STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1704

Thomas Rosen,
Appellant,

Susan Weir,
Plaintiff,

vs.

Edina Public Schools-Independent School District #273,
Respondent.

Filed April 28, 2014
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge
Concurring in part, dissenting in part, Johnson, Judge

Hennepin County District Court
File No. 27-CV-12-19489

James R. Behrenbrinker, Minneapolis, Minnesota (for appellant)

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Considered and decided by Johnson, Presiding Judge; Cleary, Chief Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Chief Judge

Appellant Thomas Rosen sustained injuries after slipping on ice while exiting the Edina Community Center. He commenced this action, alleging that his injuries resulted from respondent's negligent maintenance of the stairway where he fell. The district court granted summary judgment for respondent based on the mere-slipperiness rule. Appellant challenges that decision and the denial of his own motion for partial summary judgment. Because genuine issues of material fact exist with respect to the application of the mere-slipperiness rule, we reverse the grant of respondent's motion for summary judgment, affirm the denial of appellant's motion for partial summary judgment, and remand for further proceedings consistent with this opinion.

F A C T S

Respondent Edina Public Schools-Independent School District #273 owns and operates the Edina Community Center (the ECC). The ECC is a relatively large facility, with numerous entrances and exits. Respondent employs a custodial staff responsible for the inspection, maintenance, and repair of the building and surrounding property. The ECC provides various programs and rents its facilities to public, private, nonprofit, and for-profit organizations. So long as an organization's program complies with school district policies and pays a fee, it is allowed to rent the ECC's facilities. Different organizations have different priority in reserving the ECC and pay different hourly rates.

"City Associations and Edina Nonprofit/Not Charging" groups have highest priority and pay the lowest rental fees. "Commercial or For-Profit Organizations" have the lowest priority and pay the highest hourly rates.

On January 28, 2012, appellant brought his daughter to a ballet class offered at the ECC. As appellant exited the ECC, stepping a few feet out of the building, he slipped and fell on ice located on a concrete stairway. Due to the fall, appellant fractured his elbow and lost consciousness. A woman who exited the building with appellant when the accident occurred noticed that there were several patches of clear ice on the steps. There was no salt or sand on the stairway and no warning cones or signs had been posted near the steps to warn individuals of the ice. The morning that appellant was injured, respondent's custodial groundskeeper was responsible for removing snow and applying sand or salt as needed. The groundskeeper testified that he could not recall if the steps needed salt that morning, or if he applied salt to the steps. He was able to confirm that no warning cones or signs had been placed near the stairs.

Above the entryway where appellant's accident occurred is a large, metal overhang that partially covers the landing between the doors to the ECC and the stairway. Respondent's building supervisor testified that since September 2009, he has been aware that snow melts and drips from the overhang onto the steps below. And in August 2011, respondent applied a non-slip texture to the surface of the steps in an attempt to increase safety. The woman who witnessed appellant's accident visited the area later that same

day and noticed that water was dripping from the overhang onto the steps where appellant had fallen. Weather reports from that time indicate that the temperature on January 27th had been 36 degrees, but at the time of appellant's accident on January 28th, the temperature had dropped below the freezing point, to 24 degrees.

Appellant brought suit alleging that respondent negligently maintained the stairway where he slipped, and that he suffered injuries as a result. The district court dismissed appellant's action, granting respondent's summary-judgment motion. The district court determined that respondent was a government entity, and as such, was immune from liability under the mere-slipperiness rule. The district court rejected appellant's argument that even though the mere-slipperiness rule appeared to apply, genuine issues of material fact existed as to whether exceptions to that rule made it inapplicable in this instance. Based on its determination that the mere-slipperiness rule precluded appellant from recovery, the district court also denied appellant's motion for partial summary judgment on his negligence claim. This appeal followed.

D E C I S I O N

A district court's summary-judgment decision is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The role of an appellate court when reviewing a grant of summary judgment "is to determine whether there are any genuine issues of material fact and whether the [district] court erred in its application of the law." *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn.

1992). The appellate court may not weigh the evidence or make factual determinations, but it must consider the evidence in the light most favorable to the nonmoving party. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. The party moving for summary judgment has the burden to show that summary judgment is appropriate. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). "[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Negligence is the failure to exercise the care that persons of ordinary prudence would exercise under similar circumstances. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). "The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). If there are no facts in the record that give rise to a genuine issue for trial on any one of these essential elements, summary judgment is appropriate. *Id.* The matter is generally one for the jury, and it is "only in the clearest of cases that the question of

negligence becomes one of law." *Block v. Target Stores, Inc.*, 458 N.W.2d 705, 712 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990) (quotation omitted).

I. The district court erred by granting summary judgment for respondent based on its determination that respondent was immune from liability under the mere-slipperiness rule.

The Minnesota Supreme Court adopted the mere-slipperiness rule over a century ago. *Henkes v. City of Minneapolis*, 42 Minn. 530, 531-32, 44 N.W. 1026, 1027 (1890). Under the rule, an injured party cannot establish a cause of action against a municipality for injuries sustained in a fall on newly formed glare ice if "nothing but the slipperiness" causes the accident. *Id.* at 532, 44 N.W. at 1027. But importantly, "the mere-slipperiness rule does not confer immunity." *Rodenwald v. State Dep't of Natural Res.*, 777 N.W.2d 535, 538 (Minn. App. 2010), *review denied* (Minn. Mar. 30, 2010). It limits the city's duty of care in maintaining the safety of its roads and sidewalks, recognizing that there is no breach of duty if snow and ice are allowed to form in areas where the municipality could not reasonably be expected to maintain the premises. *See id.* at 538-39 (applying the mere-slipperiness rule where plaintiff's accident occurred in the municipality's driveway).

The rationale behind the mere-slipperiness rule is based on the practical consideration that in the winter in Minnesota it would be an unsupportable financial burden to require a city to keep its streets and sidewalks free of snow and ice. *Henkes*, 42 Minn. at 531, 44 N.W. at 1027 (stating that the constant removal of snow and ice "would

be a physical impossibility, and an attempt to do it would involve an amount of expense that would bankrupt any city"). But "the scope of the rule is defined by the reason for its existence" and our courts have recognized various exceptions to the mere-slipperiness rule. *Bufkin v. City of Duluth*, 291 N.W.2d 225, 226-27 (Minn. 1980). The rule will not protect a municipality that permits snow and ice to form for such a time that dangerous ridges, irregularities, or other obstructions to travel develop. *Bury v. City of Minneapolis*, 258 Minn. 49, 51, 102 N.W.2d 706, 708 (1960). The rule will not protect a municipality when it allows snow or ice to remain on a sidewalk outside of a building that is operated for profit. *Bufkin*, 291 N.W.2d at 227. And the rule will not protect a municipality where an accumulation of ice or snow is caused by artificial means. *Otis v. Anoka-Hennepin Sch. Dist. No. 11*, 611 N.W.2d 390, 392-93 (Minn. App. 2000).

Appellant argues that the circumstances of this case provide a basis for finding an exception to the mere-slipperiness rule. Respondent maintains, and the district court held, that respondent is immunized from liability as "there are no genuine issues of material fact that the mere slipperiness rule applies in this case."

During his deposition, appellant testified that he brought his daughter to the ECC for her ballet class. It was a Saturday, and the ECC had several programs that day. After the ballet class had concluded, appellant exited the ECC through entrance #4. Above entrance #4 is a large sign, spreading across four doors, which clearly designates these doors as one of the building's entrances or exits. Immediately outside the doors is a

stairway bordering the ECC's exterior with a handrail affixed to the wall. Two brick walls align the front and right-side of entrance #4, leaving the stairway as the only option for an individual entering or exiting the ECC from this doorway. Appellant testified that after stepping a few feet outside the building he slipped on clear ice that lined the top of the stairs.

The location of where this accident occurred is qualitatively different than the locations in which the mere-slipperiness rule has previously applied. *See Doyle v. City of Roseville*, 524 N.W.2d 461, 464 (Minn. 1994) (applying the mere-slipperiness rule where the accident occurred in civic arena parking lot); *Rodenwald*, 777 N.W.2d at 538-39 (applying rule to an accident that occurred in a driveway); *Otis*, 611 N.W.2d at 394 (applying the rule where the accident occurred on a portion of the sidewalk that was separated by a landscaped area containing shoveled snow). Here, it is alleged that respondent failed to remove ice from a stairway immediately outside a building's clearly designated entrance that is known to have heavy foot traffic, an area the municipality could reasonably be expected to maintain. *See Bufkin*, 291 N.W.2d at 226-27 (finding an exception to the mere-slipperiness rule where the accident occurred on a walkway "used solely as a route to and from the complex").

Nonetheless, even though the circumstances in this case (glare ice on a heavily traveled stairway entrance) are distinguishable from cases where the mere-slipperiness rule has been applied, the alleged condition itself, a slippery surface, is the same, and the

rule applies, absent an exception. We therefore must affirm the district court's conclusion that the mere-slipperiness rule applies in this case. But as discussed below, there are genuine issues of material fact as to whether the rule's exceptions disqualify respondent from the rule's protection.

A. For-Profit Exception

Appellant argues that the evidence creates a genuine issue of material fact as to whether the ECC operates for profit, an exception to the mere-slipperiness rule. Respondent maintains, and the district court held, that appellant failed to establish that the for-profit exception applied because the ECC is intended to serve the community and does not endeavor to operate for profit.

Where a municipality endeavors to operate a building for profit, the mere-slipperiness rule does not apply and the municipality has the same duty of care in maintaining its pathways as a private owner of a similar enterprise. *Bufkin*, 291 N.W.2d at 226-27. But where a government-owned facility charges a fee only to defray part of the cost of operations, there is no basis for departing from the mere-slipperiness rule. *Doyle*, 524 N.W.2d at 463-64.

Appellant testified at his deposition that he paid for the ballet class that his daughter attended at the ECC. Appellant also submitted a "fee schedule," listing fees that the ECC charges for the rental of its facilities. In some circumstances, the ECC will charge non-profit organizations an hourly rate of $91. Rental of that same facility costs a

"commercial or for-profit" organization $475 per hour. While respondent's director of business services claims in an affidavit that its rental fees are "intended" solely to cover the ECC's expenses, no financial statements or other documentation were provided to verify that the facility was not operated at a profit. Claimed intent, without more, does not suffice to answer the question of whether the ECC was indeed operated for profit.[1] The wide-ranging fees that the ECC charges to participate in its programs and rent its facility could reasonably lead to an inference that the ECC endeavors to operate for profit.

The evidence submitted by appellant was sufficient to create a genuine issue of material fact as to whether respondent operates for profit. Accordingly, we conclude that summary judgment on this issue was inappropriate.

B. Artificial-Condition Exception

Appellant argues that the evidence creates a genuine issue of material fact as to whether the overhang above the area where he fell caused ice to accumulate on the stairs, satisfying the artificial-condition exception to the mere-slipperiness rule. Respondent

[1] The dissent proposes that the affidavit provided by respondent suggesting that, as it regards the community center, respondent "intends to serve the community, not to derive a profit," is sufficient to erase a genuine issue of material fact as to the for-profit exception. We disagree. The affidavit is inconclusive and non-responsive to the issue of whether the center was actually operated for profit or not. Moreover, by concluding that the ECC does not operate for profit, the district court erroneously made factual determinations and weighed the evidence in a light unfavorable to appellant. *DLH, Inc.*, 566 N.W.2d at 70 ("The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.").

maintains, and the district court held, that the overhang serves the purpose of collecting snow rather than letting precipitation fall to the steps below and that the resultant accumulation of ice was not severe enough to satisfy the requirements of the artificial-condition exception.

In *Otis*, we recognized that a municipality is not protected by the mere-slipperiness rule when an accumulation of ice is caused by artificial means and negligently permitted to remain for an unreasonable period of time. 611 N.W.2d at 392-93 (recognizing that "'the authorities differentiate between conditions arising from natural causes, causes over which the municipality has no control, illustrated by the falling of snow and sleet from the clouds, and those of artificial creation'" (quoting *Nichols v. Village of Buhl*, 152 Minn. 494, 496-98, 193 N.W. 28, 29-30 (1922))). In *Otis*, the artificial condition was created when the municipality shoveled snow from its sidewalks. 611 N.W.2d at 392. The problem was the placement of the snow, which melted and caused ice to form on another section of the sidewalk. *Id.* at 394. We recognized that although artificial, the condition was desired; the city removed snow from the sidewalk, which is the very activity that the mere-slipperiness rule intends to promote. *Id.*

Appellant submitted photographs depicting a metal overhang above the doorway and water stains on the walls of the ECC below the overhang. The photographs reasonably lead to an inference that water from the melting snow on the overhang was

directed down the building wall and directly onto the stairs. Appellant also provided deposition testimony of respondent's groundskeeper, who stated that he knew snow would accumulate on the overhang, and when that snow melted, water would drip on the stairway. As a safety measure, appellant applied a non-slip texture to the stairs.[2] Appellant also submitted weather reports, indicating that the day before appellant's accident the temperature was 36 degrees, and on the day of appellant's accident the temperature was below freezing.

Reasonable jurors could conclude that the temperature change caused snow to melt and water to drip down onto the stairs and then re-freeze. They could further reasonably conclude that the overhang created an undesirable condition, as it allowed water to drip onto a concrete stairway that individuals must use to enter and exit the building. Finally, appellant provided sufficient evidence that respondent had notice of the "water problem" caused by the overhang, and that it knew the water could cause dangerous ice to form on the stairs below. Weighing this evidence in a light most favorable to appellant, reasonable minds could determine that the ice that caused appellant's fall was artificially created by the overhang.

[2] The dissent suggests that "the school district's agents took no action to alter or disturb the natural course of events." On the contrary, in addition to previously applying a non-slip texture to the steps in 2011, an agent may have applied salt to the steps the day appellant suffered injuries; he could not recall. Appellant produced evidence sufficient to create a material fact issue as to whether the agents were on notice of the continuing problem caused by the overhang and were unsuccessful in their efforts to address the danger caused by the water accumulating.

Because there is evidence from which a jury could reasonably conclude that the mere-slipperiness rule did not relieve respondent of its duty to maintain its stairway, the district court erred by granting summary judgment for respondent.

II. The district court did not err by denying appellant's motion for partial summary judgment of his negligence claim.

Appellant argues that the district court erred by denying its motion for partial summary judgment of his negligence claim.

Based on our determination that the mere-slipperiness rule does not preclude respondent's liability as a matter of law, we similarly conclude that summary judgment in appellant's favor would be premature. Genuine issues of fact remain as to the applicability of the mere-slipperiness rule. Those factual determinations will define respondent's duty of care and whether that duty was breached.

Affirmed in part, reversed in part, and remanded.

JOHNSON, Judge (concurring in part, dissenting in part)

I concur in part II of the opinion of the court but respectfully dissent from part I. The district court properly analyzed the mere-slipperiness rule and properly concluded that the school district's motion for summary judgment should be granted. Given the undisputed facts of this case, part I of the majority opinion is contrary to supreme court caselaw.

A.

The first question raised by Rosen's appeal is whether the mere-slipperiness rule does not apply on the ground that the school district intended to derive a profit from its operation of the community center. This question may be answered by considering two supreme court opinions, which reached opposite results because of dissimilar facts.

The first case is *Bufkin v. City of Duluth*, 291 N.W.2d 225 (Minn. 1980). The plaintiff was going to a concert at the Duluth Arena Auditorium when he slipped and fell on a sidewalk leading to the arena's entrance. *Id.* at 226. The supreme court held that the mere-slipperiness rule did not apply to that case because the defendant, the City of Duluth, "endeavor[ed] to operate the complex for profit." *Id.* The supreme court reasoned that the city's "activities in operating the Arena Auditorium are no different from those of an individual who operates a similar enterprise." *Id.* at 226-27. The supreme court further reasoned, "'If the government is to enter into businesses ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities.'" *Id.* at 227 (quoting *Stein v. Regents of Univ. of Minn.*, 282 N.W.2d 552, 556 (Minn. 1979) (other quotation omitted)). Accordingly, the supreme court held that "a

municipality and its agents operating a municipal auditorium for profit have the same duty of care in maintaining the sidewalks leading to the auditorium as a private owner of a similar enterprise." *Id.* at 227.

The second case is *Doyle v. City of Roseville,* 524 N.W.2d 461 (Minn. 1994). The plaintiff was leaving a high school hockey game at the Roseville Ice Arena when she slipped and fell in the arena's parking lot. *Id.* at 462. The supreme court noted its prior opinion in *Bufkin* but stated that "[t]he instant case . . . presents a quite different scenario." *Id.* at 463. Specifically, the supreme court emphasized the following facts:

> Although spectators paid an admission fee to attend the hockey game, there is no evidence -- nor even an allegation -- that the City operated the ice arena for profit or that the admission fee was anything other than a user fee designed to defray part of the cost of operation. Accordingly, there is no basis for departing from the "mere slipperiness" rule.

Id. at 463-64. The supreme court proceeded to apply the mere-slipperiness rule and concluded that the rule protected the city from liability, thereby upholding the district court's grant of summary judgment to the city. *Id.* at 464.

In his appellate brief, Rosen relies solely on *Bufkin* and ignores *Doyle*. But this case is indistinguishable from *Doyle*. Rosen introduced no evidence whatsoever that might tend to prove that the school district intended to derive a profit from its operation of the community center. The only evidence in the record on that issue is the affidavit of the school district's director of business services, who stated that "nominal fees charged to attend classes at" the community center "are intended to cover . . . expenses," and that "[b]y allowing space to be used in the Edina Community Center, the School District

intends to serve the community, not to derive a profit." Rosen did not introduce any evidence to contradict the school district's evidence on that issue. Rosen's only response is to refer to a fee schedule that shows the hourly rental rates charged to various types of organizations for the various facilities available at the community center. But the fee schedule, by itself, says nothing about profit because there is no evidence in the record concerning the total revenues or total costs associated with the school district's operation of the community center, which would be necessary to call into question the school district's evidence that it does not seek to derive a profit from its operation of the community center.

Accordingly, Rosen's evidence is insufficient to create a genuine issue of material fact concerning whether the school district "endeavor[ed] to operate the [community center] for profit," which is necessary for the *Bufkin* exception to the mere-slipperiness rule. *See* 291 N.W.2d at 226. The undisputed evidence places this case squarely within the supreme court's opinion in *Doyle*. *See* 524 N.W.2d at 463-64. Thus, the district court properly concluded that the *Bufkin* exception to the mere-slipperiness rule does not apply.[3]

[3]The majority opinion improperly imposes a duty on the school district to introduce *additional* evidence that it does not seek to derive a profit from its operation of the community center. A district court must grant a summary-judgment motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. The school district's motion papers satisfy this requirement. In his response to the motion, Rosen "may not rest upon the mere averments or denials . . . but must present specific facts showing that there is a genuine issue for trial." *See* Minn. R. Civ. P. 56.05. Rosen's response does not satisfy this requirement. If a plaintiff "fails to establish an essential

B.

The second question raised by Rosen's appeal is whether the mere-slipperiness rule does not apply on the ground that the slippery condition was caused not by the natural accumulation of snow and ice but, rather, by an "artificial" means, namely, the overhang above the entrance to the community center. Specifically, Rosen contends that the evidence shows that snow accumulated on the overhang, melted into water, dripped onto the steps, and froze to create a slippery surface.

The nature of the evidence necessary to trigger the "artificial condition" exception to the mere-slipperiness rule is illustrated by the facts of *Nichols v. Village of Buhl*, 152 Minn. 494, 193 N.W. 28 (1922), the case that gave rise to the exception. In *Nichols*, a sidewalk was icy because the village allowed residents to draw water from a local water tap, and when they carried water to their homes or businesses, water spilled from their buckets onto the sidewalk and thereafter froze. *Id.* at 496, 193 N.W. at 29. The supreme court reasoned that the mere-slipperiness rule did not apply because the slippery condition of the sidewalk was created by "artificial means," not by "natural causes." *Id.* at 498, 193 N.W. at 30. In subsequent cases, the supreme court made clear that the process by which snow melts and subsequently freezes to form ice is a natural process

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element of [his] claim," "summary judgment is mandatory . . . because this failure renders all other facts immaterial." *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001) (quotations omitted), *review denied* (Minn. Oct. 16, 2001). Furthermore, the majority opinion improperly speculates that the school district actually might have received a profit from its operation of the community center without intending to do so. "Mere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

contemplated by the mere-slipperiness rule, not an artificial cause. In *Smith v. Village of Hibbing*, 272 Minn. 1, 136 N.W.2d 609 (1965), the supreme court stated that "a municipality is not required to guard against mere slipperiness caused by a natural flow of water from melted ice and snow." *Id.* at 3, 136 N.W.2d at 610 (citing *Henkel v. City of Minneapolis*, 42 Minn. 530, 44 N.W. 1026 (1890)); *see also Bury v. City of Minneapolis*, 258 Minn. 49, 51, 102 N.W.2d 706, 708 (1960). That is exactly what Rosen alleges to have occurred in this case.

In addition, the caselaw indicates that a slippery condition is of "artificial origin" only if it was caused by a person, who could be either an agent of the municipality or a third person. *See Nichols*, 152 Minn. at 497, 193 N.W. at 29. In this case, the school district's agents took no action to alter or disturb the natural course of events. The slippery condition allegedly developed solely because of the "natural" process of melting and freezing. *See Smith*, 272 Minn. at 3, 136 N.W.2d at 610. Furthermore, the caselaw indicates that the action giving rise to an artificial condition must be taken shortly before the formation of the slippery condition. *See Nichols*, 152 Minn. at 496-97, 193 N.W. at 29. There is no authority for the proposition inherent in Rosen's argument that a building constructed years earlier is an artificial condition that might affect the application of the mere-slipperiness rule.

Accordingly, Rosen's evidence is insufficient to create a genuine issue of material fact concerning whether the allegedly slippery condition was "of artificial creation." *See id.* at 497, 193 N.W. at 29. Thus, the district court properly concluded that the artificial-condition exception to the mere-slipperiness rule does not apply. Because the slippery

condition was caused by natural means, it is unnecessary to consider whether the condition was "desirable."

C.

In part II, the majority opinion considers Rosen's argument that the district court erred by denying his cross-motion for partial summary judgment. I concur in the result in part II, but I reach that result for different reasons in light of my analysis of the two issues discussed above. I would conclude that the district court's denial of Rosen's cross-motion for partial summary judgment should be affirmed on the ground that the school district is entitled to summary judgment in its favor.

For the reasons stated above, I would affirm the judgment of the district court in all respects.