# STATE OF MICHIGAN

# COURT OF APPEALS

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KEITH D. GRIFFITHS and MYRTLE GRIFFITHS,

Plaintiffs-Appellants,

v

MEIJER, INC.,

Defendant-Appellee.

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UNPUBLISHED
September 24, 1999

No. 210263
Saginaw Circuit Court
LC No. 97-019140 NO

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court ruled that plaintiff Keith Griffiths, who claimed that he tripped over a cart corral at defendant's store, failed to allege facts sufficient to establish the causation element of his negligence claim because Griffiths testified during his deposition that he did not actually recall tripping over the corral. The court also held that the cart corral constituted an open and obvious condition, precluding recovery by plaintiffs. We affirm.

Plaintiffs first argue that the trial court erred by holding that Griffiths' deposition testimony did not generate a genuine issue of material fact. We disagree. Plaintiffs claim that Griffiths' affidavit, in which he stated that he remembered tripping over the cement blocks of the cart corral, and the testimony of other witnesses who were on the scene shortly after the accident, generated a genuine factual issue.

Summary disposition of a claim or defense may be granted when except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). That party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In this case, plaintiffs failed to proffer sufficient evidence to show that the cart corral actually caused Griffiths' injury. Griffiths testified that he did not remember what caused his fall, and he admitted under oath that his opinion that the cart corral caused his fall was only a guess.

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [*Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956), quoting *City of Bessemer v Clowdus*, 74 So 2d 259, 263 (Ala, 1954).]

In this case, Griffiths' deposition testimony indicated that his theory of causation was merely an explanation consistent with known facts and conditions; he testified that in the absence of other explanations, and because he fell in an area close to the cart corral, he guessed that his fall was caused by the cart corral. Given the possibilities that his fall was caused by moisture, loss of balance, or tripping over some other object, plaintiffs' theory of causation is conjectural. Griffiths was the only witness to his fall, and his testimony was, by its express terms, guess work. No other witnesses saw him fall, and no physical evidence was introduced to show that the cart corral was the cause in fact of plaintiff's injury.

Plaintiffs contend, however, that a material issue of fact was generated by the affidavit Griffiths submitted in which he stated unequivocally that he tripped over the cart corral. The party opposing summary disposition must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto, supra* at 362. However, a party may not create a factual dispute by submitting an affidavit that contradicts his prior sworn testimony. *Palazzola v Karmazin Products Corp,* 223 Mich App 141, 155; 565 NW2d 868 (1997); *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993).

In this case, after defendant moved for summary disposition, plaintiffs offered an affidavit in which Griffiths directly contradicted his deposition testimony. During his deposition, Griffiths stated that he did not recall how he fell; in his affidavit, he stated that he did remember how he fell. During Griffiths' deposition, he stated that he did not see the cart corral after he fell; in his affidavit, he stated that he saw the curb of the corral after he fell. During his deposition, he stated that he "guessed" that the corral caused his fall; in his affidavit, he emphasized that the corral "must" have caused his fall. Griffiths' affidavit references "something solid and immovable" whereas his deposition testimony referenced no such structure. We conclude that the affidavit proffered by plaintiffs represents exactly the kind of document meant to be precluded by the rule stated in *Palazzola, supra* at 155. The trial court properly refused to hold that the affidavit created a genuine issue of fact for submission to a jury.

Plaintiffs next argue that the trial court should not have decided, as a matter of law, that the cement blocks of the cart corral were an open and obvious danger. We disagree. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995), our Supreme Court considered the open and obvious doctrine in the context of a case involving steps, and explained:

> In summary, because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable. However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. [*Id*. at 616-617 (citations and footnotes omitted).]

No evidence was produced below to address whether cart corrals are encountered in everyday life such that a reasonably prudent person traversing a store parking lot would look where he is going, observe the corrals, and take appropriate steps to ensure his own safety. However, as a matter of common experience, cart corrals are commonly found in supermarket parking lots. The question, then, is whether this particular corral had such character, location, or surrounding conditions that would make it unreasonably dangerous despite being the kind of hazard that is typically open and obvious. Although plaintiffs averred in their complaint that the corral was "low-profile," they did not produce any evidence to show how the corral differed from any other corral such that it had a distinct character or exceedingly hazardous location or surrounding conditions. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 498-499; ___ NW2d ___ (1999). When a party defends against a motion for summary disposition, it is not enough to rest on allegations or simply to state conclusions; concrete evidence must be produced that would allow a trial judge to conclude that a material issue of fact exists. MCR 2.116(G)(4). The trial court correctly concluded that plaintiffs failed to meet this burden.

