

STATE OF MICHIGAN
COURT OF APPEALS

DEANNA OSIECKI,

Plaintiff-Appellant,

v

WAL-MART STORES, INC.,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 196877
Wayne Circuit Court
LC No. 95-500911 NO

Before: Holbrook, Jr., P.J., and Michael J. Kelly and Gribbs, JJ.

MEMORANDUM.

Plaintiff appeals by right from the trial court's order granting summary disposition to defendant in this personal injury action based on common law negligence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The incident in question occurred in Florida. However, plaintiff is a Michigan resident and defendant does business in Michigan, although its headquarters are in Arkansas. The parties have not addressed themselves to any conflict of laws issues, but have assumed that Michigan law applies. This is probably a correct assumption, *Sutherland v Kennington Truck Service, Ltd*, 454 Mich 274; 562 NW2d 466 (1997), but as there appears to be no discernible difference between Michigan and Florida principles of negligence, the issue is apparently moot. When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court views the facts in a light most favorable to plaintiff to determine whether a genuine issue of material fact exists. *Boggerty v Wilson*, 160 Mich App 514, 522; 408 NW2d 809 (1987). Circumstantial evidence and permissible inferences arising from it may constitute sufficient proof of negligence. *Duke v American Olean Tile Co*, 155 Mich App 555, 566; 400 NW2d 677 (1986); *May v Park, Davis & Co*, 142 Mich App 404, 417; 370 NW2d 371 (1985).

At her deposition, plaintiff testified that she reached and merely touched the appendage of a toy dinosaur displayed on one of the shelves of defendant's Jacksonville, Florida store, and that simultaneously one or more other boxes of toy dinosaurs fell from the shelf, striking her and knocking her to the ground, causing personal injuries. Both plaintiff's husband, who did not see the accident but

observed the particular merchandise shortly before the incident, and defendant's employee, who did observe the accident, are in agreement that the boxes of toy dinosaurs were stacked several tiers high.

Viewing the facts in a light most favorable to plaintiff, a rational trier of fact could conclude that defendant breached its duty of due care for business invitees by displaying merchandise in such a precariously balanced manner that slight force, not sufficient ordinarily to suggest the existence of a hazard to a customer unaware of the peril, may be sufficient to cause injury, particularly where the storekeeper must anticipate that, in a self-serve retail operation, application of such force by customers is not only foreseeable but intended by the retailer. See *Colonial Stores, Inc v Donovan*, 115 Ga App 330; 154 SE2d 659 (1967). On this record, the suggestion by defendant that another customer might have engendered the danger by rearranging the merchandise after it was initially safely stacked is speculative or conjectural. *Stefan v White*, 76 Mich App 654; 257 NW2d 206 (1977). In any event, such intervening acts by other customers are entirely foreseeable and do not relieve defendant of its antecedent negligence in so arranging the merchandise in the first instance as to increase the likelihood of such situations. *Colonial Stores, Inc v Donovan, supra*. Accord *Winn-Dixie Stores, Inc v Fellows*, 153 So2d 45 (Fla App, 1963); *Valdes v Faby Enterprises, Inc*, 483 So2d 65 (Fla App, 1986); see also anno: *Liability for Injury to Customer or Other Invitee of Retail Store by Falling of Displayed, Stored, or Piled Objects*, 61 ALR 4th 27. Inasmuch as a triable issue of fact is presented, the trial court erred in granting defendant's motion for summary disposition.

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

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly

/s/ Roman S. Gibbs