

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

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JOHN R. ROGOSZEWSKI,

Plaintiff-Appellee,

v

STATE LANES INC, d/b/a STARDUST LANES,

Defendant-Appellant.

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UNPUBLISHED

May 4, 2006

No. 263876

Saginaw Circuit Court

LC No. 04-051215-NO

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In this premises liability case, defendant appeals by leave granted the trial court's order denying its motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On the night of September 20, 2002, plaintiff broke his right ankle when he slipped and fell at defendant's bowling alley. The accident occurred during defendant's Friday night "Rock 'N Bowl" event, where people would bowl to dimmed lights and loud music. The event started at midnight, one hour after the regular open bowling ended, and continued until approximately 2:30 a.m. Plaintiff and his girlfriend met some of her friends at approximately 11:45 p.m., and rented two adjacent lanes. Plaintiff testified that he had finished bowling one game of ten frames and was two to three frames into his second game when he decided that he was not satisfied with his current method of approach, and moved to a different area of the approach. He slipped on his next approach and broke his right leg above the ankle.

Plaintiff filed suit, alleging that defendant was negligent in maintaining the premises or in creating the hazard. Plaintiff denied slipping because he crossed the foul line and theorized that oil from a lane oiling machine previously used by defendant's employees to condition the lane had dripped onto the approach to the lane he was using and created the slippery condition which caused him to fall and break his leg. Alternatively, he maintained that a prior bowler had tracked the oil onto the approach prior to his rental of the lane.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff failed to present any evidence that defendant was aware of or created any slip hazard in the approach to the lane. The trial court found that plaintiff had not proven that the oily substance was on the lane approach for a time period long enough for defendant's employees to discover it, or that defendant was responsible for the condition. The trial court denied

defendant's motion for summary disposition, however, because it found that a disputed issue of material fact existed due to differing testimony as to whether plaintiff slipped on the approach portion of the lane or past the foul line.

A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition under MCR 2.116(C)(10) should be granted where the affidavits or other documentary evidence show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). To avoid summary disposition under MCR 2.116(C)(10) the party opposing the motion must show that a genuine issue of fact exists for trial. *Id.* at 455-456 n 2; MCR 2.116(G)(4). We evaluate the trial court's decision "by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). Accordingly, on the issue of notice, a premises owner is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees, or, if otherwise caused, was known to the premises owner, or has existed a sufficient length of time that he should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). While negligence may be established by circumstantial evidence, the circumstances must be such to "take the case out of the realm of conjecture and within the field of legitimate inferences from established facts . . ." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979).

Taking as true plaintiff's assertion on appeal that he did not cross the foul line at the time of his fall, we agree with the trial court's underlying decision; namely, that plaintiff failed to present sufficient evidence of notice. Plaintiff asserts the alleged patch of oil upon which he slipped was either caused by defendant's employees or occurred long before he and his friends began bowling. However, plaintiff's argument relies on speculation and conjecture. For example, plaintiff has never presented anything to show that he did, in fact, slip on oil, rather than any other liquid that could have been deposited in the approach lane by a myriad of different sources. In fact, he has not shown that he slipped on any foreign substance at all.

In addition, even if plaintiff slipped on oil, he has not presented anything to suggest that it is more likely that the oil was left on the lane for a lengthy period of time rather than, for example, deposited on his shoe as he bowled, or moved about the bowling alley. Moreover, even were we to accept plaintiff's explanation that he slipped on oil deposited in the approach portion of the lane, he has failed to establish with any degree of certainty when the oil was deposited. He did not incontrovertibly maintain that he and his girlfriend were the only persons in his party bowling on the lane. Even if we were to assume that to be the case, plaintiff also did not

inconvertibly maintain that he never stepped beyond the fault line during the previous game or games that he bowled.

In cases where a plaintiff asserts that a defendant had constructive knowledge of a condition based upon the length of time it existed, our Supreme Court and this Court have rejected theoretical explanations that are unsupported by a reasonable inference. See, e.g., *Serinto v Borman Food Stores*, 380 Mich 637, 644; 158 NW2d 485 (1968); *McCune v Meijer, Inc*, 156 Mich App 561, 563; 402 NW2d 6 (1986). Here, while plaintiff has presented one theory of the circumstances that led to his accident, he has failed to eliminate other possibilities sufficiently to “take the case out of the realm of conjecture.” *Whitmore, supra* at 9.

Plaintiff attempts to counter defendant’s arguments by relying on the doctrine of *res ipsa loquitor* or “circumstantial evidence of negligence” to show that he need not have direct evidence of the exact cause or time of the oil spill to survive defendant’s motion for summary disposition. However, plaintiff’s arguments are not persuasive under these circumstances. Under the doctrine of *res ipsa loquitor*, an inference of negligence can arise when the plaintiff’s injury: (1) ordinarily would not have occurred in the absence of negligence, (2) was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) was not due to any voluntary action or contribution of the plaintiff. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193-194; 540 NW2d 297 (1995). Plaintiff’s argument fails because he cannot show that the instrumentality that allegedly caused his fall, the bowling lane approach, was under defendant’s exclusive control at, or even near, the time he fell. Plaintiff admitted that he and his companions had been bowling for approximately an hour before his fall occurred. While plaintiff did not recall traveling over the foul line at some point, this could have occurred. In addition, plaintiff fails to meet the threshold requirement of *res ipsa loquitor* that the injury be one that ordinarily does not occur in the absence of negligence. Contrary to plaintiff’s assertions, people do slip and fall in the absence of negligence. Thus, plaintiff cannot establish a presumption of negligence under the doctrine of *res ipsa loquitor*.

Plaintiff has presented no admissible evidence to show that defendant’s employees caused the allegedly slippery condition on the lane, or had notice of any unsafe condition, so as to support a claim for premises liability. We reverse the trial court’s decision and grant summary disposition to defendant.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot