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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Open and Obvious Defense Now Harder to Apply to Child Invitees

By Mark Masters

In *Bragan v. Symanzik,* __ Mich App __ (2004), the Court of Appeals dealt with an issue of first impression regarding the applicability of the open and obvious defense to child invitees. Not only did the Court reverse the dismissal by the trial court, it held that (1) whether a condition was open and obvious to a child, and (2) if open and obvious, whether the condition was still unreasonably dangerous to the child was always a question for the jury.

Plaintiff, an 11 year old child, was injured while playing on a Jacob's Ladder in Defendants' "Fun Barn." The Jacob's Ladder was constructed of rope and wood plank rungs. It was narrower at the top and widened as it reached the ground. The objective was to climb to the top and ring a bell, but 90% of the climbers would fall. The ladder was designed to twist and swing and be difficult to climb. Recognizing the danger of falling from the ladder, Defendants placed bales of hay underneath the ladder at the beginning of the busy season. As the bales broke apart, Defendants testified they maintained a two feet deep pile of hay under the ladder. Defendants also testified they checked the hay every hour to ensure the safety of the attraction.

On the day of the accident, Plaintiff and his friend went into the Fun Barn without the supervision of his parents and climbed the ladder. Plaintiff safely made it to the top, but fell to the barn floor and broke both of his wrists while descending the ladder. Plaintiff and his father testified that there was barely enough hay to cover the barn floor, there was no one supervising the attraction, and there was no one around to render assistance after the accident.

The trial court dismissed the case on the open and obvious doctrine, holding that the danger of falling off of the ladder and the amount of hay on the ground were open and obvious dangers. The trial court further held that there was no higher duty owed to Plaintiff by Defendants due to his age, and that the standard to be applied was the reasonably prudent person of average intelligence, rather than the standard of a reasonably prudent 11 year old.

SECREST WARDLE NOTES:

More than ever, special attention and preparations must be made for children on your property. This is especially true if your business caters to children by offering rides and amusements for them. The task for you is to evaluate the premises from the point of view of the child. You must see things from their perspective and ask yourself, "What would a kid do?"

You can also help protect yourself by staffing an attendant at all locations to which children are drawn, and establishing minimum age and size requirements for rides and amusements. If your business model permits, you should also consider: (1) the placement of warning signs at each of the rides and amusements, and (2) having the child's parents sign indemnity contracts in which they agree to indemnify and hold you harmless if their child sustains any injuries on your property.

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The Court of Appeals reversed the dismissal. The Court began its analysis by stating:

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

The Court of Appeals, admittedly unrestrained by the Supreme Court on this issue since it had not yet been addressed, held that landowners owed a higher duty to child invitees on the property. Therefore, whether a condition was open and obvious to a child must be examined from the perspective of a reasonably careful minor of the same age, mental capacity and experience of the injured child. In this case, Plaintiff was 11-years-old. The Court held that the analysis must focus on what a reasonably careful 11 year old would have observed and avoided for his own safety, rather than the reasonably prudent person standard which applied to adults.

Interestingly, the Court discussed the line of cases holding that there were no special standards under the open and obvious defense for people limited by physical disabilities (such as blindness) or burdened by crutches or canes. The standard in all of these cases remained the reasonably prudent person. Nevertheless, the Court based its decision on "the long line of cases establishing the duty of care owed to child trespassers and licensees and our history of treating children differently under the law, [and held that] the landowners owe a heightened duty of care to child invitees."

Moreover, the Court held "whether a child could appreciate a particular risk is, accordingly, a question for the jury. 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."

Since this is a published decision, this case of first impression is binding on all lower courts and other panels of the Court of Appeals. Since this decision stretches the bounds of prior Supreme Court rulings, it will likely be reviewed (and possibly reversed) by the Michigan Supreme Court. Unfortunately, such a decision is not expected for over a year.

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