STATE OF MICHIGAN

COURT OF APPEALS

TAMMY MEHNEY,

Plaintiff-Appellant,

v

CARL BLUMBERG, d/b/a STEVE'S LAUNDROMAT,

Defendant-Appellee.

UNPUBLISHED
January 28, 2000

No. 216733
Montcalm Circuit Court
LC No. 98-000420 NO

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition under MCR 2.116(C)(1) in favor of defendant. We reverse.

Plaintiff went to defendant's self service laundry facility for the purpose of doing her laundry. While at the laundry facility, plaintiff slipped and fell on the facility's snow-covered sidewalk and sustained injuries. Plaintiff filed a complaint against defendant asserting that defendant had a duty to maintain the premises in a reasonably safe condition; to protect invitees from unreasonable risks of injury known to defendant; to warn invitees of dangers; and to inspect the premises. Plaintiff asserted that defendant breached his duties, and as a direct and proximate result of the breach, caused plaintiff grievous bodily injury. Defendant asserted that plaintiff failed to state a cause of action upon which relief can be granted; plaintiff's own contributory negligence was a proximate cause of her injuries; defendant's employee salted and removed all ice on the date of the injury; there was no accumulation of ice; and that neither defendants nor their agents committed any act of negligence.

First, plaintiff argues that the trial court erred in holding *McQuain v Equitable Life Assurance Society of the United States*, United States District Court, ED Mich, Docket No. 96-72142, dated June 22, 1998, was controlling in the present case because the present case is a state court case and *McQuain* is a case out of the United States District Court which has no precedential value in the state courts. In *McQuain*, the plaintiff fell on a patch of ice that could not be seen at a mall parking lot. In *McQuain*, the parking lot was salted seven hours before the accident occurred. The court granted summary disposition in favor of the defendant on the basis that the plaintiff did not indicate that the

mall's procedure for removing snow was unreasonable and that the plaintiff did not cite facts why the mall should have had notice that there was a patch of ice in the parking lot. However, *McQuain* is both an unpublished case and a federal case and the instant case is a state court case. This Court is not bound in any sense to follow unpublished opinions of the Federal District Court for the Eastern District of Michigan, but may adopt that court's rationale. *Jodway v Kennametal, Inc*, 207 Mich App 622, 630-631; 525 NW2d 883 (1994). Plaintiff's status as a business invitee is not disputed as there is ample evidence in the record which indicates that plaintiff fell while in the process of emptying her vehicle of laundry and carrying it into the premises of the laundromat. In *Lundy v Groty*, 141 Mich App 757, 759-760; 367 NW2d 448 (1985), this Court stated that the duty owed by a possessor of land to a business invitee is as follows:

> A possessor of land is subject to liability to physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
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> b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> c) fails to exercise reasonable care to protect them against the danger.

This duty has been interpreted to mean that "a business invitor [is] required to take reasonable measures within a reasonable time after the accumulation of ice and snow to diminish the hazard of injury to an invitee." *Id.* at 760. In the instant case, defendant owed plaintiff a duty because defendant should have known that snow was falling on his property and that it would create a dangerous condition for his customers. *Id.* at 760. The general standard of care would require defendant to shovel, salt, sand or otherwise remove the snow from the sidewalk that his customers had to use to enter into his business. *Id.* "The specific standard of care in the instant case would be the reasonableness of defendant's actions regarding the snow." *Id.* In this case, defendant's employee testified that on the day of the accident at 5:30 a.m. she shoveled the sidewalk and used a twenty-pound bag of salt and spread it on the whole length of the sidewalk and that she then opened the doors for business and went home. She also testified that she returned to the laundry facility at 8:45 that same morning and noticed that light snow covered the sidewalk where she had previously shoveled and salted, so she shoveled and salted again. However, plaintiff testified that when she arrived at the laundromat, the entire sidewalk was covered with snow. Plaintiff also testified that at approximately 9:30 a.m. she slipped and fell on the sidewalk, and she observed ice underneath the snow, where the accident occurred. Plaintiff testified that after she fell, she saw defendant's employee go outside with a plastic pail, the same pail that the employee regularly uses to carry salt. Defendant's employee testified that after plaintiff fell, she went out to observe where plaintiff fell and she did see that there was snow on the ground and a lot of footprints in the snow, but did not observe any ice under the snow. The above testimony, therefore, raises a question as to the condition of the sidewalk at the time of the accident and whether the sidewalk was salted after the fall or before the fall. Although there was no duty to warn because the condition of

the snow accumulation on the sidewalk was obvious, the reasonableness of defendant's conduct is a question for the jury. *Id.* at 761.

Therefore, we are not persuaded that the construction placed upon a business invitor's liability to a business invitee regarding conditions of ice and snow on the walkway leading to a business invitor's premises in the *McQuain* case is correct because our prior decisions tend to support a contrary construction. *Continental Motors Corp v Muskegon Twp,* 365 Mich 191, 194; 112 NW2d 429 (1961). Therefore, the trial court erred when it held that *McQuain* was controlling in this state court case.

Second, plaintiff argues that the trial court erred when it granted summary disposition in favor of defendant because a prima facie case of notice of the hazardous conditions was established and because there were genuine issues of material fact. Plaintiff argues that defendant had notice of the hazardous conditions in that he knew his building had no gutters and was aware of previous occasions when water would drip off the roof onto the sidewalk and freeze. Plaintiff testified that after she fell, she saw ice on the sidewalk where she fell. However, defendant's employee testified that after plaintiff fell on the sidewalk, she went outside to the place where plaintiff fell and moved the snow off the ground with her foot but observed no ice under the snow. As discussed above, a possessor of land is subject to liability to physical harm caused to his invitees by a condition on the land if, but only if, he "knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees." *Lundy, supra* at 759-760. In this case, the testimony indicates that there is a question of fact as to whether there was an accumulation of ice underneath the snow which caused plaintiff to fall. Also, assuming there was ice underneath the snow, there is a question of fact as to whether it came from water dripping off the roof, a situation about which defendant had notice, or whether it was from another source, of which defendant was unaware and which defendant would not have discovered by the exercise of reasonable care. Therefore, the trial court erred when it granted summary disposition in favor of defendant because there were genuine issues of material fact. MCR 2.116(C)(10).

Further, the trial court may not make finding of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co,* 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist,* 167 Mich App 112, 121; 421 NW2d 592 (1988). In this case, the testimony of defendant's employee and that of plaintiff conflicts regarding when the sidewalk was shoveled and salted and regarding the condition of the sidewalk at the time of plaintiff's fall. Therefore, the trial court erred in granting summary disposition in favor of defendant because there is a genuine issue of fact as to what steps were taken by defendant to protect business invitees against the danger and whether the sidewalk was salted before plaintiff fell or after plaintiff fell.

We reverse.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald