STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL KOLE and JOY KOLE,

Plaintiffs-Appellants,

v

NAGLE PAVING COMPANY and PINEHURST BUILDING COMPANY, L.L.C.,

Defendants-Appellees,

and

BRAD BYARSKI,

Defendant.

UNPUBLISHED
March 1, 2012

No. 299352
Wayne Circuit Court
LC No. 08-120226-NZ

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition in favor of defendants Nagle Paving Company ("Nagle") and Pinehurst Building Company, L.L.C. ("Pinehurst") (collectively "defendants"), pursuant to MCR 2.116(C)(10) in this action alleging trespass, nuisance, and negligence. We reverse and remand for further proceedings.

In April 2007, plaintiffs' basement flooded with eight to ten inches of sewage. The parties do not dispute that the flooding was the result of a sewer system backup that was caused by excessive debris, including large chunks of asphalt, in a nearby manhole. Plaintiffs alleged that defendant Nagle was responsible for depositing the asphalt in the manhole in 2005 when it performed a paving project ("the Cobblestone project") for defendant Pinehurst, a subdivision developer. Nagle denied responsibility. The trial court granted summary disposition to defendants on the basis that plaintiffs failed to sufficiently demonstrate that the asphalt was deposited by Nagle. The court concluded that plaintiffs' evidence that Nagle was the responsible party was too speculative.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider

the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Plaintiffs first argue that, when evaluating defendants' motion for summary disposition, it is improper to consider the affidavit of John Blaszak, a project engineer for Nagle. We disagree. Plaintiffs cite *Peterfish v Frantz*, 168 Mich App 43, 54; 424 NW2d 25 (1988), for the proposition that an affidavit should be disregarded if it conflicts with the deposition testimony of the witness. The rule as stated in that case and in others, however, applies only where a witness who has given damaging deposition testimony attempts to create an issue of fact by later submitting an affidavit that contradicts the prior testimony. *Id.* at 54-55; see also *Palazzola v Karmazin Prods Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). In this case, Blaszak's affidavit was provided before his deposition. The affidavit was not offered to contradict deposition testimony, and the deposition testimony explicated the subject matter of the affidavit. Therefore, Blaszak's affidavit, as with all the other submitted documentary evidence, *must* be considered in a light most favorable to plaintiffs to determine whether there is a genuine issue of material fact. MCR 2.116(G)(5); *Wilson*, 474 Mich at 166.

We agree with plaintiffs, however, that the circumstantial evidence of Nagle's role in the deposit of the asphalt debris goes beyond speculation and conjecture, and the evidence submitted is sufficient to create a genuine issue of material fact to withstand defendants' motion for summary disposition.

In general, the trier of fact should decide causation unless there is no genuine issue of material fact, in which case, the issue may be decided as a matter of law by the court. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). Causation may be established by circumstantial evidence, but such proof must "facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). In *Skinner*, the Supreme Court observed:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [*Skinner*, 445 Mich at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

The submitted evidence showed that the manhole in question, as of 2003, was clear of any debris. On May 4, 2007, Mario Pinard and another employee, Joseph Strickland, assisted in

clearing the manhole of debris, which consisted of asphalt, gravel, brick, concrete, and "normal toilet paper and your sediments that come down the line." The majority of the material in the hole was asphalt, which was large enough that it could not be carried up. According to Pinard, "saw-cuts" were visible on the asphalt. The brick that was in the debris was "manhole brick," which is solid, as opposed to "house brick," which has holes in it. According to plaintiff Michael Kole, the debris filled the back of a half-ton pickup truck and had an estimated weight of 1,000 pounds. The largest piece of asphalt that was removed was approximately 18 inches by 24 inches by 8 inches.

Pinard believed that the material was deposited into the hole when the manhole structure, made of concrete and brick, was hit during excavation. According to Pinard, that is "usually how material ends up down in the hole." Pinard had seen that happen at least 12 times in the past 23 years. Pinard drove past the area every day. The only time he could recall a paving operation in the area of the manhole since he cleaned it in 2003 was the paving of Hoeft Road for the Cobblestone project. That project was the only source that Pinard could determine for the material in the manhole. Strickland also believed that the source of the debris was road construction during the Cobblestone project. He saw that work as it was being done and did not recall any other construction in the area dealing with asphalt.

Blaszak, a project engineer for Nagle, testified that in his five years with Nagle, he had seen heavy machinery strike the top of a manhole during excavation between 10 and 20 times. He agreed that it was "common" to see a heavy-machine operator push debris into a sewer or manhole. He explained, "It's construction. I mean there's things that get buried, get filled up, with a dozer, excavator, loaders." He agreed that a heavy-machine operator could do it by accident without even knowing.

With respect to the Cobblestone project in 2005, Blaszak's affidavit stated that Pinehurst retained Nagle to pave Hoeft Road. Nagle worked on the road from approximately July to November 2005. Hoeft Road had an existing asphalt approach to Huron River Drive. Before laying the new asphalt, Nagle "saw cut" and removed that existing asphalt, loaded it in a truck, and hauled it to a recycling plant. Although there was a manhole in the asphalt approach area, it did not need to be adjusted, and it did not interfere with the project. Blaszak was on site daily. Blaszak averred in his affidavit that Nagle did not remove the manhole cover at any time, and "Nagle did not dispose of any asphalt debris or other refuse by dumping it onto the manhole."

However, in his deposition, Blaszak provided more detail about the work and admitted certain limits to his knowledge about what occurred. He testified that all of the saw-cutting and removal of the asphalt occurred on the same day, July 12, 2005. But Blaszak also acknowledged that he was present at the site for only approximately three hours that day and left before the work was complete. He did not personally see all of the asphalt removed from the site, so he did not know with certainty whether the manhole cover was removed when he was not present or whether asphalt debris got inside the manhole. After acknowledging that heavy machinery does occasionally strike manholes causing damage from which asphalt debris can enter, he was unable to rule out that scenario in this case.

Plaintiffs' expert, Dr. Tarik Najib, a professional engineer with a Ph.D. in civil engineering and construction management, averred that he had concluded by a preponderance of

the evidence that Nagle "was responsible for allowing the asphalt and related debris to enter the aforesaid manhole cover and cause[d] the sewer [backup]." He averred that collisions between heavy machinery and manhole structures commonly occur during excavations and it is "not uncommon for asphalt and other debris to be pushed into a manhole by accident." He averred that, because of the weight of the manhole cover and the weight and volume of the chunks of debris, deposit of the material by anyone without heavy equipment was highly unlikely. Nagle was the only entity to excavate large amounts of asphalt near the manhole from 2003 until the time of the sewer backup in 2007, and it would have been in a position to have the powerful equipment that could have delivered the loose asphalt in the volume found in the manhole. He excluded sources of the debris other than Nagle within a reasonable degree of certainty, explaining that Nagle "had the clear means and opportunity to deposit such large amounts of debris into the manhole; the only time there were large amounts of asphalt debris near that manhole was during the time Nagle was excavating it and they possessed the heavy machinery capable of delivering it into the manhole." Dr. Najib further noted that the saw-cutting exhibited on the asphalt debris supported his opinion because Nagle had saw-cut at the site and a report showed that saw-cutting was planned around the manhole cover. Dr. Najib explained that debris blockage at the bottom of manholes commonly does not cause an immediate backup, which is what he believed happened in plaintiffs' situation.

We conclude that the evidence, when viewed in a light most favorable to plaintiffs, *Wilson*, 474 Mich at 166, created a genuine issue of material fact whether Nagle was responsible for the asphalt debris in the manhole. Defendants correctly note that Blaszak's testimony shows that the manhole cover, which weighed between 100 and 200 pounds, could have been moved by an individual without special equipment. Defendants argued at the hearing below that "any full grown man can take the lid off of that sewer with either a screw driver or a tire jack and can put asphalt down there." In proffering this unknown vandal theory, however, defendants ignore the quantity of debris and the size of the asphalt chunks. Although an individual may be able to move a 100-to-200 pound manhole cover, none of the witnesses indicated that an individual without equipment would be capable of depositing the quantity of the material into the manhole. Moreover, when viewing, in a light most favorable to plaintiffs, the fact that the asphalt found at the bottom of the manhole had signs that it had been "saw cut" and the fact that there were "manhole" bricks present in the debris, it allows for a reasonable inference that the asphalt was part of the asphalt that was "saw cut" in the Cobblestone project. Furthermore, the evidence established that all of the saw-cutting and removal of the asphalt for the Cobblestone project occurred *on the same day*. Defendants do not explain how a third party could have entered the active work site and have placed that much material down the manhole without anyone from Nagle noticing.

We acknowledge that a jury should not be required to guess where the evidence lends equal support to contradictory hypotheses. *Skinner*, 445 Mich at 164-167. In the present case, however, the only plausible hypothesis that was suggested by the witnesses is that the material was inadvertently deposited in the manhole during road reconstruction, which Pinard and Blaszak had seen happen on numerous other occasions. The only project that occurred in that area after Pinard cleaned the manhole in 2003 was the Cobblestone project conducted by Nagle. Although Blaszak denied personal knowledge of any incident during the project and denied seeing damage to the manhole structure, the proofs created a question of fact for the jury.

Defendants maintain that Dr. Najib's testimony is inadmissible because it merely addresses a matter within the ken of common knowledge, i.e., that Nagle had the means and opportunity to deposit the asphalt during the road construction project. But Dr. Najib's explanation of the "cycle of blow-out and reblockage" to explain the delay between the road construction project and the flooding is not a matter of common knowledge. In any event, the existence of a genuine issue of material fact does not depend on the admissibility of Dr. Najib's expert opinion. The trial court will be in a better position to exercise its gatekeeper role with respect to Dr. Najib's expert testimony if and when the issue arises on remand. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

Defendants also contend that, even if a question of fact exists with respect to Nagle's liability, the trial court's summary disposition decision in favor of Pinehurst should still be affirmed. Defendants rely on *Reeves v K-Mart Corp*, 229 Mich App 466, 471; 582 NW2d 841 (1998), for the proposition that "[a]n employer is generally not liable for an independent contractor's intentional torts or negligent conduct." In this case, however, plaintiffs alleged that Pinehurst was liable for nuisance because it "owned or controlled the property from which the nuisance arose." "Liability for nuisance may be imposed where (1) the defendant has created the nuisance, (2) the defendant owned or controlled the property from which the nuisance arose, or (3) the defendant employed another to do work that he knew was likely to create a nuisance." *Traver Lakes Cmty Maint Ass'n v Douglas Co*, 224 Mich App 335, 344-345; 568 NW2d 847 (1997). Because defendants' motion for summary disposition did not address plaintiffs' theory of liability, defendants did not show that Pinehurst was entitled to summary disposition regardless of Nagle's role in the deposit of the asphalt debris.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Although plaintiffs successfully argued that summary disposition was not appropriate, plaintiffs were not successful in their challenge of Blaszak's affidavit. Thus, no costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio