

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN C. DOUGHERTY,

Plaintiff-Appellant,

v

NYKEL-SOMERSET MANAGEMENT, LLC,  
and SOMERSET APARTMENTS, LLC,

Defendants-Appellees.

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UNPUBLISHED  
September 4, 2012

No. 303910  
Oakland Circuit Court  
LC No. 2010-111126-NO

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In this suit for damages arising from a slip and fall, plaintiff John C. Dougherty appeals by right the trial court's order granting defendant Nykel-Somerset Management, LLC and defendant Somerset Apartments, LLC's motion for summary disposition. On appeal, we conclude that Somerset failed to present evidence that, even if left un rebutted, would establish that it had the right to summary disposition in its favor. Because Somerset failed to establish a ground for dismissing any of Dougherty's claims, the trial court erred when it granted Somerset's motion as to each claim. For these reasons, we reverse and remand for further proceedings.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

Dougherty lived in an apartment on property owned by Somerset Apartments and managed by Nykel-Somerset Management (collectively Somerset). He testified at his deposition that in February 2008 he left his apartment with his wife in the midafternoon. When he left that day, the sidewalk that he routinely used to get to his car was clear. He said that he went to the mall with his wife and that they returned at approximately 7 p.m. Dougherty returned to his apartment by the same sidewalk. At some point while walking along that sidewalk, he slipped on a patch of ice, fell, and was injured.

Dougherty sued Somerset for damages arising from his fall in June 2010. Dougherty alleged that he fell on black ice, which "could not be detected upon casual observation and inspection" because the area of the sidewalk in question was "inadequately lit." He further alleged that he did not notice the ice until after he fell. Dougherty alleged that he was entitled to recover under four separate theories: ordinary negligence, breach of the contractual duty imposed under MCL 554.139(1)(a), breach of implied or quasi contract, and nuisance.

In February 2011, Somerset moved for summary disposition under MCR 2.116(C)(10). It alleged that it was entitled to summary disposition because Dougherty could not establish that the sidewalk's condition was unreasonably dangerous or that any breach of duty on its part caused his injuries. It further alleged that Dougherty should have noticed the ice and avoided it and that Dougherty could not establish that the sidewalk was not fit for its intended purpose under MCL 554.139.

The trial court determined that Somerset was entitled to summary disposition and dismissed all of Dougherty's claims in May 2011.

This appeal followed.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

Dougherty argues on appeal that the trial court erred when it determined that there were no genuine issues of material fact on his claims and dismissed them under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

### B. MOTIONS UNDER MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A party may be entitled to summary disposition if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . . ." MCR 2.116(C)(10). The moving party has the initial burden to demonstrate that it is entitled to summary disposition. *Barnard Mfg*, 285 Mich App at 369. It must specifically identify the issues to which it believes there is no genuine issue as to any material fact. *Id.*, quoting MCR 2.116(G)(4). And it must support its motion with affidavits, depositions, admissions, or other documentary evidence that, if left un rebutted, would establish its right to summary disposition. *Barnard Mfg*, 285 Mich App at 369-370. If it properly supports its motion, the burden shifts to the non-moving party to establish that a disputed fact exists. *Id.* at 370, citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). However, "[i]f the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion." *Barnard Mfg*, 285 Mich App at 370.

In this case, the transcript for the hearing on Somerset's motion for summary disposition is apparently missing. However, because this Court reviews such motions de novo to determine whether the moving party was entitled to relief, it is unnecessary for this Court to consider the trial court's analysis. Further, there is no indication that the trial court considered evidence or issues beyond that raised by the parties in their briefs on the motion for summary disposition. See *id.* at 380 n 8. As such, we shall examine anew the parties' submissions to the trial court on Somerset's motion and determine whether Somerset was entitled to relief under MCR 2.116(C)(10).

### C. COMMON LAW CLAIMS

In its motion, Somerset first argued that it was entitled to summary disposition on Dougherty's common law claims because Dougherty had no evidence that the alleged condition was "unreasonably dangerous." In support of this position, it noted that Dougherty testified that he did not complain about the ice to Somerset and that he knew of no other person who had fallen or complained to Somerset.<sup>1</sup> Somerset also wrote in its brief in support of its motion that it "avers [that] it has never received any complaint about the area from anyone before [Dougherty] allegedly fell."<sup>2</sup> It then concluded that "one would expect a series of complaints or reports of accidents from tenants if an unreasonably dangerous condition existed on their sidewalk that they use everyday."

Somerset's allegations and evidence were insufficient to establish that there was no factual dispute with regard to the sidewalk's condition. We agree that a plaintiff alleging a premises liability claim has the burden to prove that the premises had a dangerous condition and that the condition posed an unreasonable *risk of harm*. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000) (listing the elements of the duty owed by the possessors of land to their invitees). Plaintiffs do not, however, have to prove in every case that the condition was "unreasonably dangerous"; a plaintiff may do so to establish an exception to the rule that a premises possessor has no duty to rectify or warn about an open and obvious danger. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001).

Moreover, assuming that Somerset was merely referring to the unreasonableness of the risk, Somerset had to present substantively admissible evidence that, if believed, established that the ice and lighting at issue did not pose an unreasonable risk of harm in order to warrant summary disposition under this theory. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 624-625; 537 NW2d 185 (1995). But Somerset did not present any evidence concerning the conditions actually at issue; it merely presented evidence that Dougherty did not complain about the ice before his fall and was not *aware* of anyone else who had complained about the ice or fell on the ice. This evidence might permit an inference that the ice had not existed for a lengthy period of time, but it does not permit an inference that the risk posed by the ice was reasonable. Likewise, this evidence provides no insight as to the state of the lighting, which Dougherty alleged to have contributed to his fall. Because Somerset failed to present any evidence to support its position that the dangerous conditions actually at issue—the ice and poor lighting—did not in fact pose

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<sup>1</sup> Although Somerset identified this evidence as coming from Dougherty's deposition, it did not identify the location of that testimony with the required specificity. See *Barnard Mfg*, 285 Mich App at 380. Nevertheless, for purposes of this appeal, we shall assume that the trial court searched through Dougherty's deposition and considered the testimony. *Id.* at 380 n 8.

<sup>2</sup> Somerset did not attach an affidavit to its motion or identify an existing affidavit that was already in the record to support this claim. Merely stating that a party "avers" that a fact is true is insufficient to actually establish that as a fact. See MCR 2.116(G)(3); MCR 2.116(G)(4); MCR 2.116(G)(6); MCR 2.119(B). Therefore, we cannot consider this statement. *Barnard Mfg*, 285 Mich App at 380-381.

an unreasonable risk, it was not entitled to summary disposition on this basis. *Barnard Mfg*, 285 Mich App at 370.

Somerset also argued that it was entitled to summary disposition of Dougherty's common law claims because it did not have "a sufficient time to notice and fully correct" the conditions at issue. A premises possessor's duty extends only to those hazardous conditions about which it knows or that it would discover in the exercise of reasonable care. *Stitt*, 462 Mich at 597. A party may, however, establish notice by presenting evidence that the hazard has existed for a sufficient length of time that the premises possessor should have had knowledge of it. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).<sup>3</sup>

In support of its motion, Somerset cited Dougherty's testimony that he did not have any problem walking the path when he left his apartment some five hours before his return at approximately 7 p.m. He also repeatedly stated that he did not know when the ice formed and did not remember whether or when it might have snowed. Considering the evidence in the light most favorable to Dougherty, see *Maiden*, 461 Mich at 120, a reasonable jury could infer that the ice formed sometime after Dougherty left, but before he returned at 7 p.m. But this is not enough to establish that the ice existed for a sufficient length of time that Somerset should be deemed to have notice of it. The ice might conceivably have formed just minutes before Dougherty's return and the jury would have to speculate about the exact time that it formed in order to impute knowledge to Somerset, which it may not do. See *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994) (stating that a plaintiff's evidence must support reasonable inferences, not mere speculation).

Nevertheless, although Somerset's evidence showed that it might not have had notice about the ice hazard, Somerset failed to address the state of the lighting for the sidewalk in its motion. Dougherty alleged that he did not see the ice because—in part—the lighting was inadequate; thus, even if Somerset's evidence established that it did not know about the ice and could not have discovered the existence of the ice in the exercise of reasonable care, it would not be entitled to summary disposition on the ground that it did not have notice of the hazardous condition. See *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 401-402; 571

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<sup>3</sup> Somerset argued that, because the fall occurred after regular business hours, it necessarily could not have remedied the icy condition because it would have had to summon the maintenance crew back to the premises. Although a person who enters onto a merchant's property after regular business hours might not be an invitee, a tenant remains an invitee even when the tenant uses common areas after regular business hours. And Somerset's duty to its invitees, therefore, continued to 7:00 p.m., the time of Dougherty's fall. It would be for the jury to determine whether the arrangements that Somerset made to handle the accumulation of snow and ice after hours were reasonable. See *Moning v Alfonso*, 400 Mich 425, 438; 254 NW2d 759 (1977) ("While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including . . . whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable.").

NW2d 530 (1997) (noting that there may be more than one proximate cause of an injury and stating that when “a number of factors contribute to produce an injury, one actor’s negligence will be considered a proximate cause of the harm if it was a substantial factor in producing the injury.”). Somerset could still be liable if it knew or should have known about the poor lighting and the lighting played a substantial factor in Dougherty’s fall.

Dougherty submitted his wife’s affidavit in response to Somerset’s motion. In her affidavit, she stated that it snowed in the morning and evening and that the temperatures got progressively colder throughout the day. She also averred that she viewed the walkway where her husband fell the next morning and noticed that it was covered with black ice. Finally, she stated that she was with her husband at the time of his fall and that the ice was not noticeable because it was dark “and the only light in the area at that time was a single light located in the shade of a large evergreen tree.” Dougherty also testified that the only light in the area did not light the sidewalk because it was weak—not much more than a 60 or 100 watt light—and was obscured by an evergreen tree.

From this evidence, a reasonable jury could infer that precipitation coupled with falling temperatures throughout the day caused ice to form in the evening hours. In addition, the evidence that the only light was weak and obscured by a large evergreen tree permits an inference that Somerset either created the poor lighting condition by placing an inadequate light source in the shade of a tree or should have known that the light source had become inadequate as a result of the tree’s growth over time. See *Clark*, 465 Mich at 419 (stating that a premises possessor is liable for harms caused by a dangerous condition that he or she created or where the hazard has existed for a sufficient length of time that he or she should have had knowledge of it); *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 66-67; 299 NW 807 (1941) (“Defendant could not by its own act create a hazardous condition and then demand that plaintiff, who was injured as a result thereof, prove it had knowledge of such condition. Knowledge of the alleged hazardous condition created by defendant itself is inferred.”). Moreover, Somerset was on notice that, in the event that ice formed, its tenants might be unable to see the ice on casual inspection because of the poor lighting. See *Keech v Clements*, 303 Mich 69, 74; 5 NW2d 570 (1942) (stating that the premises possessor was assumed to be aware of the poor lighting in its vestibule and assumed to know that snow would get tracked into the vestibule and pose a danger in such a darkened space). As such, if Somerset had notice that its lighting was inadequate to illuminate the sidewalk, it could be liable for any harms suffered by its tenants as a result, notwithstanding that it had not yet become aware of the specific patch of ice at issue. Consequently, there was a question of fact as to whether Somerset had actual notice of the defective conditions at issue or had sufficient time to discover the defective conditions.

Somerset also argued that Dougherty’s common law claims were barred under the open and obvious danger doctrine. Under that doctrine, a premises possessor generally has no duty to rectify or warn about dangers that are so obvious that an invitee can be expected to discover them. *Lugo*, 464 Mich at 516. A danger is open and obvious if an ordinary user of average intelligence would notice the danger on casual inspection. *Novotney v Burger King Corp*, 198 Mich App 470, 474; 499 NW2d 379 (1993).

Here, there was a clear question of fact as to whether Dougherty could have noticed the hazards at issue on casual inspection. Dougherty testified that he did not see the ice that he slipped on until after his fall and that he could not see it because night had fallen and there was inadequate lighting. Similarly, his wife averred that the ice could not be seen because it was dark and the only light was obscured by a large evergreen tree. Therefore, Somerset was not entitled to the dismissal of Dougherty's common law negligence claim on this ground either.

Somerset failed to establish that there was no genuine issue as to any material fact with regard to Dougherty's ordinary negligence claim. Therefore, the trial court erred when it dismissed that claim.

