STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA JAMES and GEORGE JAMES, JR.,	UNPUBLISHED August 1, 2006
Plaintiffs-Appellants,	
v	No. 259813 Wayne Circuit Court
COSTCO WHOLESALE CORP.,	LC No. 02-209397-NO
Defendant-Appellee.	

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this negligence action. We reverse and remand for proceedings consistent with this opinion.

On April 2, 1999, plaintiff[1] went to defendant's store around 6:30 p.m. Plaintiff was familiar with the store, having shopped there four or five times before. She went into the lobby where the shopping carts are stored and took one, and was starting to enter the store when she was hit from behind by a row of carts about 15 feet long. According to plaintiff, a white male, probably a teenager, was pushing the carts, but she did not notice if he was wearing a nametag or a jacket with defendant's name on it. Plaintiff stated that while she had seen patrons push a cart into the store before, she had never seen a patron push so many at once, so she assumed he was a store employee. Plaintiff stated that two store employees witnessed the incident and commented to her about it: the entrance checker asked her if she was okay, and the exit checker said "the cart boys think they are macho bringing too many carts in at one time." Patricia then entered the store and shopped for no more than 30 minutes. Then she spoke with a male manager and filled out the paperwork he gave her to make a report of the incident.

On the date of the incident, plaintiff was 61 years old. Plaintiff stated in her deposition that as a result of the incident, she has a herniated cervical disc at C6 and C7, and a bulging disc at C4 and C5. She has pain in her right arm and shoulder, problems walking first thing in the

[1] George James is a plaintiff to this action only with respect to a loss of consortium claim; where we refer to plaintiff we therefore mean Patricia James.

morning, and a pinched nerve pain in her neck. Plaintiff stated that as a result of her injuries, she experiences pain when climbing stairs, walking long distances, or sitting in the car for long drives, and is limited in engaging in formerly typical activities such as yard work and household chores.

On March 20, 2002, plaintiffs filed a complaint in Wayne Circuit Court. In Count I of the complaint, plaintiffs asserted that one of defendant's employees negligently and carelessly injured Patricia by pushing a long line of carts into her. In Count II, George James asserted a loss of consortium claim.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that because the activity of an employee pushing shopping carts into a store is open and obvious, plaintiffs' claims are barred, and that plaintiff could only speculate regarding the identity of the person who allegedly pushed the carts, and that speculation and conjecture are insufficient to establish a genuine issue of material fact.

The parties waived oral argument and the trial court issued an opinion and order on November 30, 2004, finding that plaintiffs' negligence claim was premised upon conjecture regarding the identity of the negligent actor. The court noted that plaintiff had specifically stated that she did not know the identity of the person who pushed the carts into her, and found that because plaintiffs failed to produce any documentary evidence, such as depositions or affidavits from store employees, in support of the assertion that the negligent actor was an employee of defendant, summary disposition was appropriate.[2]

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition, a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The trial court found that plaintiff had failed to establish the existence of a genuine issue of material fact because her assertion that the person who caused her injury was probably a Costco employee was mere conjecture. It is true that "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a material fact." *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). But it is also true that circumstantial evidence may be sufficient to establish a case. *Id.* And we find here that plaintiff's testimony that she assumed it was a Costco employee pushing the carts that hit her, based on her experience that store patrons do not push

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[2] The court did not address the open and obvious doctrine issue. The court held that George's claim for loss of consortium was contingent on Patricia's claim and it too was dismissed.

long rows of carts, does not stand alone. We find that it is adequately supported by common sense and common experience to create the inference that it was more likely than not a Costco employee pushing those carts, and that inference is sufficient to take this case to a trier of fact. Defendant argues that it is speculative to assume the person pushing the carts was an employee, but we find it far more speculative to suggest, as defense counsel did at oral argument, that the person pushing the carts was just a teenage boy amusing himself by doing something unexpected, if not downright peculiar.

We note that in the criminal law context, this Court has stated that "it is well known that factfinders may and should use their own common sense and everyday experience in evaluating evidence." *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991) (citing CJI2d 2.6(2)). We find this logical conclusion applies equally to civil matters.[3] Plaintiff's assertion that the person pushing the carts was an employee goes beyond mere speculation because her own testimony, combined with common sense, raises a reasonable inference that the person pushing the carts was more likely than not an employee of defendant.

Viewing the entire record in the light most favorable to plaintiff, we find that a genuine issue of material fact remains, and we therefore reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper

[3] We note that in an unpublished opinion, this Court previously found the same. *Hawley v Smith*, 1999 Mich App LEXIS 709 (1999).