CRAIG FLEXER, and HEATHER FLEXER, parents and natural guardians of, LOGAN FLEXER, a minor, Plaintiff(s)	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 02-00,569
WEIS MARKETS, INC.; PEPSI COLA BOTTLING CO. of WILLIAMSPORT; FAMILY DOLLAR STORES of PA INC.; VENDOMATIC, INC., Defendant(s)	:	SUMMARY JUDGMENT

Date: March 24, 2005

MEMMORANDUM OPINION and ORDER

Before the court for disposition are the motions for summary judgment filed on February 11, 2005 by each of the remaining defendants. This case is scheduled for pre-trial conference before this court on March 29, 2005. Argument on the summary judgment motions was held March 21, 2005. Because of time constraints, the Court will issue a ruling on the motion for summary judgment and a brief statement of reason therefore. If necessary a further supplemental opinion in support of the Order will be issued.

Background

This case involves a broken arm Logan Flexer, a minor, sustained on April 6, 2000. Logan was born July 12, 1996 and would have been three-years old at the time of the accident. He was injured on the sidewalk outside the Family Dollar Store on Lycoming Creek Road in Williamsport. Outside the entrance to the Family Dollar Store a mechanical horse ride for children and a Pepsi vending machine are located. Logan's brother, Dylan, was riding the mechanical horse and Logan was standing on the sidewalk with his mother at the nearby

vending machine. While the mechanical horse was in motion, Logan's arm became positioned between the mechanical horse and the vending machine. Logan suffered a broken forearm. A defense expert, John L. Beight, M.D., has opined that the fracture was the result of "axial loading," meaning that the force exerted on the bone was parallel to it, like when a child would fall off playground equipment with an outstretched arm.

Defendant Vendomatic, Inc owns the mechanical horse. It was placed out in front of the Family Dollar Store per an agreement with Family Dollar. Defendant Pepsi Cola Bottling Company of Williamsport owns the soft drink vending machine. The vending machine was also placed on the sidewalk outside of the store per an agreement with Family Dollar. Defendant Weis Markets, Inc. owns the property where the Family Dollar Store is located. Weis Markets leased Family Dollar the space for its store and retained the sidewalk as a common area.

As one would face the entrance of the Family Dollar Store, the mechanical horse is located to the left of the vending machine. The tail of the mechanical horse is pointed toward the entrance of the Family Dollar Store. The space between the entry door to the Family Dollar Store and the Pepsi vending machine was sufficient for the length of the mechanical horse plus an approximate 12 inches. It appears that at various times the location of the mechanical horse, in proximity to the door and the vending machine, could vary by about 12 inches.

Logan's mother, Heather Flexer, did not observe the actual impact and occurrence of Logan's injury. Plaintiffs have not presented evidence detailing the exact location of the mechanical horse and the vending machine at the time of the accident. Plaintiffs also have not

presented exact measurements as to how far apart the mechanical horse and vending machine were at the time of the accident.

In its motion for summary judgment, Defendant Vendomatic, Incorporated asserts that Plaintiffs cannot establish their strict liability and products liability claims. At oral argument, Plaintiffs conceded this. Accordingly, summary judgment will be granted as to the strict liability and product liability claims asserted against Vendomatic, Incorporated.

The remaining thrust of Defendants' summary judgment motions centers around Plaintiffs' inability to produce exact evidence as to the location of the mechanical horse and vending machine at the time the injury occurred. Defendants asserts that Plaintiffs have also failed to produced evidence as to the length of time the two machines would have been in the particular positions they were in at the time of the accident. Defendants further assert that the Plaintiffs have not produced evidence that the Defendants would have had prior notice of the alleged dangerous position of the machines. Defendants essentially contend that because of this lack of specific evidence Plaintiffs are unable to prove a breach of duty as a matter of law. To bolster their contention that they did not have notice of a dangerous condition, Defendants rely upon the deposition of Heather Flexer in which she testified that she did not observe any noticeable hazard or danger as she permitted her children to ride the mechanical horse.

The court finds that the motions for summary judgment must be denied. Defendants' argument is that Plaintiffs have failed to establish that they owed Logan a duty because Plaintiffs have failed to establish that Defendants had notice of the dangerous condition that caused the injury. The court finds that Plaintiffs have produced evidence that could permit the trier of fact to conclude that the locations of the mechanical horse and vending machine were

under the control of one or more of the Defendants and that they knew or should have known of the proximity of the machines in relation to each other and that this proximity created a dangerous condition that would not reasonably be discovered by the anticipated users of the machines. The evidence presented does not permit the location of the two machines at the time of the accident to be established down to the exact inch. However, there is no doubt or question that the machines' relative position in relation to the front of the store and entrance into Family Dollar. Both machines had been in front of the Family Dollar Store near the entrance for two years. As such, their location with respect to the entrance and each other would be readily apparent. Given this, the Defendants knew or should have known of the location of the machines.

With regard to the distance between the two machines at the time of the accident, Plaintiffs have presented sufficient circumstantial evidence. Expert medical testimony has indicated that a parallel force being exerted on the bone caused Logan's broken arm. There has been evidence that the mechanical horse and vending machine are capable of moving and have moved in relation to their location to the entrance and to each other. There is testimony that Logan was in close proximity to both the mechanical horse and vending machine while the mechanical horse was in operation. Viewing the evidence in the light most favorable to Plaintiffs and drawing all reasonable inference in their favor, the mechanical horse and the vending machine would have to have been at least far enough apart for Logan position his arm between the two and then for the mechanical horse to impact his arm, which would have been based against the vending machine.

Contrary to Defendants' argument, Plaintiffs are not merely resting on the fact that an accident happened to establish their negligence. The distance between the two machines is not being established by the mere fact that Logan broke his arm, but by the alleged facts surrounding Logan's broken arm. The evidence cannot be viewed in isolation, but rather in totality.

In support of their motions, Defendants have cited to ***Swift v. Northeastern Hospital of Philadelphia***, 690 A.2d 719 (Pa. Super. 1995). In ***Swift***, the plaintiff was allegedly injured after slipping on water left on the hospital's floor. The Superior Court determined that plaintiff had failed to establish the negligence claim against the hospital because he failed to establish that the hospital had knowledge of the dangerous condition.

The case sub judice is distinguishable from ***Swift*** because Plaintiffs have presented evidence that could establish Defendants had or should have had knowledge of the dangerous condition. The evidence establishes that Defendants known of the machines' presence. It is uncontested by the photographic evidence in this case, taken after the accident, that both machines could move from one position to another and that they could move such that the base of the mechanical horse would come in contact with the base of the vending machine. From this evidence, a trier of fact might reasonably conclude that given the length of time that these machines were in place, the Pepsi vending machine in excess of ten years and the mechanical horse two years, Defendants had sufficient notice and awareness of this condition.

Accordingly, the motions for summary judgment must be denied.

ORDER

It is hereby ORDERED that:

Defendant Weis Markets, Incorporated's motion for Summary judgment filed February 11, 2005 is DENIED.

Defendant Pepsi Cola Bottling Company of Williamsport's Motion for Summary judgment filed February 11, 2005 is DENIED.

Defendants Family Dollar Stores of PA, Incorporated and Family Dollar Stores, Incorporated's Motion for Summary Judgment filed February 11, 2005 is DENIED.

Defendant Vendomatic, Incorporated's Motion for Summary Judgment filed February 11, 2005 is DENIED IN PART and GRANTED IN PART. The motion is DENIED IN PART in so far as its contention that Plaintiffs have failed to assert a negligence claim against it. The motion is GRANTED IN PART in that Plaintiff's strict liability and products liability claims are DISMISSED.

BY THE COURT:

William S. Kieser, Judge

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