STATE OF MICHIGAN

COURT OF APPEALS

ANDREW PRODIN,

Plaintiff-Appellant,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

MICHAEL CLIFF and KATHY CLIFF,

Defendants-Appellees.

UNPUBLISHED
August 10, 1999

No. 207409
Macomb Circuit Court
LC No. 96-003795 NO

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motions for reconsideration and summary disposition. We affirm.

Plaintiff, an acknowledged licensee on defendants' property, slipped and fell on a patch of ice on defendants' driveway in the area between the sidewalk and the street, i.e. the approach. It is undisputed that the ice patch formed as a result of improper drainage of the city sewer and that defendants knew that ice would often form in that area. Defendants' motion for summary disposition was initially denied because the court found that there was evidence presented which demonstrated that the ice patch was an "unnatural accumulation." Upon defendants' motion for reconsideration, however, the court later granted summary disposition in defendants' favor finding that defendants did not have possession or control of the approach upon which plaintiff fell.

On appeal, plaintiff argues that the trial court erred in granting defendants' motions for reconsideration and summary disposition. We disagree.

As a preliminary matter, we briefly address plaintiff's contention that the trial court erred in granting defendants' motion for reconsideration because there was no demonstration of a palpable error by which the court and the parties had been misled and that a different disposition of the motion would result from correction of the error. MCR 2.119(F)(3). A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *In re Beglinger Trust,* 221 Mich App 273, 279; 561 NW2d 130 (1997). As will become more evident from our discussion below, plaintiff's position that defendants did not satisfy the requirements of MCR 2.119(F)(3) is inaccurate. Therefore, we conclude that the trial court did not abuse its discretion in granting the motion for reconsideration. In any event, "[i]f a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion." *Smith v Sinai Hosp of Detroit,* 152 Mich App 716, 723; 394 NW2d 82 (1986). Thus, we find no error in this regard.

With respect to the true substance of plaintiff's appeal, we note that appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 210 (1998). Defendants moved for summary disposition pursuant to both MCR 2.116(C)(8) and (10), however, because the trial court considered matters outside the pleadings, we will review this issue as if the motion were brought pursuant to MCR 2.116(C)(10). *Butler v Ramco-Gershenson, Inc,* 214 Mich App 521, 524; 542 NW2d 912 (1995). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Spiek, supra* at 337. When reviewing a motion brought pursuant to this rule, the court considers affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Summary disposition was properly granted in this case because defendants did not have possession *and* control over the premises upon which plaintiff fell. "Under the principles of premises liability, the right to recover for a condition or defect of land requires that the defendant have legal possession and control of the premises." *Morrow v Boldt,* 203 Mich App 324, 328; 512 NW2d 83 (1994); *Stevens v Drekich,* 178 Mich App 273, 276; 443 NW2d 401 (1989). In this case, the evidence was insufficient to establish the necessary possession and control.

Owners of land abutting a street are presumed to own the fee all the way to the center of the street, subject to the easement of public way. *Morrow, supra* at 329. The codified ordinances for the City of Eastpointe delegated responsibility for the maintenance of sidewalks and driveway approaches to abutting property owners. (Eastpointe Ordinances, § 1022.30.) Consequently, by exercising the power to delegate responsibility for the sidewalks and driveway approaches to abutting landowners, it is evident that the City of Eastpointe's easement of public way included defendants' driveway approach. *Morrow, supra* at 329.

In *Morrow,* a case involving substantially similar facts, this Court noted, with respect to this easement, that:

> [a] right of way grants the right to unobstructed passage at all times over the grantor's land, along with such rights as are incidental or necessary to the right of passage. . . . The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights. . . . *However, it is the owner of an easement, rather than the owner of the survient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties.* [*Morrow, supra* at 329-330 (emphasis added).]

The Court further recognized that whatever residual rights to a public right-of-way are retained by an adjacent landowner, they are not possessory in nature. *Id* at 330. Applying the holding in *Morrow* to this case, we find that because defendants lacked the requisite possession and control[1] over the driveway approach necessary to establish a premises liability claim, the trial court properly granted defendants' motion for summary disposition.

Plaintiff argues, however, that because the accumulation of ice was unnatural, a different result must yield. We disagree. In *Devine v Al's Lounge Inc*, 181 Mich App 117, 119; 448 NW2d (725) 1989, this Court recognized that property owners have no duty to maintain public sidewalks and driveway approaches abutting their property free from natural accumulations of ice or snow.[2] However, the landowner whose property abuts a public sidewalk or approach may be liable for a slip and fall injury where he or she has either undertaken to remove the ice or snow and, as a result, has increased the hazard, or has taken steps to alter the walk itself, and thereby caused an unnatural or artificial accumulation of ice or snow. *Id.* In this case, there is no evidence that defendants did anything which increased the risk of hazard to plaintiff. Indeed, it is undisputed that the ice formed as a result of improper drainage from the city sewer. Therefore, plaintiff gains no advantage from the application of the "unnatural accumulation" doctrine.

Affirmed.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

[1] Defendants occasionally salted the area. In *Devine v Al's Lounge Inc*, 181 Mich App 117, 120; 448 NW2d 725 (1989), this Court held that such action was insufficient to constitute control over the premises.

[2] However, the natural accumulation doctrine does not apply to the licensor-licensee context where the injury occurred on the possessor's private property. *Altairi v Alhaj*, ___ Mich App ___; ___ NW2d ____ (Docket No 203221, issued May 28, 1999), slip op., p 6.