STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY WILLIAMS,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF ROYAL OAK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 3, 2000

No. 211671
Oakland Circuit Court
LC No. 97-001369-NO

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

PER CURIAM.

Plaintiff appeals by right the circuit court order granting summary disposition to defendant under MCR 2.116(C)(7), for failure to establish notice of a sidewalk defect necessary to avoid governmental immunity. Defendant cross appeals from the trial court's failure to rule on its motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff brought this action alleging she tripped on a defective tree grate[1] and suffered a broken foot. Although she did not see any defect on the night she was injured, when she returned several days later she noticed a hole in a grate surrounding a tree. Plaintiff testified that she believed that she stepped in the hole because she remembered being beside the tree, which was near a coffee shop.

Asserting that this hole in the grate caused her accident, plaintiff filed suit against defendant. Defendant moved for summary disposition on grounds of governmental immunity, MCR 2.116(C)(7), and the absence of a genuine issue of material fact with regard to causation, MCR 2.116(C)(10). The trial court granted the motion on the former ground, and expressly declined to reach the latter.

[1] We question, but express no opinion regarding whether the tree grate is a "sidewalk" as defined by the highway exception to governmental immunity, MCL 691.1401(e); MSA 3.996(101)(e). See *Hatch v Grand Haven Charter Twp*, 461 Mich 457; 606 NW2d 633 (2000) and *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363; 579 NW2d 374 (1998). We note that the grant of immunity "is broad and that the statutory exceptions thereto are to be narrowly construed." *Robinson v City of Detroit*, 462 Mich 439, 455; ___ NW2d ___ (2000). However, because this issue was not raised in the lower court or on appeal, it is not preserved.

There are three ways to show notice: (1) actual notice, (2) existence of the defect for over 30 days, which establishes a conclusive presumption of notice, and (3) evidence that the city should have discovered and repaired the defect in the exercise of reasonable diligence. MCL 691.1403; MSA 3.996(103); *Beamon v Highland Park*, 85 Mich App 242, 245; 271 NW2d 187 (1978). The trial court did not err in concluding that plaintiff failed to establish any of these alternatives. In contrast, defendant presented the affidavit of its city engineer establishing that there were no prior complaints about this particular sidewalk or grate. Although the time for discovery was not complete, there was no showing that further discovery would stand a fair chance of uncovering factual support for plaintiff's position. *Bayn v Dept of Natural Resources*, 202 Mich App 66, 70; 507 NW2d 746 (1993).

Further, even assuming arguendo that summary disposition was inappropriate on this ground, we agree with defendant that plaintiff failed to present sufficient evidence to create a question of fact whether her injury actually resulted from the alleged defect in the tree grate. This Court will affirm when the trial court reaches the correct result, regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Summary disposition under MCR 2.116(C)(10) is proper only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff's posture on appeal is simply to consider it as fact that the opening in the grate caused her to twist her ankle. However, plaintiff acknowledged that she did not identify the cause of her injury when it occurred, and she conceded that did not notice the grate at all at the time. Instead, plaintiff returned days later, with no particular sense of what she might find in the area of the incident, and discovered a "hole in the grate."

The mere occurrence of a plaintiff's fall is not enough to raise an inference of negligence. *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977). 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 Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Negligence may be only be inferred from circumstantial evidence where the plaintiff is unable to prove the occurrence of a negligent act if the following elements are present:

> 1. The event must be of a kind which ordinarily does not occur in the absence of someone's negligence.
>
> 2. The event must have been caused by an agency or instrumentality within the exclusive control of the defendant.
>
> 3. The event must not have been due to any voluntary action or contribution on the part of the plaintiff.

4. Evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Stefan, supra* at 661, quoting *Gadde v Michigan Consolidated Gas Co*, 377 Mich 117, 124; 139 NW2d 722 (1966).]

In this case, pedestrians routinely take an inopportune step and suffer injury without anyone being negligent in the matter. The specific condition of the tree grate was not the only factor likely affecting plaintiff's safety as she walked; also bearing on the matter were the conditions of nearby structures, e.g., lighting, or the doings of other passersby, e.g., shoving or littering. Plaintiff's consumption of alcoholic beverages earlier in the evening, and her decision to wear shoes with heels may also have contributed to her accident. Finally, defendant has no presumptive advantage over plaintiff in identifying the cause of the latter's fall on a public street.

In her deposition, plaintiff plainly indicated that she did not identify the cause of her injury when it occurred, that her companion at the time had no recollection of the incident, and that she did not know any of the other potential witnesses she could produce. A trial court may bind a party opposing summary disposition to any factual concessions that party made by way of deposition or affidavit. *Stefan, supra* at 659. Plaintiff presented no evidence of a causal link between her accident and the hole in the grate that she discovered days later, beyond her speculation that there was a logical connection between the hole and the nature of her accident. Plaintiff testified at her deposition that at the time she tripped she was wearing "clunky," 1 to 1-1/2-inch heeled shoes. Whether plaintiff tripped on the normal openings of the tree grate or on the sprinkler opening is pure speculation and conjecture. In this regard, our Supreme Court has stated:

> "There must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess . . . ."[Citations Omitted. (*Skinner v Square D Co*,445 Mich 153, 166; 516 NW2d 475 (1994), quoting *Daignewau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957)).]

See also *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 339-343; 608 NW2d 66 (2000). Accordingly, summary disposition should have been granted under 2.116(C)(10).

Affirmed.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin