STATE OF MICHIGAN

COURT OF APPEALS

LINDA GERZANICS and GREGORY GERZANICS,

Plaintiffs-Appellants,

v

BOSTON MARKET CORPORATION and METROSWEEP, INC.,

Defendants-Appellees,

and

WATERFORD PLAZA COMPANY, ARTHUR M. SILLS, and PROFESSIONAL GROUNDS SERVICES, L.L.C.,

Defendants.

UNPUBLISHED
November 18, 2010

No. 294192
Oakland Circuit Court
LC No. 2008-088429-NO

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

In this slip-and-fall case, plaintiffs appeal as of right the circuit court's orders granting summary disposition to defendants Boston Market Corporation and Metrosweep, Inc. We affirm.

I. BACKGROUND AND PROCEEDINGS

The complaint alleges that plaintiff Linda Gerzanics[1] sustained head injuries when she slipped and fell on a pile of salt outside of the Boston Market at the Waterford Plaza on January 16, 2005. Plaintiff testified that although she did not see what caused her to slip due to poor lighting, she felt a "raised area" like rocks, sand, or salt through her coat as she lay on the ground

[1] We refer to plaintiff Linda Gerzanics as "plaintiff" in the statement of facts because she was the party injured on the sidewalk.

after falling, and noted that the restaurant manager and an EMS worker made references to salt on the ground while tending to her after the fall. Accordingly, plaintiffs sought damages on the grounds of negligence and res ipsa loquitur.[2]

Following discovery, defendant Boston Market filed its motion for summary disposition arguing that dismissal of plaintiffs' claims was appropriate where: (1) the lease with its landlord (defendant Waterford Plaza Co.) required the landlord to maintain the sidewalk outside the restaurant, (2) the law of premises liability was inapplicable where Boston Market had neither possession nor control of the premises, and (3) alternatively, the danger was open and obvious. Plaintiff responded that Boston Market was liable under a theory of active negligence (as distinguished from a theory of premises liability). At the ensuing motion hearing, the court ruled on the record that Boston Market was not liable where the lease required the landlord to maintain the sidewalk and the condition was open and obvious without any special aspects present. The court entered an order reflecting this decision on March 18, 2009, and denied plaintiffs' subsequent motion for reconsideration.

In the interim, defendant Metrosweep filed its own motion for summary disposition claiming that (1) it owed plaintiff no duty separate and distinct from its snow removal obligations under its contract with defendant Professional Ground Services,[3] (2) it was not otherwise liable for negligence where it had neither possession nor control over the property, and (3) plaintiff failed to present evidence that she slipped on a pile of salt placed by Metrosweep. Plaintiffs answered that although Metrosweep's duty to salt the area sounded in contract, Metrosweep created a new hazard by "over-salting" the area. Alternatively, plaintiffs requested leave to amend their complaint to reflect that Metrosweep breached its duty to protect plaintiff by "over-salting" the sidewalk.

The court granted Metrosweep's motion, holding that Metrosweep owed plaintiff no duty separate and distinct from that created in contract and that Metrosweep's actions did not create a new hazard to plaintiff. Additionally, the court concluded that Metrosweep could not be liable under a premises liability theory where it was neither the owner nor possessor of the property and that defendant failed to present any evidence—besides hearsay by nonparties—that she slipped on salt. This order as well as the order granting summary disposition to Boston Market is now before us on appeal.

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[2] Although the initial complaint sought damages from defendant Boston Market only, plaintiffs amended their complaint to add the remaining defendants after they were named as nonparties at fault under MCR 2.112(K) and to add a count for res ipsa loquitur. The instant appeal does not concern the claims against defendants Waterford Plaza Co. (Boston Market's landlord), Archie Sills (owner of Waterford Plaza Co.), and Professional Grounds Services, L.L.C. (the snow removal company) as those were resolved after case evaluation.

[3] Professional Ground Services had subcontracted Metrosweep (an industrial and commercial sweeping company) to provide for snow removal of the area at the time plaintiff fell.

