STATE OF MICHIGAN

COURT OF APPEALS

REGONA MONTGOMERY, Personal Representative of the Estate of CHARLES MANCILL, Deceased,

Plaintiff-Appellant,

v

NICOLE GROULX, CARY FERRARA and K-MART CORPORATION,

Defendants-Appellees,

and

IMANI RESIDENTIAL SERVICES, INC., and JOSEPHINE HOUSE,

Defendants/Cross-Defendants,

and

WAYNE CENTER,

Defendant/Cross-Plaintiff,

and

ZELMA BROWN, JEROME TOWNSEND, TWAN GRAHAM, TERRY FERRARA, WAYNE COMMUNITY LIVING SERVICES, INC., COMMUNITY LIVING SERVICES, COMMUNITY MENTAL HEALTH SERVICES PROGRAM and DETROIT WAYNE COUNTY COMMUNITY MENTAL HEALTH AGENCY,

Defendants.

UNPUBLISHED
October 12, 2006

No. 263397
Wayne Circuit Court
LC No. 02-206841-NI

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants K-Mart Corporation, Nicole Groulx, and Cary Ferrara (the K-Mart defendants). We affirm.

Plaintiff's decedent, Charles Mancill, was a resident of Josephine House, a home for developmentally disabled adults. Mancill, whom the record indicates was a large man with a history of aggression against persons and property, suffered from moderate mental retardation, an autistic disorder, intermittent explosive disorder, and probable schizophrenia. On the day of his death, Josephine House caregivers took Mancill and other residents of the home to a K-Mart store in which Mancill grabbed a toy from a shelf then ran from the store. The caregivers gave chase and restrained Mancill in the parking lot of the store by either sitting or lying on top of him. The K-Mart defendants observed the situation, but were told by the caregivers that the situation was under control and did not call the police. A customer eventually called 911 at the request of the caregivers, and the police arrived to find Mancill unresponsive. After it was determined that Mancill died of compression asphyxiation, plaintiff filed this action alleging, among other things, that the K-Mart defendants were negligent for having failed to summon the police and had acted with "unreasonable disregard" to Mancill's rights in violation of MCL 600.2917. The K-Mart defendants moved for summary disposition of these claims, as well as plaintiff's claim for premises liability, under MCR 2.116(C)(8) or (C)(10). The trial court granted the motion after concluding that plaintiff failed to raise a genuine issue of material fact regarding causation.

Plaintiff first argues that the trial court erred in granting summary disposition of her premises liability and negligence claims on the basis that Mancill's death was causally unrelated to any actions or omissions by the K-Mart defendants. We disagree.

We review a trial court's grant of summary disposition de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). Dismissal pursuant to MCR 2.116(C)(8) is appropriate if the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). In contrast, a motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001).

Proximate cause "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Cause in fact requires more than a possibility of causation:

> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation, therefore, must be based on facts in evidence. And *while the evidence need not negate all other possible causes . . . [it must] exclude other reasonable hypotheses with a fair amount of certainty*. [*Craig*, *supra* at 87-88 (internal quotation marks, brackets, and footnotes omitted; second emphasis added).]

In other words, speculation in proving causation is prohibited. *Robins v Garg*, 270 Mich App 519, 527; 716 NW2d 318 (2006). "Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences, not mere speculation." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). "An explanation that is consistent with known facts but not deducible from them is impermissible conjecture." *Id*.

Here, there is no evidence that calling the police before the customer called 911 would have prevented Mancill's death. Nothing in the evidence presented below indicates that the police would have intervened to prevent the Josephine House caregivers from restraining Mancill. To the contrary, the evidence indicates that the Josephine House caregivers were legitimately restraining decedent because he posed a threat to himself and, potentially, others. The evidence does not show to any degree of "certainty" that when faced with professional caregivers utilizing restraint on a large man who was behaving aggressively, the police would have intervened. *Craig*, *supra*. Therefore, it is speculative to posit that calling the police before the customer called 911 would have prevented Mancill's death. Because the essential element of causation is speculative and conjectural, the trial court correctly granted summary disposition of plaintiff's premises liability and negligence claims to the K-Mart defendants under MCR 2.116(C)(10).

Both parties also argue regarding whether the K-Mart defendants owed a duty to Mancill to timely call the police when they observed the caregivers restraining Mancill. Although raised below, this argument was not addressed by the trial court. This Court may address an issue not decided by the trial court if it is one of law and the parties have presented all facts necessary for its resolution. *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 723-724; 697 NW2d 539 (2005). Generally, "[w]hether a defendant owes a plaintiff a duty of care is a question of law for the court." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). Thus, because all the facts necessary to resolve the question of duty have been presented, we will address this issue.

Because they are not insurers of the safety of their invitees, "merchants do not have a duty to protect their invitees from unreasonable risks that are unforeseeable." *Mason v Royal Dequindre, Inc*, 455 Mich 391, 398; 566 NW2d 199 (1997) (citation and internal quotation

marks omitted). The proper inquiry is whether, "once a disturbance occurs on the premises, . . . a reasonable person would recognize a risk of imminent harm to an identifiable invitee." *MacDonald v PKT, Inc*, 464 Mich 322, 339; 628 NW2d 33 (2001). Here, the evidence presented below, even when viewed in the light most favorable to plaintiff, fails to demonstrate such a situation. Indeed, even the witness who ultimately called 911 at the request of the caregivers testified at deposition that she would not have done so if not requested because it did not appear to her that Mancill was in danger of being harmed. Given this testimony, and considering the absence of any other evidence to show that a "reasonable person would [have] recognize[d] a risk of imminent harm" to Mancill, the evidence was insufficient to "trigger" any duty of the K-Mart defendants to more timely seek police involvement in the matter. *Id*. at 336, 338-339. Consequently, regardless whether the trial court erred in granting summary disposition on the basis of causation, summary disposition of plaintiff's premises liability and negligence claims was nonetheless proper on the ground that there existed no genuine issue of material fact regarding whether the K-Mart defendants owed Mancill a duty to more timely telephone the police.

Plaintiff also argues that the trial court erroneously dismissed her claim under MCL 600.2917(1). Again, we disagree.

MCL 600.2917(1) provides, in pertinent part:

> In a civil action against a library or a merchant . . . for false imprisonment, unlawful arrest, assault, battery, libel, or slander, if the claim arises out of conduct involving a person suspected of removing or of attempting to remove, without right or permission, goods held for sale . . . and if the merchant . . . had probable cause for believing and did believe that the plaintiff had committed . . . larceny of goods . . . damages for or resulting from mental anguish or punitive, exemplary, or aggravated damages shall not be allowed a plaintiff unless it is proved that the merchant . . . used unreasonable force, detained the plaintiff an unreasonable length of time, acted with unreasonable disregard of the plaintiff's rights or sensibilities, or acted with intent to injure the plaintiff.

As even a cursory reading of the statute reveals, nothing in the language of MCL 600.2917 provides a person aggrieved by the conduct of a merchant with a cause of action. To the contrary, as recognized by this Court in *Bruce v Meijers Supermarkets, Inc*, 34 Mich App 352, 357 n 1; 191 NW2d 132 (1971), the statute "deals only with a limitation upon damages recoverable when a cause of action has been sustained." See also *Freeman v Meijer, Inc*, 95 Mich App 475, 481; 291 NW2d 87 (1980) (describing MCL 600.2917 as a "limitation of damages statute"). Thus, because any claim under the statute is "unenforceable as a matter of law," summary disposition of plaintiff's claim in this regard was proper under MCR 2.116(C)(8). *Craig*, *supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio