STATE OF MICHIGAN

COURT OF APPEALS

CLAUDIA GERBEN,

Plaintiff-Appellee,

v

NORTHVILLE DOWNS,

Defendant-Appellant.

UNPUBLISHED

No. 201820
Wayne Circuit Court
LC No. 95-513892 NO

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

GRIBBS, J., (dissenting).

I respectfully dissent. In cases involving question of credibility, summary judgment is hardly ever appropriate. *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). I do not believe summary disposition is appropriate here.

First, I believe there was ample circumstantial evidence of proximate cause. The majority asserts that *Stefan v White*, 76 Mich App 654, 659; 257 NW2d 206 (1997), on which defendant relies, presents "substantially similar facts." I disagree. Unlike *Stefan*, where the plaintiff tripped while she was walking toward or through the door in a house, this is not a case where plaintiff presented "the mere occurrence" of a fall with nothing more. *Id* at 661. Here, unlike *Stephan*, plaintiff presented a strong circumstantial showing as to the cause of her fall.

As the trial court suggested, the presence of untouched snow and ice creates a circumstance from which the jury could infer that plaintiff slipped on the snow or ice. While plaintiff claims to suffer from memory loss that affected her deposition testimony, she clearly testified in her deposition that she "went down" while walking in two inches of snow and that the dirt parking lot had not been cleared or sanded. Plaintiff said that her right leg "went straight out." Moreover, while plaintiff did not know exactly what made her slip, it is clear from the questions and her answers at deposition that she did, indeed, "slip." In addition, plaintiff submitted evidence of statements she made to police and medical personnel that she was "just walking and slipped on either snow or ice." I do not agree that these statements are in conflict with plaintiff's deposition testimony. As the trial court reasonably found, a

jury could infer, from evidence that plaintiff's leg went out from under her while walking on accumulated snow and ice in defendant's parking lot, that plaintiff slipped on the snow or ice.

Nor do I agree that summary disposition was appropriate on the issue of duty. Defendant, as an alleged invitor, had an affirmative duty to take reasonable measures within a reasonable time after the accumulation of ice and snow to diminish the hazard of injury to plaintiff, an invitee. *Quinlivan v A & P*, 395 Mich 244, 261; 235 NW2d 732 (1975). Plaintiff testified that there were two inches of freshly fallen snow and that the snow had not been plowed or sanded. Defendant responded that it was involved in snow removal on the day of plaintiff's fall, that it had spread salt on its premises and even hired outside help for snow removal. Whether reasonable measures were taken and whether it would have been reasonable for defendant to wait until the snow stopped falling before undertaking its removal is a question for the jury. *Lundy v Groty*, 141 Mich App 757, 760; 367 NW2d 448 (1985).

I would affirm.

/s/ Roman S. Gribbs