We note that one other jurisdiction has addressed the specific issue whether a cart corral similar to the one at issue here posed an unreasonable risk of harm. The case is well reasoned and highly instructive. In *Denton v Winn-Dixie Greenville, Inc*, 312 SC 119; 439 SE2d 292, 293 (1993), the South Carolina Court of Appeals considered whether a trial court erred in denying a store's motion for judgment notwithstanding the verdict after the store was sued for negligently building and maintaining a cart corral in the store's parking lot. The court stated that the corral consisted of "six yellow concrete dividers, each approximately six feet long and eight to ten inches high, that were placed in a U-shape. The corral was located within a parking space near the entrance of the store." *Id*.

The court outlined the facts as follows:

> On August 20, 1990, at approximately 4:00 p.m., Denton left the Winn-Dixie grocery store and proceeded toward her car. As she approached her car, a fast moving vehicle came towards her down the lane between the parking spaces. The lane was wide enough to accommodate two cars passing each other. As she moved out of the path of the oncoming vehicle, Denton tripped and fell on a concrete divider at the edge of the cart corral. Denton's fall occurred during clear weather and daylight hours.
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> Denton, a regular customer of the store for at least five years, testified that she was aware of the cart corral prior to the accident, she had noticed the corral prior to entering the store the day of the accident, and that she had noticed the corral as she exited the store on the day of the accident. She further testified the concrete dividers were not hidden from her view. She failed to step over them in her haste to avoid the oncoming car. [*Id*.]

The court went on to explain:

> In this case, the cart corral was in the parking lot to keep wayward grocery carts from interfering with pedestrian and vehicular traffic. It was foreseeable that grocery carts left by customers in parking spaces or traffic lanes could cause accidents. Thus, the cart corral was itself a safety device, appropriately and reasonably maintained under the circumstances. The corral was not materially different from speed bumps, curbing, or concrete dividers at the head of parking spaces – all of which are commonly found in or along public streets and places to park. Accidents may happen around these structures as they do on steps, escalators, and other raised structures. This does not mean they are unreasonably dangerous or that a person exercising due care would not have them on the premises. They are, in fact, common structures that a person taking reasonable care for his own safety would likely expect and see while on the premises.
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> Denton admits she saw the clearly visible dividers but that she was preoccupied with the oncoming car and tripped. No evidence was presented that Winn-Dixie was responsible for the speeding car. In these circumstances, Winn- Dixie was under no duty to warn of the cart corral or to fence it off from the rest of the parking lot. Based on the evidence presented, the circuit court should have entered judgment notwithstanding the verdict. [*Id*., 439 SE2d 294.]

The court also noted, in a footnote, that

> [t]he shopping cart corral had no railing around it. Denton testified that if there had been railings around the area, she might still have tripped but she could have caught hold of a railing to prevent, or lessen the severity of, her fall. This testimony was mere speculation. Moreover, the installation of a railing could foreseeably lead to other accidents. For example, a child might be attracted to climb on the railing whence it

could fall and injure itself. Winn-Dixie had no duty to make the parking lot accident proof. [*Id*., 439 SE2d 294 n 2.]

The present case is analogous. As noted by the *Denton* court, cart corrals are themselves safety devices; thus, it is reasonable to provide them. As was the case in *Denton*, the cart corral at issue here was constructed from cement blocks similar to curbs, not unlike cement blocks encountered in many walks of life. The *Denton* court was correct to posit that these are not structures so inherently dangerous that a person exercising reasonable care would exclude them from the premises. As was the case in *Denton*, Griffiths admitted that he was familiar with the corrals and their design. Like the plaintiff in *Denton*, Griffiths was preoccupied with conditions outside the store's control; in this case, rain and an umbrella rather than an oncoming car. We conclude that under these circumstances, the trial court did not err in concluding that defendant was under no duty to warn of the cart corral or fence it off because the corral posed an open and obvious danger.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey