STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE JAKUBIEC and RONALD JAKUBIEC,

Plaintiffs-Appellees,

v

VEI FRIENDLY, L.L.C., d/b/a MERRI-BOWL LANES,

Defendant-Appellant.

UNPUBLISHED
July 8, 2008

No. 273579
Wayne Circuit Court
LC No. 05-520486-NO

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

FORT HOOD, J. (*dissenting*).

I respectfully dissent.

Defendant alleged that the trial court erred in denying its motion for summary disposition because plaintiff's claim that her fall was caused by the crack in the approach floorboard was based on speculation and conjecture. I disagree. Review of the deposition testimony of plaintiff revealed that she was an avid bowler since 1959. Plaintiff was a league bowler with a locker at defendant's establishment where she stored her ball and her shoes. On the day of the incident in question, plaintiff retrieved her ball and shoes before proceeding to the lane. Before beginning to bowl, plaintiff would wipe down her shoes. At this time, plaintiff did not notice any defect in her shoes, and the shoes were clean. Specifically, she did not notice any separation involving the sole of the shoe. Before bowling, plaintiff did not specifically inspect the approach, but casually looked it over, and everything appeared to be normal. Plaintiff had bowled a complete game without incident. During the second game, plaintiff left one pin standing, the ten pin, and had to "cross-alley" bowl from the left side of the approach. As she took her steps, plaintiff's left shoe caught on something, and it caused her to pitch forward. She tried to hop on one foot to regain her balance, but twisted, falling on her right wrist and her rear end.

After the incident, plaintiff inspected her left shoe and found that the sole was coming away from part of the shoe at the tip where it was slightly torn. Additionally, plaintiff learned of a cracked board on the approach. A fellow bowler who wiped down the approach with a towel found the "divot" or crack in the wood. The crack in the board was located when threads from the towel were snagged by the crack. Plaintiff opined that the slide of her leather shoe on the approach could not have created the crack. Plaintiff noted that the hard approach and the leather shoe were designed to slide up to the lane. She opined that her shoe had not caused the crack in

the board, but rather, the cracked board caused her shoe to rip at the tip.[1] Plaintiff also testified that no activity occurred during the bowling to cause the board to crack. Specifically, no one dropped a ball on the approach, and no one jumped up and down on the approach. Plaintiff opined that, like the towel, if the approach had been mopped before the team bowled, the mopping would have detected the cracked board, similar to the manner in which the towel threads were caught on the cracked board.

In addition to the testimony of plaintiff, the deposition of the bowling manager and head mechanic were taken. The bowling manager opined that it was possible that one side of the approach would not be used until a bowler had to cross alley bowl. Therefore, right-handed bowlers could play an entire game of bowling without the use of the left side of the approach. Moreover, when the bowling manager went to the approach to examine the location of the fall by plaintiff, she observed a splinter of cracked board sticking up "a half an inch or less." With regard to the testimony of the head mechanic, he testified that it was procedure to wipe down the approach with a mop in between leagues. He opined that if the mopping over the floor on the bowling approach was done correctly, the mop fibers would catch on the crack. Additionally, the head mechanic of the bowling alley opined that a cracked board would not happen on its own. Rather, it would take an extraordinary amount of force to cause the board to crack. The head mechanic could not recall hearing any loud crack or other loud sound. He opined that if something had caused the board to crack that morning, he would have heard it.

To establish a prima facie case of negligence, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, that includes cause in fact and legal or proximate cause; and (4) damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007); *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). Duty is any obligation owed by the defendant to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). To establish causation, plaintiff must introduce evidence for the jury to conclude that it is more likely than not that, but for defendant's conduct, the injuries would not have occurred. *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997). The plaintiff cannot rely on the mere possibility of causation; that is, when the matter remains an issue of pure speculation or conjecture, plaintiff cannot succeed in her claim. *Id*. at 648.

Contrary to defendant's assertion, plaintiff has presented circumstantial evidence that the defect in the floor was present before she bowled. Circumstantial evidence will suffice to establish a breach of the duty by defendant to plaintiff that was the proximate cause of plaintiff's injury. *Gadde v Mich Consolidated Gas Co*, 377 Mich 117, 126; 139 NW2d 722 (1966); *Bolton v Detroit*, 10 Mich App 589, 595; 157 NW2d 313 (1968) ("Negligence may be inferred from the

[1] Plaintiff could not testify if there had been any alterations to her shoes following the incident. Specifically, she testified that representatives of defendant took possession of her left shoe for six to eight weeks after the incident. It was left there because of the representation that they were going to repair the left shoe that had been damaged. Plaintiff did not know if they performed repairs on the shoe.

surrounding facts and circumstances where they are such as to remove the case from surmise and conjecture and place it within the field of legitimate inferences deduced from the established facts." (emphasis deleted.))

In the present case, defendant's employees[2] acknowledged that it would take a great deal of force to cause a board in the approach to crack. Additionally, defendant's employees admitted that a raised crack in the approach board would have been detected by correctly mopping the area in question. Further, defendant's manager testified that the board crack was raised less than one-half of an inch, and that a right-handed bowler would not cross-alley bowl for an entire game. Therefore, it was possible that plaintiff's team could bowl for a period of time without detecting or causing the cracked board. Additionally, plaintiff maintained her bowling ball and shoes in a locker at defendant's facility. Plaintiff cleaned her shoes before she put them on and did not notice any rip in the tip or separation from the sole of the shoe. There was no loud noise during the game to indicate that a ball fell on the approach with such force as to cause the board to crack. Moreover, defendant's head mechanic acknowledged that he was present and would have heard of an incident that caused the board to crack. In light of the above, plaintiff's claim is not based on speculation and conjecture, but circumstantial evidence.

Defendant next alleges that plaintiff failed to present evidence that defendant had actual or constructive notice of the existence of the defect. See *Derbanian v S & C Snowplowing, Inc*, 249 Mich App 695, 706; 644 NW2d 779 (2002). On the contrary, plaintiff presented the testimony of defendant's head mechanic. He acknowledged that a great deal of force would occur to cause the board to crack, and he did not hear any such sound that morning. Thus, according to defendant's representative, the defect at issue would have been detected because of the great deal of force involved. Further, the head mechanic opined that mopping, if performed correctly, would have detected the cracked board at issue that was raised above the floor. He testified that mopping occurred that morning and in between leagues. Nonetheless, there was no detection of the crack. In light of the deposition testimony given by defendant's representatives, defendant would have had notice of the defect because the nature of the impact required to cause the board to crack would have been readily perceivable. Thus, even if defendant's employees did not perceive the sound of the board cracking, defendant's employees would have been on constructive notice of the defect if proper mopping procedures had been followed. In light of the above, the trial court did not err in concluding that factual issues precluded summary disposition.

I would affirm.

/s/ Karen M. Fort Hood

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[2] It should be noted that defendant did not present any expert testimony to address the maintenance of bowling alleys and the force required to cause a bowling approach or lane to crack. Moreover, the only testimony presented on the issue, that of defendant's employees, supported plaintiff.