

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Open and Obvious Defense Applies to Minors

By Caroline Grech-Clapper

In *Westfall v Commerce Meadows*, an unpublished decision of the Michigan Court of Appeals, the trial court dismissed a claim involving a seven-year-old minor based on the open and obvious defense. Plaintiff's minor son was injured while riding his scooter on a concrete block that was propped up over the curb in the driveway next door to his mobile home. Plaintiff argued that the open and obvious doctrine did not apply to minors, that the lip on the concrete block created a special aspect that made the condition unreasonably dangerous, and that the condition was an attractive nuisance.

During discovery, Plaintiff's minor testified that the concrete block was big enough to see and he used it as a ramp because it "looked like a good ramp, so [he] went for it." Further, he testified that the concrete block had been on the property for months before the accident.

The Court of Appeals affirmed the trial court's dismissal of the case. The Court held that the condition described by Plaintiff's minor was open and obvious because it would have been open and obvious to a reasonably careful minor of the same age. The Court was also persuaded by the minor's testimony that he was using the block as a ramp and knew of its existence for months before the accident. The Court reasoned that, "[a] reasonably careful minor would know that the concrete block in the driveway next door was not intended to be used as a ramp and that to do so would impose some danger." The Court held that even if the lip on the concrete block was not open and obvious, the danger of using the concrete block as a ramp was.

SECRET WARDLE NOTES:

Although landowners do owe a heightened duty of care to minor invitees, minors are not immune from the open and obvious defense. The issue is whether a reasonably careful minor of the same age would discover the condition and appreciate the risk of harm. Once again, precise and thorough questioning of key witnesses carried the day for the landowner. In this case, the most important factor was Plaintiff's minor's intentional and dangerous use of the concrete block. The Court had no alternative but to find that the concrete block was open and obvious when the minor admitted to using it as a ramp.

Of note, this case did not mention whether or not Plaintiff made a claim under the Landlord/Tenant Statute (MCLA 554.139), which would have been exempt from application of the open and obvious defense.

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The Court of Appeals was not persuaded by Plaintiff's argument that the lip on the concrete block created a special aspect making the condition unreasonably dangerous. The Court found that the block was avoidable and it did not impose a severe risk of harm. The Court found that it was not the concrete block that created the harm, but rather Plaintiff's minor's use of it as a ramp.

Lastly, the Court of Appeals was not persuaded by Plaintiff's attractive nuisance argument. The Court reasoned that Plaintiff had no evidence to support the allegation that Defendant had knowledge of the condition before the accident. The only evidence Plaintiff proffered was Plaintiff's own testimony that Defendant knew or should have known of the concrete block because Defendant performed monthly inspections. The Court of Appeals found Plaintiff's opinion as to what Defendant should have known insufficient to support this claim.

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