STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA CERRITO,

Plaintiff-Appellant,

v

K-MART CORPORATION and SEARS HOLDINGS CORPORATION,

Defendants-Appellees.

UNPUBLISHED
April 21, 2011

No. 294660
Macomb Circuit Court
LC No. 2008-004605-CZ

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

In this premises liability action, plaintiff Patricia Cerrito appeals as of right from a circuit court order granting summary disposition to defendants, K-Mart Corporation and Sears Holdings Corporation, pursuant to MCR 2.116(C)(10). Viewed in the light most favorable to Cerrito, material questions of fact exist with regard to K-Mart's negligence and the proximate cause of Cerrito's injuries. Consequently, we reverse and remand for further proceedings.

Cerrito testified at her deposition that while browsing merchandise in a K-Mart store, she bent down to locate the price of a statue portraying a boy and a girl sitting on a bench. As Cerrito examined the statue, the top half of an identical statue fell from an overhead shelf, striking Cerrito in the face. Cerrito recalled, "It was just the two little kids that came down." When queried whether Cerrito had "[a]ny idea why that particular statue fell[,]" she elaborated as follows:

> The only thing that I could think of . . . because the manager, when they finally came over to help me, and the manager went back over there and he saw that *the brackets weren't on these two, but all the other ones*—there was [sic] different kinds of statues, and he checked them and *they all had their brackets on* it. And I commend *that manager* because he *said that would have never happened if our . . . stock people would have finished their jobs* and put the—he called it something. [Emphasis added.]

A K-Mart employee who investigated the accident noted on a customer incident report: "Inspection showed bench statue with a top piece not secured to the bench. Other models had the top piece secured." A different K-Mart employee confirmed that the two pieces of all the

other identical statues on nearby shelves had been bolted or screwed together. None of the properly constructed statues fell.

Michael Larsen, a K-Mart employee, testified that K-Mart merchandise is placed on store shelves according to "the layout sent down by corporate." But Larsen acknowledged that the "layout" is followed only "as long as everything is placed there and sturdy, shelf-wise." Larsen also admitted that if he had been made aware that a "heavy thing … looks like it's going to fall off a shelf," he would remove it.

Defendants sought summary disposition on the grounds that (1) Cerrito could not "sustain her burden of proving that Defendant[s] had notice of . . . [any purported defect in the statue] prior to her fall," and (2) a jury would have to speculate "to infer that a breach of duty by Defendant[s] caused [Cerrito's] injuries." In an opinion and order, the circuit court granted defendants summary disposition, ruling that Ceritto "has failed to present any admissible evidence to create a genuine issue of material fact regarding causation," and, alternatively, "[e]ven if a genuine issue of material fact exists regarding causation, . . . [Cerrito] has failed to demonstrate defendant[s] had actual or constructive notice of the condition." The court elaborated that it detected "no evidence that [K-Mart] created the alleged dangerous condition," and that Cerrito had introduced no "admissible evidence that [K-Mart] should have known about the condition of the statue."

Cerrito challenges the circuit court's summary disposition ruling, which we review de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

"[T]o state a negligence claim on which relief may be granted, plaintiffs must prove (1) that defendant owed them a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Causation requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998).

Contrary to the circuit court's view, the evidence in this case rationally supports that K-Mart breached a duty of care by placing unstable merchandise on a shelf. As a business invitee, Cerrito was "entitled to the highest level of protection" imposed under premises liability law. *James v Alberts*, 464 Mich 12, 20; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

> [A] premises owner has a duty to exercise reasonable care to protect invitees, i.e., persons who enter the premises at the owner's express or implied invitation to conduct business concerning the owner, from an unreasonable risk of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize, or protect themselves against. [*Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995).]

On the basis of the customer incident report, the testimony of two K-Mart employees, Cerrito's testimony, and the fact that all the other statues comprised a single piece, a jury could reasonably infer that K-Mart bore responsibility for assembling the statues by affixing the top and bottom portions together with a screw. Larsen's testimony underscores K-Mart's duty to position displayed items in a "sturdy" manner. A storekeeper's duty of care indisputably encompasses rectification of insecurely fastened items displayed on high shelves. Here, a reasonable juror could conclude that K-Mart's neglect to attach the top of the statue to the bottom created an inherently unstable display that presented an unreasonable risk of injury if a shelving unit was bumped or otherwise moved.[1]

We additionally reject the circuit court's finding that no evidence substantiated that K-Mart knew or should have known about a potential statuary danger. The customer incident report is wholly consistent with Cerrito's claim that a K-Mart employee negligently failed to bolt or screw together the upper and lower portions of the statue. In *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 66-67; 299 NW 807 (1941), our Supreme Court held that a storekeeper who creates a hazardous condition may not escape liability on lack of notice grounds:

