STATE OF MICHIGAN

COURT OF APPEALS

ROBERT VINCENT WATKINS, JR., Plaintiff-Appellant,	UNPUBLISHED September 28, 2010
v	No. 292578 Hillsdale Circuit Court
ST. FRANCIS CAMP ON THE LAKE, Defendant-Appellee.	LC No. 08-000601-NI

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

MURPHY, C.J. (*concurring*).

I find it unnecessary to determine whether plaintiff's lawsuit sounded solely in premises liability law. Assuming that plaintiff alleged an independent cause of action on a pure negligence theory, I would hold, as a matter of law, that defendant owed no specific duty of care to plaintiff that encompassed protecting him from or keeping him off the water slide. I would also analyze the premises liability claim in a slightly different manner. Accordingly, I respectfully concur.

"The elements of an action for negligence are (i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage." *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). As a general rule, there is no common law duty that obligates one person to protect another person from danger. *Dawe v Dr Reuven Bar-Levav & Associates, PC*, 485 Mich 20, 25; 780 NW2d 272 (2010). An exception exists when there is a special relationship between a plaintiff and the defendant. *Id.* at 25-26. The *Dawe* Court, quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), observed:

> "The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." [*Dawe*, 485 Mich at 26.]

Here, plaintiff's allegations that presumably sounded in negligence were in the nature of claims that defendant had failed to protect him from or keep him off the water slide. Despite his physical limitations, plaintiff is an adult who was fully aware of the ditch at the end of the water slide, and there is nothing in the record to suggest that he was incapable of appreciating any

potential dangers, nor that he was incapable of making his own informed decision whether to engage in the activity of using the water slide. The record reflects that plaintiff did not have a guardian and that he was employed as a mail clerk. This case does not present a situation in which plaintiff entrusted himself to the control and protection of defendant, as he never lost the ability to protect himself, which could have been accomplished by simply declining to participate in the activity. Defendant never forced plaintiff to use the water slide. Indeed, plaintiff later decided against further using the slide. I would hold, as a matter of law, that defendant owed no specific duty of care to plaintiff that encompassed protecting him from or keeping him off the water slide.

With respect to plaintiff's claims predicated on premises liability law, this case is not truly one that concerns the open and obvious danger doctrine. Rather, we have a situation in which defendant had no duty because plaintiff had actual knowledge of the hazard and chose to proceed. Plaintiff knew that camp patrons, including himself, had flipped over in the ditch, considering that he had slid down the slide and flipped previously, and given that he observed others doing the same. As indicated in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610; 537 NW2d 185 (1995), liability will not be imposed on a landowner where a hazard is known *or* is open and obvious. "[T]he open and obvious doctrine will cut off liability if the invitee *should have discovered* the condition and realized its danger." *Id.* at 611 (emphasis added). Thus, liability or a duty evaporates when a danger is open and obvious, as it should have been discovered, or when the danger was actually known, as it had been discovered, which is the case here. Plaintiff's premises liability claim thus fails, as I do not find that the condition remained unreasonably dangerous despite plaintiff's knowledge of it. *Id.*

In all other respects, I agree with the majority's opinion.

I respectfully concur.

/s/ William B. Murphy