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FINGERTIPS REMOVED BY PLAYGROUND CHAIN

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As noted by the U.S. Consumer Product Safety Commission (CPSC): "Each year, more than 200,000 children go to U.S. hospital emergency rooms with injuries associated with playground equipment." According to the CPSC, most of these injuries "occur when a child falls from the equipment onto the ground." http://www.cpsc.gov/en/Safety-Education/Safety-Guides/Sports-Fitness-and-Recreation/Playground-Safety/

For any child old enough to be at large, falls from heights are generally considered an open and obvious risk of injury. For such obvious fall risks, a landowner generally owes no legal duty of care to prevent inherent risks associated with ordinary play activity. On the other hand, when the obvious risk of injury associated with falls is unreasonably enhanced by the defective design or unreasonably dangerous condition on a piece of playground equipment, the supplier and/or owner of such equipment may be liable for injuries associated with such enhanced risks.

Among a number of recommendations in the "Public Playground Safety Checklist," CPSC identifies the following entrapment hazard: "Make sure spaces that could trap children, such as openings in guardrails or between ladder rungs, measure less than 3.5 inches or more than 9 inches." http://www.cpsc.gov/en/Safety-Education/Safety-Guides/Sports-Fitness-and-Recreation/Playground-Safety/Public-Playground-Safety-Checklist/

As illustrated by the case described herein, openings in the chain links on a playground swing could entrap a child's fingers. Playground safety inspectors generally use a number of differently sized probes to measure existing openings in various pieces of playground equipment, including swings, to identify and address potential entrapment hazards.

The National Recreation and Park Association trains and certifies individuals from communities across the United States to be a Certified Playground Safety Inspector (CPSI). The CPSI program offers the most comprehensive and up-to-date training on playground safety as well as providing certification for playground safety inspectors. http://www.nrpa.org/cpsi/

NAKED CHAIN

In the case of *Faherty v. Birchwood Lodge, Inc.,* 37 Misc. 3d 1214(A); 964 N.Y.S.2d 58; 2012 N.Y. Misc. LEXIS 5021; 2012 NY Slip Op 52031(U) (10/24/2012), plaintiff Richard Faherty lost two of his fingertips when he jumped from a swing at Birchwood Lodge, "Yogi Bear's Jellystone Park," located in Greenfield Park, in Ulster County, New York. Faherty's fingers became caught in the chain of the swing as he was holding on to it. Faherty sued Birchwood Lodge, Inc. (Birchwood) as the owner of the site and playground equipment where the accident occurred. Faherty also sued Miracle Recreation Equipment Co. (Miracle), the manufacturer and installer of the playground equipment involved in the accident.

In his complaint, Faherty alleged the swing set was dangerous, in part, because the chain supporting the swing was improperly-sized and harbored a "trap" to small children's fingers and because a covering over the chain was not provided. Miracle filed a motion for summary judgment to dismiss the claims brought by Faherty.

FACTS OF THE CASE

On June 28, 2009, Faherty, then ten-years old, was playing on a swing set on property owned by Birchwood when he jumped off the swing and his fingers got caught between the links of the swing. Faherty testified that as he was swinging, his right hand was wrapped around the swing chain and was not going through the links. As Faherty slowed down the swing and decided to jump from it, he felt the chain move and as he was coming off the swing, felt a yank or tug on his fingers. Faherty's fingers were trapped inside of the link causing the tips of two of them to be amputated as he jumped from the swing.

Faherty alleged that the Miracle-supplied playground equipment was defectively designed. In so doing, Faherty claimed the swing set's chain was "too small" and contained a "trap which a child's finger could get caught inside" and because the chain "failed to provide sheathing over the swing chain". Further, Faherty claimed “covered (sheathed) chain or PVC-covered chain could have eliminated, or at least reduced the possibility of snaring small fingers.”

The swing and swing chain in question were purchased by Birchwood from Miracle through Miracle's authorized sales agent, Pettinelli and Associates (Pettinelli), in late 2006 and early 2007. Pettinelli also installed the swings in the spring of 2007. Steven Adkins, a design engineer with over 30 years of experience with Miracle, testified on behalf of Miracle as follows:

> Miracle manufactures commercial-type playground equipment - - "the stuff you see at parks and schools." In fact, Miracle is an "expert" in the field of playground equipment. In the 2005 - 2007 period, Peerless was the exclusive supplier of chain utilized by Miracle in manufacturing the playground equipment, including the straight link coil chain used for the swings. Miracle produced sales catalogs that were used by its sales force, including Pettinelli & Associates, to assist in the sale of Miracle's products.

Defendant Pettinelli, through its sales associate, Robert Pettinelli, testified as follows:

> Pettinelli sells and installs commercial playground and recreational equipment. Pettinelli acts as a sales representative for Miracle. Part of Robert Pettinelli's duties as a sales associate was helping a customer such as Birchwood design a playground. Pettinelli was contacted by Michael Zalkin of Birchwood in 2006 regarding the installation of a playground. Pettinelli provided Zalkin with a Miracle catalogue for the year 2006. Pettinelli went over said catalogue with Zalkin. Pettinelli never discussed with Zalkin at any time what type of swing chain would be used on the swing. Pettinelli never discussed with Zalkin options in relation to the swing, swing seat and swing chains available for purchase as seen in the catalogue.

Pages 128 and 129 of the 2005 catalog show that Miracle was selling "Tensile Tough Coated chain" for use with its swings. "Tensile Tough Coated chain" refers to chain that is encased in a plastic sheath or "coat." Through Adkins, Miracle gave substantially the same testimony with regard to the 2006 and 2007 catalog. The plastic sheathing on the chain covers approximately 24 to 30 inches of the swing chain. Miracle first offered plastic-sheathed chain to its customers throughout the 2005-2007 time period.

Once Miracle began offering plastic-sheathed chain in or about 2004, "Champion" was the exclusive supplier of plastic-sheathed chain to Miracle through 2007, including the "4/0 straight link chain" that forms the basis of this lawsuit. Chain with no plastic sheathing was supplied during this period exclusively by Peerless. Adkins further testified that the Miracle engineering department was responsible for choosing the straight link coil chain (naked chain) used in the swing chain involved in the accident.

Miracle did some of their own testing in relation to the swing sets during the period of 2005-2007. Miracle tested for strength, layout of the swings and spacing of the swings. Adkins, however, did not recall the engineering department doing any type of finger probe testing on the swing sets during the period of 2005-2007.

Before beginning to offer the plastic-sheathed chain in or about 2004, Miracle offered for sale chain that was encased in a relatively thick coating of PVC. One result of coating the chain with PVC was a "fatter" look to the individual links and a smaller inside diameter of the individual links. Miracle switched over to plastic-sheathed chain when the practice of coating its chain with PVC stopped. Plastic-sheathed chain was, and remained, an option available to Miracle's customers during the 2005 - 2007 time period.

A Miracle customer could get chain with, or without, the plastic sheathing, but it was not Miracle's general practice to make a recommendation to the customer either way. If a customer chose the option of buying plastic-sheathed chain, Miracle would simply obtain a supply of it from Champion, Miracle's exclusive supplier.

If a customer simply wanted and ordered "naked" chain, then Miracle would obtain a supply of naked chain from Peerless. Peerless never supplied plastic-sheathed chain to Miracle.

During the sales process, Birchwood claimed neither Miracle nor Pettinelli offered Birchwood any options regarding swing chains. Moreover, Birchwood stated the possibility of purchasing a swing chain with sheathing or any other type of coating was not communicated to Birchwood.

CHAIN DESIGN DEFECT?

As noted by the court, "a defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use." Further, to recover on the basis that a product was designed defectively, an injured plaintiff must establish that “the marketed product in question

was designed in such a way that it is not reasonably safe and that the alleged design defect was a substantial factor in causing the injuries" sustained by the plaintiff.

According to the court, determining the existence of a design defect would require “a risk/utility analysis.” Such an analysis would consider “whether the alleged defect was known at the time of manufacture." In conducting such a risk/utility analysis of an alleged design defect, the court would also consider whether “a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner."

The court acknowledged that a risk/utility analysis of an alleged design defect would ordinarily present questions of fact to be considered and resolved in full trial proceedings. Accordingly, such claims are generally not appropriate for effective dismissal on a motion for summary judgment by defendants.

In this particular instance, the court noted that pretrial evidence from Miracle’s experts indicated “the chain met appropriate industry standards and was reasonably safe as designed and manufactured.” Moreover, Miracle’s experts had stated that there were “no malfunctions, failures, or defects in the swing that were the cause of the subject accident.”

In light of such evidence, the court found the burden of proof would shift to Faherty to produce "competent proof that the swing’s design was not reasonably safe.” In so doing, Faherty would have to show “there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." Failure to do so by Faherty would result in the court granting summary judgment in favor of Miracle, effectively dismissing Faherty’s claims without a trial.

In this particular instance, however, the court found Faherty had indeed provided evidence which would call into question whether this particular swing chain was reasonably safe under the circumstances. Specifically, Faherty had offered “the affidavit of his expert setting forth his opinion that the design of the swing - - which undisputedly allowed for the trapping/pinching of small fingers - - was not reasonably safe and was the cause of plaintiff's accident.” In his affidavit, Faherty’s expert witness claimed the following factors were “the proximate causes of the happening of his accident”:

> [T]here was a design defect in the improper size of the swing chain links; defendant Miracle negligently did not conduct certain finger probe tests to check the safety of the swing chain; the exemption of the swing chain from ASTM* standards was improper; the naked swing chain should have been sheathed or covered where a child could grasp the links; defendant Birchwood was not properly advised concerning the availability of sheathed chain by defendant Pettinelli; Birchwood should have had sheathed or covered swing chain on the swing upon which plaintiff's accident happened; defendants were aware that children jump off swings while playing; and Birchwood failed to warn plaintiff of the risk of jumping off the swing and improperly maintained the wood fill surfacing under the swing contributing to the accident.

(* ASTM The American Society for Testing and Materials International has developed a standard for the manufacturing of public playground equipment, Standard Consumer Safety Performance Specification for Playground Equipment for Public Use.)

In addition, Faherty's expert had also noted that "Miracle manufactures 'tensile tough coated chain' as an alternative to the 'naked swing chain' which was involved in this accident." As described by Faherty's expert, the "tensile touch coated chain is covered and sheathed in a spongy type material. Accordingly, in the opinion of Faherty's expert, tensile touch coated chain was an economically and feasible alternative, available to Miracle, which would have effectively eliminated the alleged design defect in naked swing chain, i.e., the finger entrapment hazard.

In light of the "conflicting opinions of the parties' experts regarding the reasonableness of the swing's design," the court found this case presented "classic credibility issues that are ordinarily a matter for the trier of fact to resolve." In other words, this type of fact specific claim would warrant further trial proceedings, as opposed to being resolved without a trial on a motion for summary judgment.

ASSUMPTION OF RISK

Miracle had also contended that Faherty should be barred from any recovery of damages of his injuries because he had "assumed the risk of injury." In other words, by his mere participation, Miracle and Birchwood claimed Faherty had assumed the obvious inherent risks associated by the activity which produced his injury, in this case jumping from a moving playground swing.

As noted by the court, the assumption of risk defense doctrine is "frequently applied, or sought to be applied, to claims of injury arising out of a plaintiff's participation in a sporting or entertainment event or activity, whether amateur or professional." That being said, the court found the assumption of risk defense for inherent and obvious dangers in an activity does not apply to "strict products liability." Strict products liability, or liability without proof of fault, could be imposed on the seller for injuries sustained by the ultimate user of a defectively designed product which prove to be unreasonably dangerous for its intended use. As a result, the court rejected Miracle's motion for summary judgment based on assumption of risk.

LANDOWNER LIABILITY

The court then considered the applicability of the assumption of risk defense for Birchwood, as landowner under the circumstances of this particular case. As noted by the court, a landowner generally has a legal duty to "exercise reasonable care in maintaining its property in a safe condition under all the circumstances." According to the court, such relevant circumstances include "the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property."

Moreover, the court acknowledged that there is generally "no duty to warn against a condition which is readily observable or an extraordinary occurrence, which would not suggest itself to a reasonably careful and prudent person as one which should be guarded against." Ordinarily, the court noted "[t]he question of whether a condition is hidden or open and obvious is generally for

the finder of fact to determine" in a trial proceedings. That being said, the court acknowledged that it could "determine that a risk is open and obvious as a matter of law where clear and undisputed evidence compels such a conclusion." In such a case, the court could enter a pretrial motion summary judgment in favor of a defendant effectively dismissing the landowner liability claim.

However, under the circumstances of this particular case, the court found Miracle and Birchwood had failed to submit pretrial evidence which conclusively proved that "the chain link swing which pinched plaintiff's fingers was not inherently dangerous and was readily observable by the reasonable use of one's senses." On the contrary, Faherty's pretrial evidence indicated the chain link posed inherently dangerous risk of finger entrapment which would not be obvious. Moreover, the court held the assumption of risk defense would not apply to an inherently dangerous product defect which was not readily observable under the circumstances of this case.

As a result, the court denied Miracle's and Birchwood's motion for summary judgment to effectively dismiss Faherty's claims without trial. In the absence of any settlement, Faherty's claims would proceed to trial in which a jury would determine whether the playground swing chain constituted an inherently dangerous product and unreasonably dangerous condition on the premises at the time of the injury.

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