

STATE OF MICHIGAN
COURT OF APPEALS

WANDA LEWIS, Next friend of RACHEL
LEWIS, Minor,

UNPUBLISHED
September 11, 2003

Plaintiff-Appellant,

v

No. 241232
Calhoun Circuit Court
LC No. 01-001488-NO

HERITAGE CENTER FOUNDATION, a/k/a
KELLOGGS CEREAL CITY USA, PLAYCORE
WISCONSIN, INC., d/b/a GAMETIME, d/b/a
PENTES PLAY, INC., and JACK ROUSE
ASSOCIATES,

Defendants-Appellees.

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants pursuant to MCR 2.116(C) (10) in this personal injury action in which plaintiff alleged negligence and breach of implied warranty with regard to injuries she sustained on a child's indoor play structure. The claims against the defendants arise from their alleged failure to warn of the dangers associated with use of the play structure. The trial court granted summary disposition in favor of defendants on the ground that the danger associated with an opening in the web tower of the play structure was open and obvious. We affirm.

Nine-year-old Rachel Lewis (hereinafter plaintiff) visited Kellogg's Cereal City USA as part of a field trip sponsored by a local Girl Scout troop. The field trip participants were given an opportunity for free play on the indoor play structure. Plaintiff was crawling on her hands and knees, head first, through a tube that opens into a "web tower" when she was advised that it was time to leave. As she neared the end of the tube, plaintiff turned around inside and assumed a sitting position with her feet hanging down outside the tube's mouth. Grabbing the edge of the tube with her hands, she "scoted" forward on her buttocks out of the tube into the web tower. In the process, her right leg and body fell through the opening in the web tower floor while her left leg did not, causing it to twist and fracture. Plaintiff testified in her deposition that she "sat down to like jump down and wasn't really looking. I guess I should have, but I wasn't, and so then I just jumped . . ."

Defendants filed motions for summary disposition, arguing that the opening in the web tower was open and obvious and, therefore, defendants did not owe plaintiff any duty to warn and/or to protect. Following a hearing on the motion, the trial granted summary disposition in favor of defendants on the grounds that the opening through which plaintiff fell was open and obvious and that there were no special aspects of the opening that rendered it unreasonably safe despite its open and obvious nature.

The key to the trial court's reasoning that defendants did not have a duty to warn plaintiff about the openings in the web towers was its conclusion that the danger the opening posed was open and obvious. The "no duty to warn of open and obvious danger" doctrine, which applies to both premises liability¹ and products liability², effectively bars liability if the plaintiff knew of the dangers or if they were "so obvious" the plaintiff could "reasonably be expected to discover them." *Riddle, supra* n 2 at 96. However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, reasonable precautions must be taken to protect against the risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Here, none of the defendants owed plaintiff a duty because the danger presented by the opening in the web tower was open and obvious. The photographs and videotape submitted by plaintiff show that the opening in the web tower is the means in which a participant ascends the stories in the play structure. The opening in the web tower is bound on each edge by bright red foam rubber matting, and is offset from being directly beneath the area where a child would land upon descending from an upper level of the play structure. Plaintiff testified in her deposition that there was nothing preventing her from seeing the opening in the floor of the web tower and that she simply did not look before jumping. Because the opening was open and obvious, defendants did not owe plaintiff a duty to warn or make safe.

Plaintiff did not present any evidence of special aspects of the opening in the web tower that would render the opening unreasonably dangerous despite its open and obvious nature, and no evidence was presented that the openings presented an especially high risk of injury. *Lugo, supra*. To the contrary, evidence was presented that there had not been any previously reported injuries on the play structure arising from a child falling through the openings in the web towers. Plaintiff contends that she did not expect there to be an opening on the bottom of each level of the web tower but, rather, solid netting on the bottom. However, plaintiff's risk of falling through the opening would have been eliminated had she observed where she was jumping. There is no genuine issue of material fact with regard to whether the opening presented an unusual risk of harm.

¹ *Riddle v McLouth Steel Products*, 440 Mich 85, 90-97; 485 NW2d 676 (1992).

² *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 385; 491 NW2d 208 (1992).

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly