STATE OF MICHIGAN

COURT OF APPEALS

RICHARD GALE,

Plaintiff-Appellant,

and

BLUE CROSS/BLUE SHIELD,

Intervening Plaintiff,

v

RD BLOOMFIELD ASSOCIATES LIMITED PARTNERSHIP d/b/a BLOOMFIELD TOWN SQUARE MALL and RIS CONTRACTORS, INC.,

Defendants-Appellees.

UNPUBLISHED
April 15, 1997

No. 191647
Oakland Circuit Court
LC No. 95-492345-NO

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(8) and (10). We reverse.

This case arises out of an injury suffered by plaintiff when he slipped and fell on a patch of ice on a sidewalk located on defendant Bloomfield's mall premises. Plaintiff had gone to the mall to pick up mail from a United States Post Office, which leased space in the mall from defendant Bloomfield. Defendant RIS had previously contracted with defendant Bloomfield to provide snow plowing and salting services at the mall. The terms of the contract stated that said plowing and salting were conditional upon a snowfall in excess of 1.5 inches within a twelve-hour period.

Plaintiff initiated the present action, claiming that defendants had negligently breached their duty of care to him. Defendant Bloomfield moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), claiming that plaintiff had failed to demonstrate that it exercised anything other than ordinary

care and prudence, that it did not know, nor had reason to know, of the ice patch located on the sidewalk outside of the post office, and that plaintiff's claim was barred due to the natural accumulation doctrine. Defendant RIS joined defendant Bloomfield's motion, adding that plaintiff failed to demonstrate that its actions were negligent. The trial court granted defendants' motions for summary disposition, stating that the natural accumulation doctrine precluded plaintiff's claim. The court failed to rule on the other issues raised.

Plaintiff first argues that because the sidewalk upon which he fell was on privately owned property, the trial court erred in dismissing his claim based upon the natural accumulation doctrine. We agree.

Neither party disputes that plaintiff was an invitee on defendant Bloomfield's premises. As explained in *Morrow v Boldt*, 203 Mich App 324; 512 NW2d 83 (1994):

> The natural accumulation doctrine provides that neither a municipality nor a landowner has an obligation to a licensee to remove the natural accumulation of ice or snow from any location, except where the municipality or property owner, by taking affirmative action, has increased the travel hazard to the public. . . . The natural accumulation doctrine does not apply to situations involving an invitee injured on private property. A landowner's obligation to an invitee is to take reasonable measures within a reasonable time after the accumulation of snow to diminish the hazard of injury. . . . However, a landowner has no duty even to an invitee to clear natural accumulations of ice or snow from public sidewalks abutting his property. . . . A panel of this Court has extended that rule to driveway approaches as well. . . . [*Id.* at 327-328 (citations omitted).]

In this case, it appears from the record that the sidewalk on which plaintiff slipped and fell was located on private, commercial property. Consequently, we conclude that the trial court erred in dismissing plaintiff's claim based on the rule pertaining to invitees and the natural accumulation of ice and snow on public sidewalks.

Next, plaintiff argues that whether defendant Bloomfield knew or should have known of the existence of the icy condition outside of its single-door exit was a question of fact precluding summary disposition. We agree.

Our Supreme Court has adopted the definition provided in the Restatement of the general legal duty that a premises owner owes an invitee:

> 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. [*Riddle v McLouth Steel*

Products Corp, 440 Mich 85, 93; 485 NW2d 676 (1992) (quoting 2 Restatement Torts, 2d, § 343).]

A case in negligence may be based on legitimate inferences from circumstantial evidence. *Ritter v Meijer*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

Based upon the same circumstantial evidence in this case, the parties present diametrically opposed arguments regarding the formation of the icy patch and whether defendant Bloomfield should have had notice of its existence. Plaintiff asserts that because the weather on the day of the incident was sunny and the last snowfall had occurred six days earlier, a jury could reasonably believe that the ice patch had existed for a considerable period of time. Plaintiff further contends that the evidence demonstrated that both the parking lot and main entrance had been salted; however, the side exit where plaintiff fell had not been salted and thus defendant knew that care needed to be taken to remedy the danger from the icy conditions. Defendant Bloomfield argues that the temperature had reached thirty-eight degrees on the day before the accident. Defendant Bloomfield contends that, therefore, the icy patch could have been caused by melting the previous day and refreezing the previous night. We find that the conflicting interpretations of the circumstantial evidence clearly evidences a genuine issue of material fact.

Last, plaintiff argues that genuine issues of material fact exist concerning whether defendant RIS breached its duty owed to plaintiff by failing to salt the walkway at issue. We agree.

Accompanying all contracts is the common-law duty to perform with ordinary care the things agreed to be done. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995). Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. *Id*. at 708. This Court has adopted the following definition provided in the Restatement of the legal duty owed by a contracting party to a third person:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. [*Courtright v Design Irr, Inc*, 210 Mich App 528, 531; 534 NW2d 181 (1995) (quoting Restatement, § 324A).]

In this case, defendant Bloomfield had a duty to exercise reasonable care to protect invitees such as plaintiff from dangers that are known or should be known through the exercise of reasonable

care. *Riddle, supra* at 93. The presence of icy conditions on a landowner's property constitutes such a danger. *Clink v Steiner*, 162 Mich App 551, 555; 413 NW2d 45 (1987). Defendant RIS undertook to perform defendant Bloomfield's duty to remove dangerous conditions on the property arising from ice and snow. Consequently, defendant RIS may be subject to liability for physical harm resulting from its failure to exercise reasonable care in its contractual undertaking.

The contract between defendant RIS and defendant Bloomfield states that "salting shall be performed at the discretion of the Contractor or as directed by RIS Change Order." Defendant RIS counters that the reference to salting is strictly in the context of their duty to remove snow upon accumulation of over 1.5 inches within twelve hours. All contractual ambiguities are to be construed against the drafter. *Brauer v Hobbs*, 151 Mich App 769, 774; 391 NW2d 482 (1986). Regardless, when the terms of a contract are contested, the actual terms of the contract are to be determined by the jury even when the evidence of the contract terms is uncontradicted. *Butterfield v Metal Flow*, 185 Mich App 630, 636-637; 462 NW2d 815 (1990). Thus, whether defendant RIS had agreed to salt the premises other than after an accumulation of 1.5 inches of snow remains a question of fact.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski