American Educational Institute, Inc.

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS COMPENSATION, FRAUD INVESTIGATION AND AUTOMOBILE

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AEI CLAIMS LAW QUIZ

OPEN AND OBVIOUS CONDITIONS AND THE DUTY TO WARN

[Ref. Tort Concepts, Para 1.05]

FACTS: Aaron was six years old when he accompanied his father to a neighbor's house where he saw a zip line and asked if he could use it. The zip line was set up between two trees in the neighbor's backyard and consisted of 200 feet of cable with a hand trolley used to glide along its length. The neighbor purchased and installed the zip line himself. He knew that the zip line could accommodate a seat, but he neither purchased nor constructed a seat and, therefore, all it had was a hand trolley that users had to grip with their hands and hold on to for the duration of the ride.

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

Aaron's mother filed a tort action against the neighbor on behalf of her minor son. The plaintiff claimed that the zip line was unreasonably dangerous without a seat and, therefore, the defendant should have warned Aaron of the danger of falling. In addition the plaintiff claimed that the defendant failed to remedy what he knew or should have known to be an unreasonably dangerous condition. The defendant argued that the danger of the zip line was open and obvious and, therefore, he owed no duty of care.

QUESTION: Does a landowner owe a supervised minor a separate duty to warn of an open and obvious danger?

ANSWER: No, according to the Appeals Court of Massachusetts in *LaForce v. Dyckman*, 132 NE3d 1015 (Mass. App. 2019).

The plaintiff's claim focused on the defendant's failure to install a seat as recommended by the manufacturer. According to the plaintiff, the danger of falling from a zip line was not open and obvious because that issue, based on these facts, should be analyzed from the perspective of an average six-year-old child rather than an average adult. The plaintiff argued that while an adult of average intelligence may have perceived the danger of falling from a seatless zip line, an average six-year-old would not have and, therefore, the defendant owed Aaron a separate duty to warn him of that danger.

The court reviewed the law:

> Owners or possessors of property owe a common law duty of reasonable care to all persons lawfully on the premises. 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. However, a landowner has no duty to protect lawful visitors on his property from risks that would be obvious to persons of average intelligence. 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 reasonable care for his own safety would suffer injury from such blatant hazards. A conclusion that the danger is open and obvious negates a defendant's duty of care. The test is objective, and its application does not depend on a particular plaintiff's subjective reasonableness or unreasonableness in encountering a known hazard.

The court focused on the presence of Aaron's father when Aaron encountered the zip line and said: "When a child is under an adult's supervision, no separate duty is owed to the child apart from that owed to the adult." Defendants are relieved of the duty to warn of dangerous conditions that are open and obvious because plaintiffs have a duty of reasonable care for their own safety. If a dangerous condition is open and obvious rather than latent or obscure, the plaintiff should avoid it. Since the test to determine whether a condition is open and obvious is objective, a defendant has no duty to warn of a danger if a person of average intelligence would have recognized the danger even if this plaintiff did not.

The court held that because Aaron was under his father's direct supervision when the accident occurred, if any duty to warn was owed, it was owed to the father. Not only did Aaron use the zip line with his father's consent, but his father actually assisted and supervised him while he used it. The defendant did not owe Aaron a separate duty to warn because Aaron's father was present and aware of all the circumstances involving the zip line including the absence of a seat, but nonetheless allowed Aaron to use it. Since an adult of average intelligence would have recognized that a six-year-old child could lose his grip and fall, the risk was open and obvious, negating the defendant's duty to warn Aaron's father.

As for the duty to remedy argument, the court acknowledged that a landowner can have such a duty if he knows or has reason to know that visitors might proceed to encounter an unreasonably dangerous, albeit obvious hazard. The court held that in this case the zip line was not such an unreasonably dangerous condition.

CONCLUSION: While this case addressed a landowner's potential duty to warn of or remedy dangerous conditions on the property, it also illustrates the circumstances in which the duty to warn may be negated by the open and obvious nature of a dangerous condition. A condition is open and obvious if a reasonable person exercising ordinary perception, intelligence, and judgment would recognize both the condition and the risk involved. The standard is objective and, therefore, what the claimant actually perceived is irrelevant. Whether a condition is open and obvious depends not on

subjective knowledge but on the objective knowledge of a reasonable person confronted with the same or similar condition.

In cases that involve a supervised minor child several jurisdictions have held that a landowner does not owe a child a separate duty to warn aside from that owed to the supervising parent or guardian. These courts have concluded that a landowner should not be burdened by a duty to warn child guests about obvious dangers when a parent or guardian is present and is aware of or should be aware of the danger. If a dangerous condition would be recognized by a reasonable supervising adult, the condition is open and obvious and, therefore, a landowner will be found to have no duty to warn the child or the adult of the condition.