> It was not necessary for plaintiff to prove defendant had actual or constructive knowledge of the hazardous condition of its floor, as the alleged negligence was the act of defendant in creating this condition. Defendant could

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[1] We respectfully disagree with the dissent's contention that because "no evidence" exists "regarding whether the screws were never present or, alternatively, whether the screws were missing because they were defective and fell out, an employee did not tighten them sufficiently and they fell out, or another customer took them out," a jury "would have to speculate to reach the conclusion that defendants acted negligently." *Post* at 3. Because all the other statues on display at the K-Mart store were properly assembled, a jury could reasonably conclude that K-Mart personnel neglected to attach the top and bottom portions of the statue that fell on Cerrito. "Negligence may be established by circumstantial evidence as well as by direct proof and they are equally competent, their relative convincing powers being for the jury to determine." *Spiers v Martin*, 336 Mich 613, 616; 58 NW2d 821 (1953). Circumstantial evidence and permissible inferences arising therefrom may suffice to prove negligence. *May v Parke, Davis & Co*, 142 Mich App 404, 417; 370 NW2d 371 (1985). The existence of other potential explanations for the statue's condition negates neither (1) K-Mart's duty of care, nor (2) the reasonable inference that K-Mart breached that duty by (a) failing to screw the two pieces of the statue together before placing it on the shelf, or (b) neglecting to notice that the unstable statue remained on display.

> not by its own act create a hazardous condition and then demand that plaintiff, who was injured as a result thereof, prove it had knowledge of such condition. Knowledge of the alleged hazardous condition created by defendant itself is inferred.

The notice doctrine simply does not shield a premises owner or possessor from liability for injury where the premises owner or possessor himself unreasonably creates, tolerates or causes a dangerous condition. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 604-605; 601 NW2d 172 (1999). An invitee such as Cerrito is "entitled to expect" that a premises possessor will "take reasonable care to know the actual conditions of the premises and either make them safe or warn the invitee of dangerous conditions." *Kroll v Katz*, 374 Mich 364, 373-374; 132 NW2d 27 (1965). In *Conerly v Liptzen*, 41 Mich App 238; 199 NW2d 833 (1972), this Court recognized that an occupier's knowledge of the "actual conditions" of the premises demands adequate inspection to discover latent dangers:

> "The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use." [*Id*. at 241-242, quoting Prosser, Torts (3d ed), § 61, pp 402-403.]

More recently, in *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001), this Court explained that "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land" if the possessor

> (a) knows, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

This elucidation of the elements of a landowner's duty closely mirrors the Restatement of Torts, 2d:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger. [2 Restatement Torts, 2d, § 343, pp 215-216.]

Thus, an invitor's duty encompasses reasonable inspection intended to detect dangerous conditions on the premises. "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007). Because record evidence reasonably supports that a K-Mart employee negligently placed an unstable item on a high shelf, a question of fact exists concerning K-Mart's notice of this potentially dangerous condition.

Lastly, the circuit court incorrectly concluded that Cerrito did not present prima facie evidence proving causation. As we have already observed, establishment of causation demands proof of both cause in fact and proximate cause. *Reeves*, 229 Mich App at 479. Cause in fact "generally requires a showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). The plaintiff must introduce evidence affording "a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Id*. at 165 (internal quotation omitted). Proximate cause involves an examination of the foreseeability of consequences, and a determination whether a defendant should be held legally responsible for those consequences. *Id.* at 163.

An injury may have more than one proximate cause. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988). Two causes often operate concurrently so that both constitute a proximate cause of resultant harm. *Id*. Normally, the issue of causation is for the jury. *Reeves*, 229 Mich App at 480. Although the plaintiff bears the burden of proof as to causation, the plaintiff need not produce evidence positively eliminating every other potential cause of an accident. *Skinner*, 445 Mich at 159. When a motion for summary disposition challenges causation pursuant to MCR 2.116(C)(10), "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id*. at 161. "[I]f there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." *Kaminski v Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (internal quotation omitted).

Viewed in the light most favorable to Cerrito, circumstantial evidence gives rise to a reasonable inference that K-Mart's failure to bolt together the statue parts proximately caused the statue to fall. Another force, albeit unknown, undisputedly placed the statue in motion. But K-Mart personnel confirmed that all of the properly constructed statues remained on the shelf, regardless of the source or quantum of force applied to the shelf. And Larsen conceded his awareness that displayed merchandise should be "sturdy, shelf-wise." Given this evidence, a jury could reasonably find foreseeable that an unstable statue would fall on a customer if someone accidentally bumped into the shelf, a common occurrence in a shopping environment.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Elizabeth L. Gleicher

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Before: MURPHY, C.J., and METER and GLEICHER, JJ.

METER, J. (*dissenting*).

I respectfully dissent and would affirm the trial court's decision.

As noted by the majority, plaintiff was injured at defendants' store when a garden statue of two children sitting on a bench fell off a shelf and hit her in the face.[1] The statue consisted of two pieces—the children and the bench—and there were no screws connecting the two pieces, unlike "other models[, which] had the top piece screwed." Defendants' manager, Dorothy Banks, could not say whether these statues came already assembled or whether they were assembled at the store. Plaintiff testified that the statue was on a shelf over her head and that only the top piece fell and hit her. The employee who completed the incident report no longer works for defendants and could not be deposed. There is no dispute that defendants' employees are responsible for assembling products such as this statue and for stocking the shelves. Plaintiff testified that she did not know why the statue fell and could not say whether she might have knocked it over or whether someone else hit it; she stated that the "only thing I could think of is somebody, a worker or a customer, somebody might have bumped into the shelf."

Plaintiff's theory was that defendants failed to keep display merchandise in a "reasonable condition or properly assembled" and that defendants' agent failed to properly bolt the statue's

[1] Although it is not entirely clear from the record, defendant alleges that the shelf was approximately four feet high. This assertion is largely consistent with pictures provided. I cannot agree with the majority's statement that the shelf in question was an "overhead" shelf.

two pieces together. Defendants moved for summary disposition, arguing that a jury would be required to engage in speculation to infer that defendants breached a duty to plaintiff and caused her injuries, and that there was no evidence defendants had notice of the hazardous condition.

The trial court agreed with defendants. Specifically, the court found no question of fact regarding causation, noting that plaintiff testified that she did not know why the statue fell. The court also noted that, although there was no dispute that the two pieces of the statue were not bolted together, there was no evidence that this made this statue defective. In addition, the court found that even if causation were shown, plaintiff had not shown that defendants had notice of the danger, i.e., there was no evidence that defendants created the condition and no evidence showing how long the statue had been in the pertinent condition.

I conclude that the trial court did not err in dismissing this case. There is no evidence that defendants acted negligently. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Determining a breach of duty requires determination of the standard of care; determining causation requires an analysis of both cause in fact and proximate cause. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6, 6-7; 615 NW2d 17 (2000). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001); see also *Martin v Ledingham*, 282 Mich App 158, 161; 774 NW2d 328 (2009). Cause in fact may be established by circumstantial evidence, but such proof must encompass reasonable inferences and not mere speculation. *Skinner*, 445 Mich at 163-164. An explanation that is consistent with known facts but not deducible from them is inadequate conjecture. *Id*. at 164.

While defendant owed plaintiff a duty to maintain its premises in a reasonably safe condition, there is no evidence that it did not do so. Plaintiff states certain things as facts that are simply unknown, such as who placed the statue on the shelf even though it had no screws, and how the screws came to be absent. There is no evidence regarding whether this kind of statue came already assembled or if it was assembled in the store and no evidence regarding whether the screws were never present or, alternatively, whether the screws were missing because they were defective and fell out, an employee did not tighten them sufficiently and they fell out, or another customer took them out. There is also no evidence concerning whether, had the two pieces been attached, the whole statue might have fallen on plaintiff, and there is no evidence that, even unscrewed, the top piece would have fallen without action from another force, such as a customer or plaintiff herself. A jury would have to speculate to reach the conclusion that defendants acted negligently.[2] Moreover, plaintiff herself confirmed the speculative nature of

[2] Contrary to the majority's contention in the footnote of their opinion, my conclusion about the jury's need to speculate is not based solely on whether K-Mart employees caused the statue's unscrewed condition. There is a litany of speculation that would have to occur in order for a jury to find for plaintiff in this case.

her claim, conceding during oral argument that there is no evidence that the condition of being unscrewed caused the statue to fall and conceding that there were a "litany of uncertainties" regarding what may or may not have caused the statue to fall.

Because there is no evidence that defendants created the condition, plaintiff, to proceed with her claim, must provide evidence that defendants had actual or constructive notice of the hazard. *Clark v K-Mart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Plaintiff argued below that the condition was not open and obvious because she could not tell upon inspection that the statue was unbolted. There is no testimony that the condition would have been apparent to store employees, either. Nor is there testimony about how long the condition existed. Although plaintiff states that "[t]his is not a case where another customer improperly placed the statue back on the wrong shelf," there is no evidence that that did not happen. The situation depicted in the photographs does not look hazardous, and plaintiff presents no evidence to show that it would appear otherwise to defendants' employees. In my opinion, reversal is unwarranted.

I would affirm.

/s/ Patrick M. Meter