himself against it. . . .
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> *c.* Because of his status as a licensee or an invitee, the child may be entitled to greater protection than that afforded to a trespasser. This Section is intended to say only that he is entitled to at least as much.[21]

B. Open and Obvious Doctrine

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[17] *Kosmalski v St. John's Lutheran Church*, 261 Mich App 56, 67; 680 NW2d 50 (2004), quoting 2 Restatement Torts, 2d, § 342, comment b, p 210. See also *Pigeon v Radloff*, 215 Mich App 438; 546 NW2d 655 (1996), nullified sub nom *Pigeon v Allied Pools & Spas*, 451 Mich 885 (1996).

[18] *Kosmalski*, *supra* at 58.

[19] *Id.* at 67.

[20] 2 Restatement Torts, 2d, § 343B.

[21] *Id.*, comments b and c, p 223.

Our courts have never addressed whether child invitees are entitled to a heightened duty of care. As a general rule, "a premises possessor 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."[22] An invitor is protected from liability, however, if the danger is open and obvious.[23] Michigan's open and obvious doctrine was initially based on the Restatement of Torts.[24] Under the Restatement approach, a premises possessor is not liable for harm caused by known or obvious dangers "unless the possessor should anticipate the harm despite such knowledge or obviousness."[25] A possessor must still warn or protect an invitee against open and obvious dangerous conditions when the possessor should anticipate the harm.[26]

However, in *Lugo v Ameritech Corp*, our Supreme Court replaced the Restatement approach with a special aspects analysis as follows:

> [T]he general rule is that 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.[27]

A special aspect exists when the danger, although open and obvious, is unavoidable or imposes a "uniquely high likelihood of harm or severity of harm."[28] Pursuant to *Lugo*, a court must "focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff" or other idiosyncratic factors related to the particular plaintiff.[29]

The Supreme Court recently solidified this novel legal premise in *Mann v Shusteric Enterprises, Inc*, where the plaintiff visited the defendant bar during a blizzard.[30] After the defendant served the plaintiff nine drinks in a three-hour period, the visibly intoxicated plaintiff

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[22] *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

[23] *Id.*, citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

[24] *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 336-337; 683 NW2d 573 (2004) (Cavanagh, J., concurring in part and dissenting in part), citing *Lugo*, *supra* at 528 (Cavanagh, J., concurring), *Bertrand*, *supra* at 609, and *Perkoviq v Delcor Homes Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002).

[25] 2 Restatement Torts, 2d, § 343A, p 218. See also *Mann*, *supra* at 337 (Cavanagh, J., concurring in part and dissenting in part).

[26] 2 Restatement Torts, 2d, § 343A, comment f, p 220.

[27] *Lugo*, *supra* at 517.

[28] *Id.* at 518-519.

[29] *Id.* at 523-524.

[30] *Mann*, *supra* at 324.

exited the bar.[31] The plaintiff slipped, fell, and was injured on ice and snow that the defendant had allowed to accumulate in the parking lot.[32] The Supreme Court held that courts must examine whether a danger is open and obvious, and whether special aspects render an open and obvious condition unreasonably dangerous, from the perspective of "a reasonably prudent person."[33] Whether a dangerous condition is open and obvious is "not dependent on the characteristics of a particular plaintiff. . . ."[34] In so finding, it vacated a jury award in favor of the plaintiff, finding that "[a] visibly intoxicated person is held to the same standard of reasonable conduct as a sober person."[35] The Supreme Court also invalidated the standard jury instruction pertaining to a possessor's duty to warn an invitee of dangerous conditions[36] as the language did not comport with *Lugo*.[37]

Taken to its logical conclusion, the cases that followed *Lugo* disallowed liability to individuals laden with bulky and heavy items, limited by physical disabilities, or burdened by crutches and canes. The Michigan Supreme Court recently denied leave to appeal in *Sidorowicz v Chicken Shack, Inc*,[38] where a panel of the Court of Appeals rejected the premises liability claim of a blind restaurant patron who slipped on water on the restroom floor, holding:

> Plaintiff was unable to see this condition because of his blindness, but this condition would have been open and obvious to an ordinarily prudent person. No evidence has been presented indicating that the "special aspects" of the unsafe condition would remove this case from the open and obvious doctrine.[39]

C. Duty of Care to Minor Invitees

We are, of course, duty bound to follow our Supreme Court's decisions in *Lugo* and *Mann*. However, even the Michigan Supreme Court has yet to address the open and obvious doctrine as it relates to children. Accordingly, this Court now finds, based on a long line of cases establishing the duty of care owed to child trespassers and licensees and our history of treating

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[31] *Id.*

[32] *Id.*

[33] *Id.* at 328-329.

[34] *Id.* at 329 n 10.

[35] *Id.* at 329.

[36] M Civ JI 19.03.

[37] *Mann, supra* at 331-332.

[38] *Sidorowicz v Chicken Shack, Inc*, 469 Mich 912 (2003).

[39] *Sidorowicz v Chicken Shack, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2003 (Docket No. 239627), slip op at 3. We cannot help but note Justice Cavanagh's dissent of the denial of leave: "My fellow justices . . . have clearly stumbled over what is so plain in this case—what is open and obvious to the sighted is *not necessarily open and obvious to the blind*." *Sidorowicz, supra* at 912 (Cavanagh, J., dissenting) (emphasis in original).

children differently under the law, that landowners owe a heightened duty of care to child invitees.

As noted earlier, children are not held to the same standard of care as adults. Children under the age of seven are presumptively incapable of committing negligent or criminal acts or intentional torts.[40] In negligence actions, a child over the age of seven is required only to act as "a minor of similar age, mental capacity, and experience would conduct himself," unless engaging in an adult activity.[41]

In *Fire Ins Exch v Diehl*, the Michigan Supreme Court found that an exclusionary clause in an insurance contract barring coverage for an injury that "may reasonably be expected to result from the intentional or criminal acts of an insured person" applied differently to children than adults.[42] It is a question of fact for the jury whether a result is reasonably foreseeable to a child of similar "age, ability, intelligence and experience."[43] In so finding, the Supreme Court noted that "[t]he reasonable expectation is for a child to be held to a lesser standard of foreseeability than an adult."[44]

As their age, mental capacity, and ability to foresee the consequences of their acts are lesser than that of adults, children receive different treatment under other aspects of the law as well. Minors may only sue and be sued through a court-appointed next friend.[45] Michigan even handles minors who have committed criminal offenses under a separate Juvenile Code with the purpose of ensuring that minors "receive the care, guidance, and control . . . that is conducive to the minor's welfare and the best interests of the public."[46] Rather than convict juvenile offenders in a criminal trial, minors under the age of seventeen are tried in delinquency proceedings in the family division of the circuit court unless the prosecutor petitions to try the juvenile as an adult for an enumerated offense.[47]

Based on this long history of treating children differently under the law and entitling child trespassers and licensees to a heightened duty of care, we find the instant case legally distinguishable from the line of open and obvious cases involving adult invitees. Landowners owe the greatest duty of care to invitees as a class. Even the Restatement of Torts, upon which

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[40] *Queen Ins Co v Hammond*, 374 Mich 655, 657-658; 132 NW2d 792 (1965); see also *Burhans v Witbeck*, 375 Mich 253, 255; 134 NW2d 225 (1965) (finding children under seven incapable of contributory negligence).

[41] *Stevens*, *supra* at 443.

[42] *Fire Ins Exch*, *supra* at 684, 688.

[43] *Id.* at 688, quoting *Burhans*, *supra* at 255.

[44] *Id.*

[45] MCR 2.201(E)(1).

[46] MCR 3.902(B)(1).

[47] MCL 712A.2(a); see also MCR 3.914(B).

Michigan's open and obvious doctrine was originally based, recognizes that child invitees are entitled to greater protection due to their "inability to understand or appreciate the danger, or to protect [themselves] against it."[48] It would, therefore, be illogical to find that child invitees are entitled to less protection than child licensees or trespassers. Furthermore, as minors in Michigan are only held to the standard of care of "a reasonably careful minor,"[49] it would be similarly illogical to hold child invitees to the standard of an objective, reasonably prudent person; i.e., an adult. Accordingly, we 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.

Plaintiff testified that he did witness the ladder move and sway and other children fall off. Plaintiff understood that he could fall and he could have noticed the lack of straw underneath the ladder before climbing. It does not necessarily follow that plaintiff, or other child invitees, would have appreciated the risk of injury from falling into the scant amount of straw underneath a ten-foot high rope ladder. Whether a child could appreciate the particular risk is, accordingly, a question for a jury.[50] Only a jury can determine whether the Jacob's Ladder and lack of straw amounted to open and obvious dangerous conditions in the eyes of a child and, if open and obvious, whether the condition was unreasonably dangerous in light of the targeted youthful audience.

Plaintiff created a genuine issue of material fact regarding defendants' liability, and summary disposition in this case was unwarranted. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Jansen, J., concurred.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen

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[48] 2 Restatement Torts, 2d, § 343B, comment b, p 223.

[49] SJI2d 10.06.

[50] See *Taylor*, *supra* at 91-92.