STATE OF MICHIGAN

COURT OF APPEALS

MARCEL THIRMAN and MAGDALENA THIRMAN,

Plaintiffs-Appellants,

v

D & T CEMENT, INC.,

Defendant-Appellee.

UNPUBLISHED

No. 199621
Oakland Circuit Court
LC No. 95-504141-NO

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

YOUNG, Jr., J. (dissenting).

I conclude that plaintiffs have failed to create a genuine issue of material fact concerning whether defendant breached its duty to exercise ordinary care in removing snow and ice from the parking lot. Accordingly, I respectfully dissent from the majority's reversal of the trial court's decision granting summary disposition in favor of defendant.

I agree with the majority that the question whether a defendant acted reasonably generally is reserved for the jury. *Lundy v Groty*, 141 Mich App 757, 760; 367 NW2d 448 (1985). However, it is for the court to determine whether sufficient evidence has been presented to establish a prima facie case requiring submission to the jury. See *Cabana v City of Hart*, 327 Mich 287, 305; 42 NW2d 97 (1950). While *Cabana* involved a motion for a directed verdict, the standards regarding the sufficiency of proof are essentially the same in the context of summary disposition. See *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994).

Here, the record establishes that defendant applied rock salt to the parking lot approximately 2 ½ hours before plaintiff's fall and that the temperature on the day of the incident was between -14 and -20 °F. While plaintiffs offered evidence that defendant knew that rock salt is not effective at "certain temperatures," and that other measures were "probably" available, the *record evidence* simply was not sufficient to allow a reasonable jury to conclude that defendant failed to act reasonably under the circumstances of this case. Cf. *Ziginow v Redford Jaycees*, 133 Mich App 259, 263-264; 349 NW2d 153 (1983). Specifically, plaintiffs offered no evidence to show exactly what alternative

measures were available, let alone that those measures would have been more effective than rock salt under the circumstances.

The majority, for its part, fails to hold plaintiffs to their burden under the court rules when it asserts that, "[i]f the court had been inclined to grant the motion on that basis, plaintiffs should have been afforded an opportunity to produce the documentation referred to at argument – the packaging materials and evidence regarding alternate materials." However, plaintiffs never suggested that discovery was incomplete. Faced with a defense motion brought under MCR 2.116(C)(10), plaintiffs were required to set forth specific facts by way of documentary evidence, not counsel representations, showing that there was a genuine issue for trial. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Because plaintiffs failed to do so, summary disposition was proper even though the trial court did not rely on this reasoning in granting defendant's motion. See *D'Ambrosio v McCready*, 225 Mich App 90, 96 n 3; 570 NW2d 797 (1997). I would affirm the trial court's decision.

/s/ Robert P. Young, Jr.