

Harold E. Williams, as the personal representative of the Estate of Arnetia Williams, and Beverly Stamper (collectively, Williams) appeal the grant of partial summary judgment to the Fayette County Board of Commissioners and the Fayette County Highway Department (Fayette County) in Williams' lawsuit against Fayette County. Williams raises the following issues:

- I Did the trial court err in concluding that Fayette County was immune, under Ind. Code 34-4-16.5-3(3), for negligent failure to make their roads reasonably safe for motorists despite notice of the hazardously icy condition of the road and opportunity to remedy that condition?
- II Did the trial court err in concluding that Fayette County, despite notice of the hazardously icy condition of their road and opportunity to remedy the condition, owed the appellants no private duty to exercise reasonable care to remedy that condition?

We affirm.

This case was resolved by summary judgment. Our standard of review is well-established. The reviewing court faces the same issues that were before the trial court and follows the same process. Greathouse v. Armstrong (1993), Ind., 616 N.E.2d 364, 366. Although the party appealing from the grant of summary judgment has the burden of persuading the court that the grant of summary judgment was erroneous, the reviewing court carefully scrutinizes the trial court's decision to assure that the party against whom summary judgment was entered was not improperly prevented from having its day in court. *Id.*

Summary judgment is appropriate only if the pleadings and evidence sanctioned by Indiana Trial Rule 56(C) show 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'

Even if the facts are undisputed, summary judgment is not proper if those undisputed facts 'give rise to conflicting inferences which would alter the outcome.' Bochnowski v. Peoples Federal Sav. & Loan Ass'n (1991), Ind., 571 N.E.2d 282, 285. The burden is on the moving party to prove the non-existence of a genuine issue of material fact. Oelling v. Rao (1992), Ind., 593 N.E.2d 189, 190. If the movant sustains this burden, the opponent may not rest upon the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. T.R. 56(E). If there is any doubt, the motion should be resolved in favor of the party opposing the motion. Oelling, 593 N.E.2d at 190.

Mullin v. Municipal City of South Bend, 639 N.E.2d 278, 280-281 (Ind. 1994).

The evidence reveals that ice accumulated overnight on a bridge in Fayette County, Indiana. At about 5:30 a.m. the next day, Arnetia Williams drove her car onto the bridge. Because of the ice, she lost control of the car, which then collided with another vehicle. Arnetia Williams died from injuries received in the accident. Beverly Stamper, a passenger in the car, sustained injuries in the crash. Stamper and the personal representative of Williams eventually sued Fayette County for negligence with a claim that "their damages were caused by the negligence of the County in breach of its duty to make roads safe for travelers after it had notice of a hazardous condition and opportunity to remedy it."

The trial court granted partial summary judgment to Fayette County. The trial court based its decision, in part, upon the Indiana Tort Claims Act, which states:

A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from:

* * *

(3) the temporary condition of a public thoroughfare which results from the weather,

Ind. Code 34-4-16.5-3. The trial court concluded that no genuine issue of material fact existed on the question of whether the ice on the bridge was a temporary condition which had resulted from the weather.

Williams claims that the trial court should not have granted summary judgment because a genuine issue of material fact still exists for the jury to resolve. Williams quotes the following:

In Walton v. Ramp (1980), Ind.App., 407 N.E.2d 1189, we held that I.C. 34-4-16.5-3 is a codification of a governmental entity's common law duty to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel. Under the common law, a governmental entity is not generally liable for injuries caused by defects in sidewalks and streets due to natural accumulation of snow and ice. Id.; City of South Bend v. Fink (1966), 139 Ind.App. 282, 219 N.E.2d 441. However, a city could be held liable under the common law for failure to remove snow and ice if it could be shown that the snow and ice were an obstruction to travel and that the city had an opportunity to remove the snow and ice. Ewald v. City of South Bend (1938), 104 Ind.App. 679, 12 N.E.2d 995. Reflecting these common law principles, I.C. 34-4-16.5-3(3) provides immunity for temporary conditions caused by the weather, but does not provide for immunity when the condition is permanent or not caused by the weather.

Van Bree v. Harrison County, 584 N.E.2d 1114, 1117 (Ind. Ct. App. 1992). Williams contends that Fayette County breached its common law duty to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel. Williams claims the designated evidentiary matter supports the inference that the ice was an obstruction to travel and that the city had an opportunity to remove it.

This Court has described the extent of the common law duty mentioned above, as follows:

The general rule, as to the liability of cities for injuries caused by the presence of snow or ice on the sidewalks thereof, as gathered from the best reasoned decisions seems to be, that while a city is not liable for injuries arising from a general slippery condition of a sidewalk made so from an accumulation of snow or ice through natural causes, nevertheless liability may exist *where such snow or ice has been so changed in form from its original condition as to become an obstruction to travel* by reason of being rough and uneven.

City of Linton v. Jones, 75 Ind.App. 320, 322, 130 N.E. 541, 542 (1920) (emphasis added).

The slippery condition of a thoroughfare arguably demands less attention from a city than does

a sidewalk, but we nonetheless consider the above description of the common law an accurate statement of the law as it relates to the bridge in question.

Thus, if the snow or ice is not shown to have so changed from its natural condition as to have become an obstruction to travel, then a city cannot be held liable under the common law for failure to remove it. If, in addition to the above, the snow or ice constitutes a temporary condition of a public thoroughfare which resulted from the weather, then a city obtains immunity under the Indiana Tort Claims Act.

In the present case, Williams has neither claimed nor shown that the accumulation of ice on the bridge so changed from its natural condition as to have become an obstruction to travel. At most, Williams has demonstrated that the ice was slick, which is the same condition it held when first deposited there.

Williams cites Ewald v. City of South Bend, 104 Ind.App. 679, 12 N.E.2d 995 (1938), in support of the claim that Fayette County breached its common law duty to maintain the bridge. There, however, we concluded that the trial court had not erred when it had sustained the demur to a complaint. The complaint had alleged that motor vehicles had cut ruts and depressions into the ice at an intersection thereby changing the surface and condition of the ice when it refroze. *Id.* We concluded that:

There are no allegations in this complaint to the effect that any snow or ice had been cast upon the street except from natural causes, nor are there allegations that the snow and ice on said street was in any other than natural formations except such change as was made by ordinary vehicular traffic.

Id. at 684, 12 N.E.2d at 997. In the present case, Williams has identified nothing from which one could infer that the ice on the bridge was in any state other than its natural formation.

Moreover, Williams has not even alleged that any vehicular traffic changed the ice, which was not enough of an allegation in the Ewald case to survive a demur to the complaint. See also, Johnson v. City of Evansville, 95 Ind.App. 417, 180 N.E. 600 (1932), trans. denied, (total lack of any allegations that the snow and ice was in any different form than it was when placed there by nature, except for such change as was made by pedestrians walking in it when it was slushing and freezing in such condition thereafter). Therefore, in the present case, the evidence does not support the inference that the ice became an obstruction.

Williams also cites City of South Bend v. Fink, 139 Ind.App. 282, 219 N.E.2d 441 (1966). There, we concluded that the evidence was sufficient for the jury to have inferred that the condition of the street was not due to the natural accumulation of snow and ice. Id. at 286, 219 N.E.2d at 443-444. The evidence showed that the city had designated the street in question as a play street and that ice and snow had become thick and full of ruts two to three inches deep as a result of children sliding on the street. Id. We observe that the evidence there supported an inference that the accumulation of ice had so changed from its natural condition to have become an obstruction. In the present case, Williams has produced no evidence which would support such an inference.

Further, in Walton v. Ramp, 407 N.E.2d 1189 (Ind. Ct. App. 1980), we concluded that the disposal of water by an adjacent landowner onto the highway, causing an icy slick spot when it was cold, was not a natural accumulation or a temporary condition resulting from the weather. Id. at 1191. Again, however, in the present case, Williams has produced no evidence from which one could infer that the condition of the ice on the bridge was anything other than a natural accumulation.

Finally, Williams relies heavily upon the decision in Van Bree, 584 N.E.2d 1114, as set out above. There, we affirmed the actions of the trial court when it eliminated a claim that the county had negligently maintained a road by not removing snow and ice from the roadway. Id. Although the "jury could reasonably have inferred that the road had become defective or unsafe from the testimony ... that the road was too slick to travel," there was "no evidence that the ice was caused by anything other than natural accumulation of snow." Id. at 1118. Likewise, in the present case, there is no evidence that the ice was caused by anything other than a natural accumulation. Again, the evidence does not support the inference that the ice became an obstruction.

Also, Williams attempts to distinguish the case of Leinbach v. State, 587 N.E.2d 733 (Ind. Ct. App. 1992), from the present case. There, the decedent lost control of his vehicle on an icy overpass, and the ice had resulted from freezing rain which had begun to fall shortly before the accident. Id. at 734. This Court determined that, under the facts, there could be no doubt that the icy condition of the overpass was a 'temporary condition of a public thoroughfare which results from weather' under the Indiana Tort Claims Act. Id. at 735. The case provides no indication that the ice was anything other than a natural accumulation or that the ice had so changed from its natural condition as to have become an obstruction. Williams claims that the decision in Leinbach is erroneous because it makes "clear that notice and opportunity [are] not relevant to the existence of immunity." To the contrary, the case is consistent with the view that notice and opportunity to remove snow and ice need not be considered until after a demonstration that the snow or ice has been so changed in form from its original condition as

to have become an obstruction to travel. Here, Williams has made no such demonstration and therefore notice and opportunity need not be addressed.

Thus, Williams has identified nothing which supports the inference that the condition of the ice on the bridge was anything other than a natural and unchanged accumulation deposited there as a result of the weather. In other words, Williams has produced no evidence which supports the inference that the ice on the bridge constituted an obstruction to travel. Therefore, Williams has identified no genuine issue of material fact on the question of breach of common law duty, private or otherwise.

Further, Williams has produced nothing which supports the inference that the condition of the ice on the bridge was anything other than temporary so as to take his claims outside the coverage of the Indiana Tort Claims Act. Therefore, Williams has identified no genuine issue of material fact on the question of whether Fayette County was entitled to immunity.

For the reasons stated, the trial court properly granted partial summary judgment due to the absence of a common law duty and the application of the Indiana Tort Claims Act. We therefore affirm the judgment of the trial court.

Judgment affirmed.

BAKER, J., and CHEZEM, J., concur.