Somerset similarly failed to establish that it was entitled to summary disposition of Dougherty's nuisance claim. Somerset argued—in its reply brief—that it was not aware of a single case where a court allowed a claim premised on black ice to establish a nuisance in fact. Somerset had the initial burden to establish that it was entitled to the dismissal of Dougherty's nuisance claim and this bald assertion was inadequate to establish that right. *Barnard Mfg*, 285 Mich App at 369-370. In addition, Somerset argued in passing that the open and obvious danger doctrine barred *all* Dougherty's common law claims, but failed to specifically address Dougherty's nuisance claim. Even if this were sufficient to challenge the viability of Dougherty's nuisance claim and even if the open and obvious danger doctrine applied to nuisances in fact, for the reasons already noted, there is a question of fact as to whether the danger at issue was open and obvious. Therefore, the trial court erred to the extent that it granted summary disposition in favor of Somerset on Dougherty's nuisance claim as well.<sup>4</sup>

#### D. STATUTORY DUTY

Somerset also argued in its brief in support of its motion for summary disposition that there was no evidence that it breached its duty under MCL 554.139. Under that statute, a lessor covenants in every lease that “the premises and all common areas are fit for the use intended by the parties” and that it will “keep the premises in reasonable repair.” MCL 554.139(1). Somerset contended that a transient condition, such as ice, cannot render a sidewalk unfit under MCL 554.139(1)(a). However, Somerset entirely failed to address whether the failure to maintain proper lighting for the sidewalk rendered it unfit for use. Because Somerset did not present evidence that the sidewalk was fit for its intended use even with allegedly inadequate lighting conditions, Dougherty had no duty to respond to this claim and the trial court should have denied the motion. *Barnard Mfg*, 285 Mich App at 370.

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<sup>4</sup> We do not mean to suggest that Dougherty's nuisance claim is viable. We have merely recognized that Somerset failed to support its motion for dismissal as required by our court rules. As such, the trial court's decision to dismiss that claim was premature. Nothing within this opinion should be read to preclude Somerset from making a renewed—properly supported—motion for summary disposition, which might then establish its right to relief.

In any event, Dougherty presented evidence that established that the lighting was so inadequate that it made it difficult for an ordinary user to discover dangerous conditions on the sidewalk when it is dark. From this, a reasonable jury could find that Somerset breached its duty to maintain the sidewalk in a condition fit for its intended use. Consequently, there was a question of fact as to the fitness of the sidewalk and Somerset was not entitled to summary disposition of this claim. MCR 2.116(C)(10).

#### E. PROXIMATE CAUSE

Finally, Somerset argued that Dougherty could not establish that Somerset's acts or omissions proximately caused Dougherty's injuries. Specifically, Somerset argued that the evidence showed that the ice "could have formed for any number of reasons . . . without any negligence by defendants." That is, Somerset appears to have argued that Dougherty had to present evidence that Somerset contributed to the ice's formation. Somerset also related that the evidence showed—without actually citing any evidence—that Dougherty did not know where the ice came from or how long it had been there. Hence, Somerset maintained, Dougherty could not show that Somerset engaged in a negligent act that was a substantial factor in bringing about Dougherty's injuries. Contrary to Somerset's implied argument, a plaintiff does not have to show that the premises possessor's acts or omissions contributed to the accumulation of the snow or ice; a premises possessor remains liable for harms caused by its failure to mitigate the danger posed by natural accumulations of snow and ice. See *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 260-261; 235 NW2d 732 (1975) ("[W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation.")<sup>5</sup>

Moreover, as already explained, there was sufficient evidence to establish a question of fact as to whether Somerset knew or should have known about the inadequate lighting and it was undisputed that it did nothing to rectify that condition. As such, there was evidence that it breached its duty to take reasonable measures to rectify the hazard posed by a poorly lit sidewalk in winter. *Stitt*, 462 Mich at 597. And it is foreseeable that Somerset's failure to provide adequate lighting on its sidewalk might cause an invitee—such as Dougherty—to slip, fall, and be injured by an unseen hazard, such as ice. Accordingly, a reasonable jury could find that Somerset's acts or omissions proximately caused Dougherty's injuries. *Skinner*, 445 Mich at 163. Somerset also failed to establish that it was entitled to summary disposition on this basis as well.

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<sup>5</sup> Our Supreme Court has never overruled *Quinlivan*. Instead, it has clarified that the duty stated in *Quinlivan* "must be understood in light of this Court's subsequent decisions in *Bertrand*[, 449 Mich 606 (1995),] and *Lugo*[, 464 Mich 512 (2001)]." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 333 n 13; 683 NW2d 573 (2004).

### III. CONCLUSION

After reviewing the arguments and evidence that Somerset proffered in support of its motion for summary disposition, we conclude that Somerset failed to establish that there was no genuine issues as to any material facts on any of Dougherty's claims. As such, the trial court erred when it granted Somerset's motion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Dougherty may tax his costs. MCR 7.219(A).

/s/ Michael J. Kelly