II. ANALYSIS

A. BOSTON MARKET

Plaintiffs first argue that Boston Market's active negligence in "over-salting" the sidewalk precluded summary disposition. Although the trial court did not address plaintiffs' active negligence argument in granting summary disposition to Boston Market, we may properly consider this issue because plaintiffs raised it below. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

The Court reviews de novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth satisfactory evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). "But such materials shall only be considered to the extent that [they] would be admissible as evidence . . . ." *Woodman v Kera, LLC*, 280 Mich App 125, 135; 760 NW2d 641 (2008), aff'd 486 Mich 228 (2010) (quotation marks and citations omitted); MCR 2.116(G)(6). While circumstantial evidence may be sufficient to establish a case, "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Although the trial court granted summary disposition to Boston Market because the hazard causing plaintiff's fall was open and obvious, plaintiffs maintain that the open and obvious doctrine does not apply because Boston Market was actively negligent. Plaintiffs are correct that the open and obvious doctrine relates to a claim sounding in premises liability, as opposed to one sounding in *ordinary* negligence. *Laier v Kitchen*, 266 Mich App 482, 484; 702 NW2d 199 (2005). A claim sounds in premises liability when the injury results from a condition on the land; however, a claim sounds in ordinary negligence when the injury results from "the overt acts of a premises owner on his or her premises." *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010).[4] To determine whether plaintiffs' claim sounds

[4] Plaintiffs' styling their claim as one arising out of "active negligence" is misleading since an invitor's liability may arise from his "active negligence" in a premises liability context. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). What plaintiff is claiming is that this is

in premises liability or negligence, we look to the substance of the complaint and the theory underlying the action rather than the labels attached to the claims by the parties. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006); *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

Here, while plaintiffs assert that their negligence allegation is sufficient to render their claim as one sounding in ordinary negligence, their second amended complaint alleges that the slip and fall resulted from an unsafe condition *on the land*. Indeed, the complaint repeatedly indicates that plaintiff fell on a pile of salt "on the sidewalk outside of the door" and "outside of the doors of the business." Thus, because plaintiff's injury arose out of a condition on the premises, the claim sounds exclusively in premises liability and the trial court properly analyzed and dismissed the claim within that framework.[5] See *Kachudas*, 486 Mich at 914.

Regardless, even assuming that plaintiffs' claim sounds in ordinary negligence, plaintiffs' claim fails because the conclusion that a pile of salt caused plaintiff's fall, let alone that Boston Market applied the salt, is based on nothing but speculation and conjecture.[6] Indeed, our review of the evidence in the light most favorable to plaintiff reveals that although the Boston Market manager joked about the amount of salt on the sidewalk after plaintiff's fall, both plaintiff and the restaurant manager testified that they did not actually see any salt on the sidewalk. Moreover, while plaintiff was adamant that she slipped on what "felt like a raised area," she admitted that she did not know what substance was in the area, describing it only as "just a pile, a small mound of sand—of salt, like kind of in a curve" and elaborated that she could "feel like rocks [sic] or something through my coat."

Certainly, to deduce from this evidence that plaintiff *may have slipped on salt* is an explanation consistent with possible conditions on the sidewalk at the time plaintiff fell. It is also equally likely that plaintiff slipped on rocks or sand according to her own testimony. Our case law, however, requires more than a mere possibility or a plausible explanation for a plaintiff to establish causation in a negligence claim. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004).

> Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation,

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an ordinary negligence claim because the injury resulted from an overt act of Boston Market. *Kachudas*, 486 Mich at 914.

[5] Plaintiffs make only a cursory challenge to the court's reliance on the open and obvious doctrine, alleging that the pile of salt constituted a special aspect because it was located in front of the only entrance to Boston Market. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001). However, even if the salt existed as plaintiff argues, she has not shown that any danger posed was unavoidable or that it posed "a uniquely high likelihood of harm or severity of harm if not avoided . . . ." *Id.* at 518-519.

[6] Of course, to prove negligence, plaintiffs must show: (1) duty, (2) breach, (3) causation, and (4) damages. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009).

> therefore, must be based on facts in evidence. And while the evidence need not negate all other possible causes, this Court has consistently required that the evidence exclude other reasonable hypotheses with a fair amount of certainty. [*Id*. at 87-88 (quotation marks and citations omitted).]

Given the foregoing, the evidence in this case hardly excludes other reasonable hypotheses of causation with a fair amount of certainty.[7]

Furthermore, even if plaintiff did slip on salt, the only evidence implicating Boston Market in placing that salt is the manager's testimony that he occasionally spread a substance like salt on the sidewalk around the restaurant. However, Boston Market was not the only entity to occasionally place salt in that area and there is no evidence that the manager placed salt on the day in question. Again, we are left with nothing more than an explanation that—although consistent with known conditions—is not deducible as a reasonable inference from the record before us. Put differently, the conclusion that the Boston Market manager placed salt on the ground where plaintiff fell is mere conjecture, and is therefore insufficient to withstand summary disposition. *Libralter Plastics, Inc*, 199 Mich App at 486.

B. METROSWEEP

We agree with the trial court's analysis that Metrosweep owed plaintiff no duty that would give rise to a negligence claim.[8] Indeed, the duty to salt the plaza sidewalks was incumbent upon Metrosweep *only* by virtue of its contract with Professional Grounds Services. And the failure to properly perform a contractual duty may only give rise to a negligence action where a duty is breached "separate and distinct from those assumed under the contract." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 461-462; 683 NW2d 587 (2004).

Plaintiffs correctly point out that Metrosweep's duty under contract would not exempt it from liability if its performance created a new hazard. *Id*. at 469, citing *Osman v Summer Green*

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[7] We note that in asserting the negligence claim against Boston Market, plaintiff makes no reference to her testimony that the EMS worker had indicated that she nearly slipped on salt upon arriving on the scene to help plaintiff. Besides the fact that it is not incumbent upon us to craft plaintiffs' arguments, this statement would be otherwise unavailing as it constitutes inadmissible hearsay (it was not an admission by a party opponent under MRE 801(d)(2)) and therefore cannot satisfy plaintiffs' burden to oppose a summary disposition motion with satisfactory evidence. *Woodman*, 280 Mich App at 135; MRE 801.

[8] Although the trial court analyzed this issue under the standards for MCR 2.116(C)(8) and (10), this purely legal question does not require us to look outside the pleadings. Our review, therefore, is subject to MCR 2.116(C)(8), which requires us to accept plaintiffs' factual allegations as true "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998) (citation omitted).

Lawn Care, Inc, 209 Mich App 703; 532 NW2d 186 (1995), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446; 592 NW2d 28 (1999). However, we cannot find that Metrosweep created a new hazard in light of our Supreme Court's ruling in *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087; 729 NW2d 225 (2007).

In that case, the plaintiff sued a snow removal company after slipping and falling on ice in a parking lot. *Mierzejewski v Torre & Bruglio, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 26, 2006 (Docket No. 269599). The plaintiff alleged that the company created a new hazard and increased the danger to her by performing its contractual obligation in such a way that the plowed snow melted into the parking lot and refroze, forming ice. Disagreeing with this Court that the snow removal company created a new hazard, our Supreme Court ruled that the company "did not owe any duty to the plaintiffs separate and distinct from the contractual promise made under its snow removal contract with the premises owner." *Mierzejewski*, 477 Mich at 1087. Plaintiffs' "new hazard" argument is nearly identical to the plaintiff's in *Mierzejewski*. Therefore, we conclude the salt did not constitute a new hazard under *Fultz*, and no separate and distinct duty exists. The trial court properly granted summary disposition and dismissed plaintiffs' claims.

Plaintiffs also claim that Metrosweep's active negligence in "over-salting" the sidewalk precluded summary disposition. Our resolution of the duty issue does not require us to address this issue, but we will for the sake of completeness. Even assuming that plaintiffs' argument sounds in negligence, it fails for the same reason it did against Boston Market: namely, whether plaintiff slipped on a pile of salt and whether Metrosweep created the alleged pile in question are each based on speculation and conjecture.

In addition to the evidence previously cited, we simply add that *both* the restaurant manager's joke about the salt as well as the EMS worker's comment that she almost slipped on salt are insufficient to sustain plaintiff's argument since both statements were inadmissible against Metrosweep.[9] To be sure, "inadmissible hearsay do[es] not satisfy [MCR 2.116(G)(3)]; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991); see also *Lenzo v Maren Engineering Corp*, 132 Mich App 362, 366; 347 NW2d 32 (1984) ("admissions of one defendant are not admissible as substantive evidence against a codefendant."). Plaintiffs do not argue otherwise, and we will not search for authority on plaintiffs' behalf. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Thus, we are left with even less evidence than presented against Boston Market on this issue, and consequently we must conclude that plaintiff has merely speculated that she slipped on a pile of salt.

And in any event, although the Boston Market manager explained that a Metrosweep truck salts the plaza, there was no evidence that this salt ended up on the sidewalk. Instead, the manager explained that the salt occasionally "smashed" into and "bounce[d] off of the restaurant

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[9] Both statements were made out of court and were offered for their truth. This is the definition of hearsay. *Merrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998); MRE 801(c).

windows." From this, it is a stretch even to hypothesize that Metrosweep laid salt in plaintiff's path on the fateful day. Consequently, plaintiffs' active negligence argument is pure speculation and conjecture.

Affirmed.

Defendants may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray