

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
JAN 31 2008
COURT OF APPEALS
DIVISION TWO

FERNANDO CHIQUETTE and OLIVIA)
CHIQUETTE, husband and wife, for)
themselves and on behalf of their minor)
daughter, SAMANTHA CHIQUETTE,)

Plaintiffs/Appellants,)

v.)

INTERNATIONAL CHURCH OF THE)
FOURSQUARE GOSPEL, dba TUCSON)
GRACE CHAPEL FOURSQUARE)
CHURCH, a California corporation; and)
BROKEN ARROW ENTERPRISES,)
INC., an Arizona corporation,)

Defendants/Appellees.)

2 CA-CV 2007-0097
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20057105

Honorable John E. Davis, Judge

AFFIRMED

Stompoly, Stroud & Erickson, P.C.
By John G. Stompoly

Tucson
Attorneys for Plaintiffs/Appellants

The Redhair Law Group, P.C.
By Jack Redhair

Tucson
Attorneys for Defendant/Appellee
Grace Chapel Foursquare Church

and

Rusing & Lopez, P.L.L.C.
By Sean E. Brearcliffe

Tucson
Attorneys for Defendant/Appellee
Broken Arrow Enterprises, Inc.

E S P I N O S A, Judge.

¶1 In this personal injury action, plaintiffs/appellants Fernando and Olivia Chiquette appeal from the trial court’s grant of summary judgment in favor of defendants/appellees Tucson Grace Chapel Foursquare Church (Foursquare Church) and Broken Arrow Enterprises, Inc. (Broken Arrow). For the reasons set out below, we affirm.

Factual and Procedural Background

¶2 In September 2005, Olivia Chiquette and her fourteen-year-old daughter Samantha attended a three-day “family retreat,” which was hosted by Foursquare Church at a campground owned by Broken Arrow. On the first day of the retreat, leaders of Foursquare Church told the campers that climbing a mountain immediately adjacent to the campground was “prohibited,” that Broken Arrow had instructed them “not to climb the mountain,” and that campers who chose to do so would proceed “at their own risk.” Additionally, each camper was given a written list of rules for the retreat that provided, *inter alia*: “campers are

not allowed to go out of the camp boundaries,” “mountain climbing is not permitted without proper supervision,” and “parents are responsible for their children.” The mountain in question is not part of the campground but is located within Coronado National Forest.

¶3 On the second day of the retreat, Samantha and several other girls went to the mountain and climbed until they reached an area where they could sit and take photographs. Olivia saw Samantha on the mountain and waved to her, but she did not tell her to stop climbing or to come down. As the girls descended the mountain, a rock was dislodged and rolled onto Samantha. An adult from another hiking party lifted the rock off of her, and she was taken by helicopter to a hospital.

¶4 In December 2005, the Chiquettes filed a complaint against Foursquare Church and Broken Arrow, alleging the defendants were liable for Samantha’s injuries because they had negligently failed to warn of a dangerous condition and had failed to provide adequate supervision. In February 2007, the Chiquettes moved for summary judgment on the issue of liability, and both defendants cross-moved for summary judgment. The trial court denied the Chiquettes’ motion and granted the defendants’ cross-motions, finding that Samantha had been an invitee on the defendants’ property, that she had “engaged in an activity she had been warned against by defendants,” and that the defendants’ duty to Samantha had therefore been “extinguished.” The Chiquettes now appeal from that ruling.

Discussion

¶5 The Chiquettes contend the trial court erroneously granted summary judgment in favor of the defendants because reasonable jurors could have found the defendants had inadequately warned the campers against climbing the mountain.¹ Specifically, they claim the written warning given by Foursquare Church—that “mountain climbing is not permitted without proper supervision”—should have defined “proper supervision” and explained the risks associated with climbing the mountain. The defendants respond that summary judgment was proper because they owed no duty to protect Samantha from a dangerous condition on property they did not possess or control, Samantha had exceeded the scope of the invitation, and the warnings they gave were adequate.²

¶6 We first examine the threshold issue of whether the defendants owed a duty to Samantha, which is a question of law for the court. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). Generally, the duty owed by a possessor of land to an entrant

¹We note that the Chiquettes, in their motion for partial summary judgment, conceded that “no warning would have stopped [Samantha]” from climbing the mountain. The defendants contend this constituted a judicial admission and they cannot be found liable for providing inadequate warnings when no warning would have prevented Samantha from climbing the mountain. *See Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) (judicial admission is admission of an alleged fact that party cannot later disprove). Because we affirm the trial court’s decision on other grounds, however, we need not address this claim.

²We do not differentiate between Broken Arrow and Foursquare Church for purposes of our analysis because Foursquare Church joined in Broken Arrow’s motion for summary judgment below and the defendants do not meaningfully distinguish themselves on the essentially identical arguments they have raised in their answering briefs on appeal.

on the land is determined by the entrant's status as an invitee, licensee, or trespasser. *See Woody v. Weston's Lamplighter Motels*, 171 Ariz. 265, 268, 830 P.2d 477, 480 (App. 1992).

¶7 Here, it is uncontested that Samantha was an invitee on the defendants' property and that the defendants, therefore, owed her a duty to maintain their property in a reasonably safe condition and to warn of concealed dangers. *See Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 142, 639 P.2d 330, 332 (1982); *Heth v. Del Webb's Highway Inn*, 102 Ariz. 330, 333, 429 P.2d 442, 445 (1967). The defendants contend, however, that they had a duty to warn only of the dangers on *their* property and, because Samantha was injured on a mountain in Coronado National Forest, they cannot be liable for her injuries.

¶8 We agree with the defendants that, generally, possessors of land have no duty to warn others of dangers on neighboring premises over which they exercise no control or possession. *See, e.g., Calhoun v. Belt Ry. Co. of Chicago*, 731 N.E.2d 332, 339 (Ill. App. Ct. 2000). The Chiquettes argue, however, that the defendants' duty was not limited to the campground boundary, asserting "[t]he Church [impliedly] approved of campers climbing the mountain which the Church knew was on adjacent government property," and cite *Stephens v. Basha's Inc.*, 186 Ariz. 427, 430, 924 P.2d 117, 120 (App. 1996), and *Udy v. Calvary Corp.*, 162 Ariz. 7, 11-12, 780 P.2d 1055, 1059-60 (App. 1989). The defendants counter that *Stephens* and *Udy* are not applicable because in *Stephens* the plaintiff was attempting to enter the defendant's premises when he was specifically directed to a dangerous location where he was injured; *Udy*, they add, involved a landlord-tenant relationship which invoked a duty broader than a landowner's duty to an invitee and turned

on questions of foreseeability, which our supreme court in *Gipson* expressly rejected as a factor in making duty determinations. See *Gipson*, 214 Ariz. 141, ¶ 15, 150 P.3d at 231. The defendants further point out that Samantha “was warned *specifically not to do what she did*, but she ignored those warnings and was injured while under the *direct supervision* of her mother.”

¶9 In *Gipson*, our supreme court cautioned that

[a] fact-specific analysis of the relationship between the parties is a problematic basis for determining if a duty of care exists. The issue of duty is not a factual matter; it is a legal matter to be determined *before* the case-specific facts are considered. *Markowitz v. Ariz. Parks. Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985); see 1 Dan B. Dobbs, *The Law of Torts* § 226, at 577 (2001) (“The most coherent way of using the term duty states a rule of law rather than an analysis of the facts of particular cases.”). Accordingly, this Court has cautioned against narrowly defining duties of care in terms of the parties’ actions in particular cases. “[A]n attempt to equate the concept of ‘duty’ with such specific details of conduct is unwise,” because a fact-specific discussion of duty conflates the issue with the concepts of breach and causation.

214 Ariz. 141, ¶ 21, 150 P.3d at 232 (citation omitted). The court further stated that a finding of duty does not necessarily depend on the relationship between the parties. *Id.* ¶ 22. Here, the defendants clearly owed Samantha a duty in relationship to her activities as their invitee. But the more difficult question, particularly under *Gipson*, is whether the harm that she suffered was within the scope of that duty owed. Broken Arrow posits that “[t]he duty the Chiquettes demand . . . is to ensure Samantha’s safety *wherever she went* and whether or not she did so under Broken Arrow’s control, with or without its permission, against its explicit rules, well-off of its property, and whether she was being supervised by her mother or not.”

¶10 We conclude that, ultimately, we need not determine the precise nature of the duty owed to Samantha under the circumstances of this case because no reasonable juror could find any such duty had been breached. *See Gipson*, 214 Ariz. 141, n.1, 150 P.3d 228, 230 n.1 (“summary judgment may be appropriate if no reasonable juror could conclude that the standard of care was breached”). Generally, invitees are “entitled to nothing more than knowledge of the conditions and dangers [they] will encounter” on the possessor’s land. Restatement (Second) of Torts § 343A cmt. e (1965). They can then make an informed decision about whether to remain on the land and encounter that danger. *Id.* Here, the defendants warned the campers several times about the mountain, both verbally and in writing, completely and partially prohibiting them from climbing the mountain, thereby alerting the campers that climbing the mountain was a dangerous activity. The campers were free to choose whether to disregard the warning and climb the mountain. Contrary to the Chiquettes’ assertion, the defendants were not required to instruct the campers on *how* to encounter that danger by defining “proper supervision”; rather, having warned of the danger, the defendants were entitled to “reasonably assume that [the campers would] protect [themselves] by the exercise of ordinary care.” *Id.*

¶11 The Chiquettes also claim they “did not know the mountain was steep and a slip and fall accident could occur,” and that the defendants were required to specify the dangers associated with climbing the mountain. We disagree. The dangers attendant to climbing a mountain are open and obvious, and a possessor of land is not negligent for failing to warn an invitee of open and obvious dangers. *See Markowitz v. Ariz. Parks Bd.*,

146 Ariz. 352, 356, 706 P.2d 364, 368 (1985). There was no evidence here that the defendants knew the mountain was more dangerous than other mountains in Arizona. When Obed Orozco, pastor of Foursquare Church, was asked at his deposition why he had not wanted campers to climb the mountain, he stated, “[f]or obvious reasons; it’s dangerous, very steep.” He also testified Foursquare Church had held retreats at the Broken Arrow campground for the previous ten years and Samantha had been the first person injured on the mountain during that time.³ The president of Broken Arrow also testified at his deposition that he was unaware of anyone who had previously been injured on that mountain. *See Robertson v. Sixpence Inns. of America, Inc.*, 163 Ariz. 539, 544, 789 P.2d 1040, 1045 (1990) (duty to protect invitees includes obligation to warn of any danger of which occupier knows or should know). We therefore conclude that no reasonable juror could find the defendants had been negligent for failing to explain the specific dangers associated with climbing this particular mountain.

¶12 The Chiquettes’ final contention is that the defendants negligently failed to supervise Samantha and did not take reasonable steps to prevent her from climbing the mountain. Generally, parents are responsible for protecting their children and third parties may become responsible only after they have assumed responsibility for their care. *See Sunnarborg v. Howard*, 581 N.W.2d 397, 398-99 (Minn. Ct. App. 1998); *see also Bloxham*

³Although one person who attended the retreat, Miguel Diaz, in his written account of Samantha’s accident, stated that there had been “some accidents” on the mountain in previous years, there is no evidence that he was a member of the Foursquare Church staff or associated with Broken Arrow or that he had previously informed them of these accidents.

v. Glock, Inc., 203 Ariz. 271, ¶ 7, 53 P.3d 196, 199 (App. 2002) (duty to control or protect third party arises only where special relationship between parties such as parent-child). Here, the defendants had not assumed responsibility for Samantha’s care. Indeed, Foursquare Church explicitly stated in its written rules for the retreat that parents would be responsible for their children and “constant parent supervision will allow us to have a successful camp for all.”⁴ Moreover, to the extent the Chiquettes argue the defendants should have physically restrained minor campers or set up a physical barricade to prevent them from climbing the mountain, that would have created an unreasonable burden on the defendants and would have also been unnecessary in light of their several warnings against climbing the mountain. *See Knauss v. DND Neffson Co.*, 192 Ariz. 192, 195, 963 P.2d 271, 274 (App. 1997) (landowners owe duty “to take *reasonable measures* to protect against foreseeable activities creating danger” on their land), *quoting Martinez v. Woodmar IV Condos. Homeowners Ass’n, Inc.*, 189 Ariz. 206, 212, 941 P.2d 218, 224 (1997) (emphasis added).

¶13 In sum, the defendants adequately warned the campers through both verbal prohibitions and written admonishments that climbing the mountain was a dangerous activity.

⁴We note that possessors of land do not always fulfill their duty to act reasonably to protect minor invitees by simply warning that parents are responsible for their children. *See Gabel v. Koba*, 463 P.2d 237, 239-40 (Wash. Ct. App. 1969) (telling parents to monitor their children does not necessarily discharge landowner’s duty to act reasonably). Accordingly, as the Chiquettes point out, any negligence on the part of the Chiquettes to monitor Samantha would go to the issue of comparative fault but would not relieve the defendants of their own duty. *See Degel v. Majestic Mobile Manor, Inc.*, 914 P.2d 728, 733 (Wash. 1996). In this case, however, as discussed above, no reasonable juror could find the defendants breached their duty to the Chiquettes.

The trial court did not err in concluding that “[t]he defendants’ duty to plaintiffs was satisfied under these facts.”

Disposition

¶14 The trial court’s denial of partial summary judgment in favor of the Chiquettes and grant of summary judgment in favor of the defendants is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge