STATE OF MICHIGAN

COURT OF APPEALS

FRANK HOFFMAN,

Plaintiff-Appellant,

v

CITY OF WARREN and SAMUEL JETT,

Defendants-Appellees.

UNPUBLISHED
February 26, 2002

No. 227222
Macomb Circuit Court
LC No. 98-2407 NO

Before: Whitbeck, C.J., and Markey and K. F. Kelly, JJ.

PER CURIAM.

In this slip and fall action, plaintiff appeals as of right the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts and Procedural History

On December 17, 1997, plaintiff went for a walk in the neighborhood, as was his routine. The weather was cold and clear. However, as he approached defendant Samuel Jett's residence, he noticed that the length of the sidewalk was covered with snow. According to plaintiff, the sidewalk in front of the Jett residence was filled with thick ruts of ice resulting from footprints and tire tracks that thawed out, refroze and then snowed over.

Because the area was covered with snow, plaintiff did not notice the ice and proceeded across the driveway area. As he walked, he noticed that this area was slippery. Plaintiff moved farther to his right towards the edge of the sidewalk where the sidewalk meets the driveway apron, because it appeared a little smoother. There is a one inch gap between the sidewalk and the driveway. As plaintiff moved to his right, his foot slipped and he fell. As a result of his fall, plaintiff sustained injury to his left hip.

Plaintiff filed suit alleging that the City of Warren breached its duty to keep the sidewalk reasonably safe and convenient for public travel by failing to repair defects[1] in the sidewalk

[1] Plaintiff submitted the portion of sidewalk in front of the Jett residence was defective in that it was heaved higher and lower in several directions causing a place for water to accumulate and freeze. Plaintiff also cited that the sidewalk at issue is separated by more than one inch, forms a (continued…)

which allowed water to pond and freeze in the area between Jett's driveway and the sidewalk. Plaintiff further alleged that defendant Jett altered the otherwise natural accumulation of ice and snow by continuously driving over that area thus causing deep ruts of ice to form on that portion of the sidewalk. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court found the natural accumulation doctrine barred plaintiff's claim and granted both defendants' respective motions. Plaintiff appeals of right. We affirm.

II. Standard of Review

This Court reviews de novo a grant or denial of a motion for summary disposition. *Altairi v Alhaj*, 235 Mich App 626, 628; 599 NW2d 537 (1999). A summary disposition motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of plaintiff's complaint. *Id*. In ruling upon a (C)(10) motion, the trial court must consider the "pleadings, affidavits, admissions, and other documentary evidence submitted by the parties and, giving the benefit of reasonable doubt to the nonmoving party, must determine whether a record could be developed leaving an issue on which reasonable minds might differ." *Id*. To survive a (C)(10) motion for summary disposition, the nonmoving party must set forth specific facts, beyond the pleadings, demonstrating that a genuine, material, factual issue exists for resolution by the trier of fact. *Id*. at 629.

III. The Natural Accumulation Doctrine

As an initial matter, we note that the general rule governing the liability of a municipality or a property owner for injuries sustained by a plaintiff[2] occasioned by icy conditions is the well established natural accumulation doctrine. *Zielinski v Szokola*, 167 Mich App 611, 615; 423 NW2d 289 (1988) overruled in part on other grounds in *Robinson v Detroit (On Remand)*, 231 Mich App 361, 363; 586 NW2d 116 (1998). This doctrine provides that "neither a municipality nor a landowner has an obligation to a licensee to remove the natural accumulation of ice or snow from any location." *Id*.

There are, however, two exceptions to this general rule. First, where the municipality or property owner takes affirmative action to alter the natural accumulation of ice and snow thus increasing the hazard of travel to the public, liability may attach. *Id.* For purposes of this exception, a plaintiff must demonstrate that a defendant's act "introduced a new element of danger not previously present or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by natural accumulation." *Skogman v Chippewa County Road Com'n*, 221 Mich App 351, 354; 561 NW2d 503 (1997). (Citations omitted.)

(…continued)

lip, and has a grade change that exceeds five percent all of which violate the City's own standards rendering the underlying sidewalk "defective."

[2] On appeal, plaintiff contends that the trial court misidentified him as a licensee. Plaintiff argues that as he traveled the public sidewalks, he was an invitee of the City of Warren and as such, owed a more stringent duty. We do not need to reach this issue. The plaintiff's status is inconsequential considering that the duty owed by the municipality to either a licensee or an invitee is identical and the natural accumulation doctrine applies with equal force to both. See generally *Gillen v Martini*, 31 Mich App 685; 188 NW2d 43 (1971).

Alternatively, liability may attach where a defendant takes affirmative action to alter the underlying condition of the sidewalk itself which then causes an artificial or unnatural accumulation of ice. *Zielinski, supra* at 617. In the case at bar, plaintiff does not contend that the municipality or defendant Jett altered the underlying condition of the portion of sidewalk currently at issue.

A. The City of Warren's Liability

Plaintiff maintains that the portion of the sidewalk upon which plaintiff fell was defective as violative of the City's own standards delineating the acceptable limits for existing sidewalks and that defendant City of Warren breached its duty to repair these defects[3]. Plaintiff further contends that the City's failure to maintain its sidewalks pursuant to its own standards caused an unnatural accumulation of ice and snow which proximately caused plaintiff's injuries. We disagree.

In a very recent case, our Supreme Court reaffirmed the "well-settled" principle that governmental agencies, while engaging in governmental functions, are immune from tort liability absent a specific exception. *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). The exception implicated in the case at bar is the "highway exception" to governmental immunity which provides in pertinent part that:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. (MCL 691.1402(1)).

For purposes of the statute, the term "highway" includes public sidewalks. MCL 691.1401(e). According to MCL 691.1402(1), the duty imposed upon a municipality is to "maintain" sidewalks "in reasonable repair and in a condition reasonably safe and fit for travel." Plaintiff argued that the failure of the City to maintain its sidewalks in accord with its own standards caused the unnatural accumulation of ice and snow to form on the sidewalk at the driveway. The trial court found that although the sidewalk in front of the Jett residence was "not completely even," it was not "substantially damaged" either making it reasonably safe for public travel. In granting defendant City's motion for summary disposition, the trial court found that plaintiff failed to produce evidence demonstrating that the City either took affirmative steps to alter the natural accumulation of ice and snow or otherwise altered the condition of the

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[3] Plaintiff argues that the portion of sidewalk at issue does not comport with the City of Warren's own standards for existing sidewalks thus rendering it "defective" in the following respects: 1) the sidewalk had an elevation change of 5 degrees; 2) the sidewalk had "gapping" of more than one inch; 3) the sidewalk's cross-slope did not permit surface drainage toward the street but permitted water to accumulate at the driveway; and 4) the sidewalk had a one inch change in elevation.

underlying sidewalk itself sufficient to circumvent application of the natural accumulation doctrine. We agree.

As our Supreme found in Court *Haliw, supra*, the plaintiff can not "demonstrate that it was the *combination* of ice *and* a defect in the sidewalk that cause[d] her to slip and fall." *Haliw, supra* at 310. (Emphasis in original.) To that end, the Court opined:

> Simply put, a plaintiff cannot recover in a claim against a governmental agency where the sole proximate cause of the slip and fall is the natural accumulation of ice or snow. *This is true even where the ice or snow naturally accumulates in a portion of the [sidewalk] that was otherwise not `reasonably safe and convenient for public travel.'* (Citation omitted.) Rather, there must exist the combination of the ice or snow and the defect that, in tandem, proximately causes the slip and fall. *Id*. at 311. (Emphasis added.)

Thus, according to the rule set forth in *Haliw*, even accepting plaintiff's claim that the sidewalk at issue was not "reasonably safe and convenient for public travel," unless plaintiff can establish that the defect in the sidewalk *combined* with the accumulation of ice and snow caused plaintiff to slip and fall, summary disposition in favor of the municipality is proper.

In the instant case, a review of plaintiff's deposition testimony demonstrates that the presence of ice and snow on the sidewalk caused plaintiff to slip, fall and sustain injury. Counsel inquired whether the apparent rise in the sidewalk "had anything to do with" plaintiff's fall to which plaintiff responded, "I could not see it. [I] could not make a statement because it was covered with snow and ice; ice and snow . . . ." Thereafter, in response to counsel's question as to why plaintiff veered slightly to his right, plaintiff responded "[b]ecause in the sidewalk there were all footprints in there and they were all frozen. That's why you had such an uneven walk on that piece." According to plaintiff's own testimony, the accumulation of the ice and snow created the treacherous condition on that stretch of the sidewalk which caused plaintiff to slip and fall. Indeed, the plaintiff himself testified that the "uneven walk" was occasioned by ice formations that naturally accumulated in that region of the sidewalk as opposed to an underlying defect. The mere presence of ice alone "which naturally accumulates and which is the sole proximate cause of a slip and fall [does not] satisf[y] the remaining elements of the negligence analysis employed in actions against governmental agencies." *Id.* at 312.

Similarly, a review of the record does not reveal any evidence indicating that defendant municipality acted affirmatively to alter the natural accumulation of ice and snow upon the public sidewalk or otherwise altered the condition of the sidewalk itself sufficient to remove this case from within the purview of the natural accumulation doctrine. Additionally, a review of the record does not contain evidence to demonstrate that the combination of the alleged defect and the accumulation of ice and snow together proximately caused plaintiff's slip and fall to permit plaintiff to prevail "against an otherwise immune municipality." *Id*. The evidence plaintiff submitted did not establish that the sidewalk where plaintiff fell was cracked or broken, nor did it indicate that the height differential between the slabs *where plaintiff fell* exceeded one inch. The evidence submitted demonstrates a one inch height differential between the sidewalk and the driveway apron as opposed to between the slabs of concrete forming the sidewalk. The facts contained in the record here before us, establish that although the sidewalk permitted the accumulation of ice, as a factual matter, `no other danger to the steps of the traveler than that

arising from the presence of the ice . . .' existed. *Id*. (Citation omitted.) Considering the documentary evidence presented, in a light most favorable to plaintiff, fails to reveal a genuine issue of material fact sufficient to withstand summary disposition. Accordingly, we find that the trial court did not err by granting defendant City of Warren summary disposition in accord with MCR 2.116(C)(10).

B. Defendant Samuel Jett's Liability

Plaintiff argues next that defendant Jett created an unnatural accumulation of ice and snow thus increasing the travel hazard to the public by driving through the snow and creating "a rutting of snow on the sidewalk" which, according to plaintiff, is an affirmative action that alters the natural accumulation of ice and snow thus defeating application of the natural accumulation doctrine as a bar to recovery. We disagree.

It is a well settled principle in Michigan jurisprudence that a landowner does not have an affirmative duty to remove the natural accumulation of ice and snow from a public sidewalk. *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984). Conversely, a landowner *does* have an affirmative duty *not* to take affirmative actions that would alter the natural accumulation of ice and snow in such a way as to increase the hazard of travel to the public. *Zielinski, supra* at 615. As one court instructed, "[t]o be liable under the increased hazard theory, the defendant's act of removing ice and snow must have introduced a new element of danger not previously present, or created an obstacle to travel, such as a snow bank, that *exceeds the inconvenience posed by the natural accumulation*." *Skogman, supra* at 354. (Emphasis added.)

A review of the record in the case sub judice establishes that plaintiff failed to come forth with documentary evidence to establish that defendant Jett, by driving through the snow, "increased the travel hazard to the public," *Morrow v Boldt*, 203 Mich App 324, 327; 512 NW2d 83 (1994) beyond that which is ordinarily present as a result of the natural accumulation of ice and snow during the winter months in Michigan. See *Skogman, supra* at 354 (stating that `the interference with travel must be unusual or exceptional, that is, different in character from conditions ordinarily and generally brought about by winter weather in a given locality.'). (Citation omitted.) The alleged "rutting" effect created by defendant Jett's ingress and egress from his driveway does not definitively establish that Jett created an impediment to the public's travel that "exceed[ed] the inconvenience posed by a natural accumulation" *Id.* sufficient to defeat the bar to recovery imposed by application of the natural accumulation doctrine.

A review of the applicable caselaw reveals that the term "unnatural accumulation" contemplates the creation of an artificial condition such as a snow bank, hump, or some other condition which makes travel along the highway at issue more onerous. See eg, *Johnson v City of Marquette*, 154 Mich 50; 117 NW 658 (1908) (stating that an unnatural accumulation of snow and ice obtained where the shoveling of the snow from the railroad track produced a "hump" on either side of the track which increased the height of the bank on each side.); *Hampton v Master Products, Inc*, 84 Mich App 767, 773; 270 NW2d 514 (1978) (holding that the trier of fact could reasonably infer that the village was responsible for "unnatural accumulation" of snow where the municipality plowed the snow in such a way as to create a "drift" across the sidewalk.)

In the instant case, there is no evidence that defendant Jett undertook to remove the ice and snow from the sidewalk thus producing an "unnatural" or artificial condition such as a snow

bank, hump, drift or ridge. Plaintiff contends that the "unnatural" accumulation derived from Jett repeatedly driving over the snow creating ruts of ice to form on the sidewalk. Driving over existing snow and ice does not transform an otherwise natural accumulation into an unnatural impediment. Indeed, in *Elam v Marine*, 116 Mich App 140, 142-143; 321 NW2d 870 (1982) we stated "[i]n Michigan, the result of a change in the natural condition because of others traveling over the snow does not give rise to a duty on the part of another to maintain that sidewalk free from ice and snow." Jett's conduct in compacting the snow on the public sidewalk by driving into and out of his driveway did not transform the natural accumulation of ice and snow on the sidewalk into an artificial or otherwise "unnatural" condition as that term is defined by the applicable caselaw. On the facts herein presented, the trial court did not err by determining that the ice and snow on the sidewalk was a natural accumulation. Upon de novo review of the record, we find that plaintiff failed to create genuine issues of material fact upon which reasonable minds could differ sufficient to preclude judgment as a matter of law. Accordingly, the trial court did not err by granting defendants' motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly