STATE OF MICHIGAN

COURT OF APPEALS

STANISA JOVANOVIC and
MARY BETH JOVANOVIC,

Plaintiffs-Appellants,

v

THOMAS STASIAK and
GAYLE STASIAK,

Defendants-Appellees.

UNPUBLISHED
March 3, 1998

No. 202152
Kent Circuit Court
LC No. 96-003893 NO

Before: Griffin, P.J., and Holbrook and Neff, JJ.

PER CURIAM.

In this premises liability case, plaintiffs appeal as of right an order granting summary disposition in favor of defendants. We affirm.

This case arises out of a slip and fall which occurred in December of 1995 at the residence of defendants. It is undisputed that the plaintiff Stanisa Jovanovic was a social guest, or licensee, of defendants on the date in question. When he arrived at defendants' home, there was a light coating of snow on the ground and additional snow was falling, adding up to an accumulation of an "inch or two" of snow during the time plaintiff was in the home. Defendants did not remove the snow or apply sand, salt, or gravel to the driveway. After plaintiff was at defendants' residence for approximately thirty minutes, the parties left to have dinner at a restaurant. Plaintiff, while walking to his car parked in defendants' driveway, slipped and fell. The accident caused plaintiff to become unconscious and required treatment for a concussion and spinal disc injury.

Plaintiffs brought suit alleging that defendants negligently maintained a driveway that they knew or should have known was "unusually slippery" when covered with ice, snow, and water. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) on the ground that they had no duty to protect their licensee from a natural accumulation of snow and ice. The trial court granted defendants' motion. Although the trial court did not articulate, and it is unclear, whether the motion was granted pursuant subrule (C)(8) or (C)(10), we affirm because of the absence of a genuine issue of

material fact on the question of causation. Plaintiffs' claim is barred by the natural accumulation doctrine.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). In deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it, MCR 2.116(G)(5), and must give the nonmoving party the benefit of every reasonable doubt. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). Although the court should be liberal in finding a genuine issue of material fact, summary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 243; 492 NW2d 512 (1992). On appeal, a trial court's grant of summary disposition will be reviewed de novo, and this Court must determine whether the moving party was entitled to judgment as a matter of law. *Allen, supra*.

The controversy in the present case centers on the well-established natural accumulation doctrine, which sets forth the general rule regarding the liability of a municipality or property owner for injuries sustained by a licensee as a result of icy conditions. The doctrine provides that a landowner does not have an obligation to a licensee to remove the natural accumulation of ice and snow from any location. *Zielinski v Szokola*, 167 Mich App 611, 615; 423 NW2d 289 (1988). The natural accumulation doctrine is subject to two exceptions. The first exception provides that liability to a licensee may attach where the property owner has taken affirmative action to alter the natural accumulation of ice and snow and, in doing so, increases the hazard of travel to the public. *Id*. To establish liability under this doctrine, a plaintiff must prove that the defendant's act of removing ice and snow introduced a new element of danger not previously present. *Id*. The second exception provides that liability may arise where a party takes affirmative steps to alter the condition of the surface itself, which in turn causes an unnatural or artificial accumulation of ice or snow on the surface. *Id*. at 617. See also, *Morrow v Boldt*, 203 Mich App 324, 327; 512 NW2d 83 (1994).

Plaintiffs do not allege that either of the two exceptions to the natural accumulation doctrine applies to the present circumstances, and we likewise find the exceptions to be inapplicable. Plaintiffs nonetheless contend that the instant case presents a "unique factual scenario" which takes it outside of the parameters of the natural accumulation doctrine. Plaintiffs assert that the distinguishing feature of this case is the fact that the driveway was "unusually slippery, *at any time*, when exposed to wet, snowy, or icy conditions." The dangerous condition, according to plaintiffs, was caused not by the mere accumulation of snow, but rather by defendants' resealing of the driveway (one year and three months prior to the accident) with a surface that had no texture or grit particles in it to provide traction. Plaintiffs maintain that the natural accumulation doctrine therefore does not negate defendants' duty to warn of this dangerous condition, and that a question of fact exists as to whether or not plaintiff's fall was attributable to the mere presence of snow as opposed to an unreasonably dangerous driveway surface.

In granting summary disposition in the present case, the trial court expressly relied on *Wright v Bradley*, unpublished opinion per curiam of the Court of Appeals issued April 26, 1996 (Docket No. 176846). In *Wright*, the plaintiff slipped on ice while walking her dog on the sidewalk in the City of

Southfield. The ice was in a depression in the sidewalk where two slabs of concrete had settled, but the pavement was not broken or cracked. This Court affirmed summary disposition in favor of the defendant city, concluding that "although there was a dip in the sidewalk, it was neither cracked nor broken and was therefore not dangerous in its original condition." The *Wright* Court cited two cases in support of its decision, *Wesley v Detroit*, 117 Mich 658; 76 NW 104 (1898), and *Hopson v Detroit*, 235 Mich 248; 209 NW 161 (1926).

In *Wesley*, the Supreme Court denied relief to a petitioner who had slipped on an inclined portion of a sidewalk that was covered with ice and snow. The Court declared,

> It [the sidewalk] was not unsafe or dangerous in its original condition. It was made unsafe solely by the accumulation of ice and snow. Sidewalks and streets must have inclines, and. . . it is settled in this State that municipalities are not liable for accidents caused by the natural accumulations of ice and snow. . . . All inclined sidewalks become dangerous for pedestrians when covered with ice. All the law requires is that the municipality shall keep them otherwise in a reasonably safe condition. [*Wesley, supra*, at 658-659.]

In *Hopson, supra*, the plaintiff was injured when, while walking on a sidewalk in the City of Detroit, she ducked to avoid an overhanging branch and slipped on ice that had formed in a depression in the sidewalk. The sidewalk had sunk about two inches in the middle, making a saucer-shaped depression, but there was no cement broken and no hole in the walk itself. The *Hopson* Court, s*upra* at 250-252, held that a verdict should have been directed for the defendant city at the close of plaintiff's proofs:

> [T]he rule obtaining in this jurisdiction places no liability for ice so forming. The rule, and the only rule, under which plaintiff could recover, is that, where two causes combine to produce an injury to a pedestrian using a sidewalk, one of the causes at least must be a defect in the walk, rendering the walk not reasonably safe for public travel *at any time.* Ice on a sidewalk, whether on level places or in depressions, constitutes no defect entailing liability. . . . There was no culpable defect in the walk.
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> "[W]herever ice or snow is the sole proximate cause of the accident, there shall be no liability, but where at the time of the accident there is any other defect to which, as a proximate cause, the accident is in part attributable, there may be a liability notwithstanding the fact that it also may be attributable in part to ice or snow. This other defect, however, is not a proximate cause . . . simply because it causes the accumulation of the ice or snow. . . . [A]ttention is to be directed to the actual physical condition of the way for the purpose of ascertaining whether there is at that time any other danger to the steps of the traveler than that arising from the presence of ice or snow. . . " [*Newton v City of Worcester*, 174 Mass 181 (54 NE 521)].

After a thorough review of the record, and viewing the evidence in a light most favorable to plaintiffs, we find that plaintiffs have failed to offer evidence from which reasonable minds could infer that plaintiff's fall was attributable to an alleged defect in the driveway. 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 of Ins Companies*, 199 Mich App 482, 486; 502 NW2d 742 (1993). In *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), the Court discussed the degree of proof necessary to establish a genuine issue of causation and emphasized that "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." The Court quoted with approval from the observation made in 57A Am Jur 2d, Negligence, § 461, p 442:

> 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 other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy whether 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].

The evidence in the instant case does not establish a reasonable likelihood of probability that plaintiff's fall was caused by a defect in the condition of the driveway, independent of the natural accumulation of ice and snow. Plaintiffs rely solely on statements made by defendants in their depositions to establish a question of fact that the driveway surface was "unusually slippery" and therefore defective. However, this proffered evidence of a defect falls short of the *Skinner* standard of threshold causation and fails to abrogate application of the natural accumulation doctrine to the present circumstances.

A thorough examination of the evidence on record demonstrates that, according to defendants' deposition testimony, the "unusually slippery" quality of the driveway depends on exposure to "wet, snowy, or icy conditions." Defendant Thomas Stasiak testified that he formed no impression that his driveway was unusually slippery until plaintiff's accident occurred. When asked if he believed from his experience that the surface was unusually slippery, he replied affirmatively. However, he concluded that "when our driveway is *wet or has any ice or snow on it*, it seems to be. . . more slippery. . . . than other driveways I've been on." (Emphasis added.) He further stated that "in my opinion, *anything that can cause the driveway to be wet* can cause it to be slippery."

Defendant Gayle Stasiak similarly testified at deposition that she had fallen on the driveway previously, approximately one year before plaintiff's fall, *when the surface was wet*. She testified that she did not recall forming an opinion that the driveway was unusually slippery before her fall, but she did opine that the driveway was unusually slippery. However, she concluded, as to plaintiff's fall, that "I

don't think if snow had fallen on gravel that he would have fallen. So together *snow and this driveway* made Stan fall." (Emphasis added.)

Mary Kooienga, defendant Gayle Stasiak's mother, testified at deposition that *when it had snow and ice on it*, defendant's driveway was more slippery than other surfaces she had encountered. Kooienga testified that it was true that rain could cause the driveway to become unusually slippery, snow and ice not being necessary for this result.

All of the above witnesses further testified that plaintiff's slip and fall could have just as likely occurred solely due to icy and snowy conditions. Moreover, defendants engaged an expert whose report expressed the opinion that defendants' driveway had a reasonably slip-resistant surface, and that a buildup of snow made it impossible to determine whether the surface below contributed to plaintiff's fall.

The deposition testimony of the lay witnesses is purely conjectural ("A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Skinner, supra*, at 164) and does not amount to a reasonable likelihood of probability that the driveway was defective, independent of natural accumulations of winter precipitation. Not only is the testimony speculative in nature, but it also indicates that the driveway is unusually slippery *only when affected by wet, snowy, or icy conditions*. The unrefuted report of defendants' expert indicates that the driveway surface was reasonably slip-resistant and that it was impossible to determine, when there was snow on the driveway, if the inherent nature of the surface contributed to the accident. Thus, according to the evidence before us, the allegedly dangerous condition exists only when the natural accumulation of winter precipitation combines with the propensity of defendants' driveway surface to maximize the slipperiness of those elements.

Plaintiffs do not allege that the driveway is defective in its original, dry condition. Plaintiffs do suggest that because rain, as well as snow and ice, also may result in a slippery surface, this renders the driveway dangerous "at any time" within the meaning of *Hopson, supra*. However, because plaintiffs do not allege that the driveway is unsafe when dry, or that the driveway is never dry and thus never safe, we disagree with plaintiffs' conclusion that the driveway is "not reasonably safe for public travel at any time." *Hopson, supra* at 250. Plaintiffs have failed to come forth with evidence that, at the time of the accident, there existed "any other danger to the steps of the traveler than that arising from the presence of ice or snow." *Id* at 252. Where, as here, the evidence "lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." *Skinner, supra* at 166-167.

In accordance with the principles set forth above in the *Wesley* and *Hopson* cases, no liability arises out of injuries resulting from otherwise safe surfaces that accentuate the slipperiness inherent in accumulations of winter precipitation. We therefore conclude that the natural accumulation doctrine obviates any duty that defendants may have owed to the licensee plaintiff.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff