

STATE OF MICHIGAN
COURT OF APPEALS

JAMES ELLIOTT and TERESA ELLIOTT,

Plaintiffs-Appellants,

V

LEON J. PERRIN, COUNTRY VILLAGE
APARTMENT COMPLEX, and LEE
McCARTHY, d/b/a MIDNIGHT SNOW
PLOWING,

Defendants-Appellees.

UNPUBLISHED

January 18, 2002

No. 222807

Shiawassee Circuit Court

LC No. 98-001639 - NO

Before: K. F. Kelly, P.J., and White and Talbot, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. Defendants' entitlement to summary disposition rests on the proposition that it would have been unreasonable to apply salt before 7:30 because of the rain. However, McCarthy's testimony can be understood to state that it is appropriate to apply salt even when it is raining, provided that there is something forming on the ground that the salt can be applied to. Although defendants' employees testified that there was no ice until shortly before plaintiff's fall, Ward's testimony can be understood as stating that ice was beginning to form shortly before 5:30 a.m. Thus, there was a question of fact regarding when the ice began to form, and the jury could have concluded that Hasyn, an employee of Country Village responsible for shoveling and salting, who claimed to have inspected the walks at 7:00 a.m., should have discovered the condition and salted.

Further, there was testimony that defendant McCarthy had contracts with eight complexes spread over a significant distance, and that although he had previously employed helpers, he did not do so at the time of plaintiff's fall. Depending upon when the ice began to form, this might factor into the assessment of whether reasonable measures were taken within a reasonable time.

Additionally, defendants' motions were brought before the close of discovery. Plaintiff asserted that the motions were premature and that plaintiff was "in the process of gathering information to have an expert review and possibly render an opinion." An expert may have provided opinions regarding the application of salt in the rain, when the application is effective in general, and whether, assuming Ward saw ice forming at 5:30 a.m., salt would have been

effective if applied in the early morning hours. This was not a situation where there was no reasonable chance that further discovery would result in support for plaintiff's claims. The grant of summary disposition was thus premature. *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000).

I would reverse and remand for further proceedings.

/s/ Helene N. White