STATE OF MICHIGAN

COURT OF APPEALS

GLADYS DUPONT and ERNEST DUPONT,

Plaintiffs-Appellants,

V

MORRISON LAKE RESORT ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
December 27, 2002

No. 236819
Ionia Circuit Court
LC No. 00-020989-NO

Before: Bandstra, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Principal plaintiff Gladys Dupont filed this action to recover damages for injuries she sustained in a trip and fall on property owned and controlled by defendant Morrison Lake Resort Association. Plaintiff's complaint asserted that she tripped on a post adjacent to a recycling dumpster while depositing newspapers in the dumpster. As she was stepping up onto a concrete apron on which the dumpster stood, she fell and fractured her ankle. Mrs. Dupont testified at her deposition that as she was lying on the ground, she saw leaves and papers scattered around the dumpster and a post lying on the ground at an angle to the dumpster, several yards away. Mrs. Dupont described the post as being a 4" x 4" approximately the length of the dumpster. She surmised that she had tripped or slipped on the post. Plaintiff's husband, Ernest Dupont, also a party to this suit by virtue of his derivative loss of consortium claim, indicated during his deposition that he did not witness the accident and never viewed the scene of the accident.

After the depositions of plaintiffs were taken, defendant filed a motion for summary disposition under MCR 2.116(C)(10), claiming that the dearth of admissible evidence establishing proximate causation between plaintiff's injury and any unsafe condition on the premises was fatal to plaintiffs' claim. The trial court agreed that no disputed factual issue existed regarding proximate cause and granted defendant's motion.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id*. "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits,

pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id*. A motion for summary disposition under MCR 2.116(C)(10) may properly be granted if there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id*.; *Scharret v City of Berkley*, 249 Mich App 405, 410; 642 NW2d 685 (2002).

A possessor of land can only be liable for injuries to an invitee resulting from some dangerous condition on the land. *Prebenda v Tartaglia*, 245 Mich App 168, 170; 627 NW2d 610 (2001). In the present case, plaintiffs claimed that the wooden post lying on the ground next to the dumpster constituted the requisite defect or dangerous condition. Defendant's summary disposition motion was based on the inability of plaintiffs to establish that this alleged defect actually caused Mrs. Dupont's fall. To establish a prima facie case of negligence, including a complaint alleging premises liability, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Berryman v K-Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992). See also *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences out of the realm of conjecture. *Clark v K-Mart Corp*, 242 Mich App 137, 140-141; 617 NW2d 729 (2000), rev'd on other grounds 465 Mich 416; 634 NW2d 347 (2001). "'[T]he burden of establishing proximate cause . . . always rests with the complaining party, and no presumption of it is created by the mere fact of an accident.'" *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), quoting *Howe v Michigan C R Co*, 236 Mich 577, 583-584; 211 NW 111 (1926). As further explained by the *Skinner* Court:

> All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude all reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established. [*Id*. at 166-167, quoting 57A Am Jur 2d, Negligence, § 461, p 442].

See also *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 339-343; 608 NW2d 66 (2000).

Plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. Plaintiffs did not present evidence to establish why the accident occurred as it did. In her deposition, Mrs. Dupont testified that at the time of the accident, she had no idea why or how she fell. She denied any sensation that she was stepping onto something higher than the normal concrete apron and, prior to landing on the ground, did not feel her foot slip. She simply "didn't know what happened."

Plaintiff's deposition testimony is virtually identical to that of the plaintiff in *Stefan v White*, 76 Mich App 654, 661-662; 257 NW2d 206 (1977), where this Court held that a plaintiff

must present evidence linking a defect on the premises to a fall in order to establish proximate cause. In *Stefan*, the plaintiff alleged that she caught her heel on the metal strip of a door sill and fell, injuring herself. The plaintiff's deposition testimony, that she "just went down" and did not know how or why she fell, *id*. at 656-657, was found by this Court to be insufficient to withstand the 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.
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> Furthermore, as indicated, plaintiff's own deposition appears to negative any negligence on the part of defendant. [*Id*. at 661-662].

See also *Pete v Iron Co*, 192 Mich App 687; 481 NW2d 731 (1992).

In the instant case, plaintiff likewise could not identify the cause of her fall when it occurred, but merely surmised that the post, which was lying next to the dumpster and which appeared to have shifted its position as indicated by the wet surface markings, was what she had tripped or slipped on. Plaintiff's speculation and conjecture regarding the instrumentality of her fall is insufficient to create a genuine issue of material fact. *Skinner, supra*; *Stefan, supra*.

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Richard Allen Griffin