STATE OF MICHIGAN

COURT OF APPEALS

EVELYN DORIS SMALLEY and BRUCE DARWIN SMALLEY,

Plaintiffs-Appellees,

v

PIZZA CRUST COMPANY, INC.,

Defendant-Appellant.

UNPUBLISHED
November 14, 1997

No. 191340
Ingham Circuit Court
LC No. 94-077311-NO

Before: Kelly, P.J. and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment for plaintiffs in this slip and fall negligence action. At approximately midnight on February 8, 1992, Evelyn Smalley broke her left ankle as she fell while attempting to cross over a snow bank located at the curb of the public sidewalk abutting defendant's place of business. A jury awarded Smalley $28,422 in damages, and the trial court awarded plaintiffs $21,987.25 in mediation sanctions. We reverse and remand for a new trial.

Defendant argues that the trial court erred in granting plaintiffs' motion for partial summary disposition. We agree. However, we disagree with defendant's argument that the trial court erred in failing to grant summary disposition in favor of defendant upon plaintiffs' motion for partial summary disposition. Because both arguments address plaintiffs' motion for summary disposition, we analyze them together. When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, admissions, depositions, and any other documentary evidence available to it in a light most favorable to the nonmoving party. *Tranker v Figgie International, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997). We must then determine whether there exists a genuine issue of material fact on which reasonable minds could differ or whether the moving party is entitled to judgment as a matter of law. *Id.* Summary disposition is properly granted to the opposing party if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment. MCR 2.116(I)(2); *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 700; 550 NW2d 596 (1996).

In granting plaintiff's motion for partial summary disposition, the trial court found as a matter of law that defendant breached a duty of care owed to plaintiffs when it shoveled snow from the public sidewalk in front of its place of business. Duty encompasses "whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct." *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). As a general rule, property owners may not be held liable to pedestrians for injuries sustained on public sidewalks abutting their property which become hazardous because of natural accumulations of ice or snow. E.g. *Woodworth v Brenner*, 69 Mich App 277, 280; 244 NW2d 446 (1976). However, in certain circumstances, a property owner may be held liable for undertaking an affirmative act that increases the danger posed on the abutting property. See *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 132-133; 463 NW2d 442 (1990); *Devine v Al's Lounge, Inc*, 181 Mich App 117, 119; 448 NW2d 725 (1989); *Woodworth*, *supra* at 280. For example, by gratuitously shoveling an adjoining public sidewalk, the property owner voluntarily assumes the duty to exercise reasonable care in performing the act. Cf. 2 Restatement of Torts, 2d, § 323. In this case, because defendant admits to having shoveled the sidewalk, the trial court properly concluded as a matter of law that defendant owed a duty of care to plaintiffs. *Moning*, *supra* at 437.

We next turn to the question of whether, as a matter of law, defendant breached the duty of care owed to plaintiffs. A landowner whose property abuts a public sidewalk may be liable for a slip and fall injury where he or she has either (1) undertaken to remove the snow and has increased the hazard or (2) taken steps to alter the sidewalk itself, and thereby caused an unnatural or artificial accumulation of ice or snow on the sidewalk. *Devine*, *supra* at 119. Because no facts suggest that defendant altered the sidewalk's physical structure, the second of the two circumstances is not applicable here, and the focus is whether defendant's actions increased the hazard faced by pedestrians. Although an increased hazard *may* lead to the conclusion that a defendant has breached his or her duty of care, *Devine*, *supra* at 119, it does not *require* such a conclusion. This is so because conduct involving risk is not negligent unless the magnitude of the risk involved so outweighs the utility of defendant's conduct as to make the risk unreasonable. *Moning*, *supra* at 450 n 29, quoting 2 Restatement of Torts, 2d, § 291, comment b. Therefore, in order to determine as a matter of law that defendant breached a duty of care owed to plaintiffs, we must find that defendant's actions increased the hazard and that the risk posed by the increased hazard was unreasonable under the circumstances.

Generally, once a defendant's legal duty is established, the reasonableness of defendant's conduct under that standard is a question for the jury. *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992); see also *Moning*, *supra* at 433-434. In granting plaintiff's motion for partial summary disposition, the trial court concluded that reasonable minds could not differ on the question of whether defendant's actions in creating a "barrier" of snow along the curb increased the hazard faced by pedestrians stepping from the street onto the sidewalk. However, in so doing, the trial court completely disregarded the potential utility of defendant's conduct. Michigan's appellate courts have long recognized the social value advanced when property owners gratuitously undertake to shovel public sidewalks abutting their property. See, e.g., *Weidner v Goldsmith*, 353 Mich 339; 91 NW2d 283 (1953), cited with approval in *Woodworth*, *supra* at 281. In *Weidner*, the Michigan Supreme Court observed, "'[t]he general assumption is that the industry displayed by citizens removing snow after a snowfall is desirable, if not necessary.'" *Weidner*, *supra* at 342, quoting *Riccitelli v Sternfeld*,

109 NE2d 921 (1952), aff'd 115 NE2d 288 (1953). Here, defendant's actions might have decreased the hazard and inconvenience faced by pedestrians walking along the sidewalk who otherwise would have been forced to negotiate a snow-covered path. Because we think reasonable minds could differ on the question of whether defendant's actions were reasonable under the circumstances, we hold (1) that the trial court erred when it granted plaintiff's motion for partial summary disposition and (2) that defendant was not entitled to summary disposition upon plaintiff's motion. *Tranker, supra* at 11.

Defendant next argues that the trial court erred in denying its motion for summary disposition brought pursuant to MCR 2.116(C)(10). We disagree. In moving for summary disposition, defendant argued that plaintiff failed to present sufficient facts to raise a genuine issue of material fact as to the cause in fact of Smalley's injury. Generally, to establish the necessary element of cause in fact, a plaintiff must demonstrate that his or her injury would not have occurred "but for" the defendant's actions. *Skinner v Square D Company*, 445 Mich 153, 163; 516 NW2d 475 (1994). The element of cause in fact may be established by circumstantial evidence, but such proof must facilitate reasonable inferences of causation rather than mere speculation. *Id.* at 163-164. In this case, Smalley testified in her deposition that she could not say precisely what made her fall. However, she was certain she fell as she was attempting to step over a pile of snow along a curb in front of defendant's business. Based on this testimony, when considered in a light most favorable to plaintiffs, reasonable minds could differ as to whether defendant's conduct was a "but for" cause of Smalley's injury. Cf. *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977) (no genuine issue of material fact as to causation where evidence that the plaintiff tripped over a metal strip was mere conjecture). Accordingly, we hold that the trial court did not err in denying defendant's motion for summary disposition. *Tranker*, *supra* at 11.

Defendant also argues that the trial court erred in denying its motion for directed verdict with respect to the issue of causation. We disagree. When reviewing a motion for a directed verdict, this Court must consider all of the evidence in a light most favorable to the nonmoving party. *Berryman v K mart*, 193 Mich App 88, 91; 483 NW2d 642 (1992). Where the evidence is such that reasonable jurors could honestly have reached different conclusions, the trial court may not substitute its judgment for that of the jury and the motion must be denied. *Id.* In moving for a directed verdict at the close of plaintiff's proofs, defendant expressly relied on the causation argument it made in its motion for summary disposition. Because Smalley testified at trial that she fell as she was attempting to step over the pile of snow, the evidence was sufficient to submit the issue of causation to the jury. *Skinner, supra* at 163-167.

Given our disposition of this case, we need not address defendant's remaining arguments on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen