

STATE OF MICHIGAN
COURT OF APPEALS

CLAUDIA GERBEN,

Plaintiff-Appellee,

v

NORTHVILLE DOWNS,

Defendant-Appellant.

UNPUBLISHED

September 25, 1998

No. 201820

Wayne Circuit Court

LC No. 95-513892 NO

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals by leave granted an order of the circuit court denying its motion for summary disposition brought pursuant to MCR 2.116(C)(10). We reverse and remand for entry of judgment in favor of defendant.

I

On February 12, 1993, plaintiff sustained personal injuries as the result of falling on defendant's premises. Although it was snowing on the day of the incident, plaintiff testified in her deposition that "I just went down" and that she had no idea as to what, if anything, caused her to "go down."

In the lower court, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). In support of its motion, defendant submitted portions of plaintiff's deposition along with portions of the depositions of James J. Zayti and Michael Priest. The depositions of Zayti and Priest detailed the extensive efforts that defendant took to remove snow on the day of plaintiff's fall. Defendant also submitted to the lower court two unauthenticated documents: a weather compilation allegedly prepared by the National Oceanic and Atmospheric Administration, and an unauthenticated invoice allegedly submitted by J. Zayti Trucking, Inc. However, because the unsworn and unauthenticated documents were not admissible evidence, they will not be considered in this appeal. *SSC Associates Ltd Partnership v General Retirement Systems of City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991).

In opposition to defendant's motion, plaintiff submitted her own affidavit which states in pertinent part: "That I do not have specific memory of my fall or why I fell." In addition, plaintiff submitted unauthenticated medical records and referenced an alleged statement she claims to have made in a police report. With the exception of plaintiff's affidavit, the materials submitted by plaintiff were also not admissible and therefore may not be considered. *SSC Associates, supra*. See also MRE 901(b)(7); *People v Shipp*, 175 Mich App 332; 437 NW2d 385 (1989); *Hewitt v Grand Trunk W R Co*, 123 Mich App 309; 333 NW2d 264 (1983).

II

The necessary elements in every negligence cause of action, including a complaint alleging premises liability are (1) legal duty, (2) breach of duty, (3) proximate cause, and (4) damages. See, generally, *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. In *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), the Supreme Court set forth the following standards which must be used in evaluating summary disposition motions brought on this basis:

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

III

In the lower court, plaintiff failed to present any admissible evidence in support of her claim of breach of duty. While defendant submitted deposition testimony regarding the extensive efforts

defendant made to remove the snow from the parking lot, plaintiff relied on a conclusory assertion that because “about two inches of freshly fallen snow” rested on defendant’s parking lot, that defendant *must* have been in breach of its duty. First, we take notice that during our Michigan winters, two inches of freshly fallen snow is a common and frequent occurrence. Second and most importantly, plaintiff failed to sustain her burden of opposing defendant’s motion. Specifically, plaintiff offered no evidence to rebut the documentary evidence of defendant’s extensive efforts to remove the snow within a reasonable time. In view of plaintiff’s failure of proof, defendant’s motion for summary disposition should have been granted. MCR 2.116(G)(4).

In addition, plaintiff failed to submit any evidence regarding proximate cause. On the contrary, plaintiff’s deposition testimony was that she had no idea as to what, if anything, caused her to fall:

Q. So you are walking along?

A. Yes.

Q. And what happened?

A. I just went down.

Q. Do you have any idea what caused you to go down?

A. No.

As the Supreme Court stated in *Skinner v Square D Co*, 445 Mich 153, 174; 516 NW2d 475 (1994), the occurrence of an accident, in itself, is not sufficient to establish a genuine issue as to factual causation:

Taking the record evidence in the light most favorable to the plaintiff, we conclude that the record facts do not manifest a genuine issue of factual causation. The offered evidence only established that an accident took place. Michigan law does not permit us to infer causation simply because a tragedy occurred in the vicinity of a defective product. The plaintiffs were required to set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. Instead, the plaintiffs posited a causation theory premised on mere conjecture and possibilities.

Under substantially similar facts, we held in *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977), that a plaintiff must present evidence linking a defect on the premises to a fall in order to establish proximate cause. Plaintiff’s testimony in *Stefan* that, “she did not know how or why she fell” was found by this Court to be insufficient to withstand a defendant’s motion for summary disposition:

The mere occurrence of plaintiff’s fall is not enough to raise an inference of negligence on the part of defendant. As has been noted, plaintiff’s husband did not see the fall. His affidavit points to one possible cause -- the metal strip -- but it presents no

evidence linking that strip to the fall. Only conjecture can make this the causal element to the exclusion of all others. Such speculation or conjecture is insufficient to raise a genuine issue of material fact. . . .

* * *

An attempt to apply these factors demonstrates the lack of a showing, even circumstantial, as to the cause of the fall. Without such a showing, there is no causal connection between the defendant and the fall; only speculation and conjecture remain. More than this has to be presented in order to raise a genuine issue of material fact. Furthermore, as indicated, plaintiff's own deposition appears to negative any negligence on the part of defendant. [*id.* at 661-662.]

In the present case, because plaintiff failed to meet her burden of opposing defendant's motion for summary disposition with admissible evidence as to the elements of breach of duty and proximate cause, the lower court clearly erred in denying defendant's motion for summary disposition. MCR 2.116(G)(4). *Skinner, supra*; *Stefan, supra*.

Reversed and remanded for entry of judgment in favor of defendant.

/s/ Richard Allen Griffin

/s/ Michael J. Talbot