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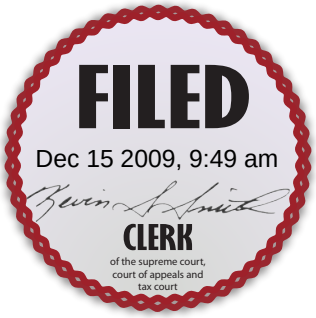

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IN THE
COURT OF APPEALS OF INDIANA

NORMA WARDLOW and ROLAND WARDLOW,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 71A03-0906-CV-248
A-1 STRIPING SERVICES, INC., KROGER FOOD STORES,	)	

MERRIFIELD PLAZA, LLC,	)
ARNT ASPHALT SEALING, INC.,	)
And CRESSY & EVERETT MANAGEMENT	)
CORPORATION,	)
	)
Appellees-Defendants.	)

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
The Honorable David T. Ready, Magistrate
Cause No. 71C01-0712-CT-169

December 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-plaintiffs Norma and Roland Wardlow (collectively, the Wardlows), appeal the trial court's grant of summary judgment in favor of appellees-defendants A-1 Stripping Services, Inc. (A-1), Kroger Food Stores (Kroger), Merrifield Plaza, LLC (Merrifield Plaza), Arnt Asphalt Sealing, Inc. (Arnt), and Cressy & Everett Management Corporation (Cressy & Everett) (collectively, the appellees), claiming that a genuine issue of material fact exists as to whether the appellees were negligent when Norma slipped and fell in a Kroger store parking lot in Mishawaka. More specifically, the Wardlows argue that the designated evidence would permit a jury to conclude that Kroger, Merrifield Plaza, and Cressy & Everett breached their duty of care to Norma while she was on the premises. The Wardlows further maintain that a genuine issue of material fact exists with regard to A-1 Striping and Arnt's duty of care and breach of that

duty as contractors. Concluding that the trial court erred in granting summary judgment for the appellees, we reverse and remand for further proceedings consistent with this opinion.

FACTS

On December 21, 2006, Norma went shopping at the Merrifield Plaza Kroger grocery store in Mishawaka. Norma exited the store and attempted to leave the sidewalk area and enter the parking lot. At some point, Norma slipped and fell on the inclined handicap access ramp that was painted yellow. When Norma fell, it was raining and the ground was wet. Although Norma was not aware of the slippery nature of the painted area before she fell, she later described the painted surface as "much slipperier than the unpainted concrete." Appellants' App. p. 58-59.

Merrifield Plaza owned the property, leased it to Kroger, and Cressy & Everett managed it on a day-to-day basis. Either Merrifield Plaza or Cressy & Everett contracted with Arnt to provide pavement markings on the premises. Arnt then contracted with A-1 to apply the paint to the parking lot and ramp.

A-1 "repainted surfaces that had previously been painted in accord with its instructions from the general contractor and/or the property owners." Appellee's Br. of A-1 Striping p. 5. In other words, A-1's job, as dictated by the general contractor and property manager, was to "repaint that which had previously been painted." Appellant's App. p. 63. Representatives of A-1 selected and applied the paint to the ramp at Kroger "in accord with the specifications provided to it." A-1 Striping Br. p. 5. A-1 painted the

sloped area of the handicap ramp to notify individuals of the "trip hazard" and provide notice of the difference in the elevation of the ramp. Appellants' App. p. 64.

James Zakrzewski is the owner of A-1 and has been in the traffic marking business since 1968. A-1 selected a traffic marking paint marketed under the name of "HotLine" by Sherwin-Williams. Traffic marking paints are designed for pavement markings, including the handicap ramp at Kroger. Zakrzewski's company has used Hotline paint for over eight years, and he testified in a deposition that Hotline is the "most commonly used" paint in the "traffic marking industry." Id. at 78. Zakrzewski never received any "complaints of slippery surfaces," and he is not aware of any coating that could be placed over the paint to "make it non-skid, make it skid resistant." Id. at 72-73, 75. Although Zakrzewski has heard of paints that have sand mixed into them to render surfaces more skid resistant, he did not believe that such a mixture was available in his business. Zakrzewski has never heard of a sand/paint mixture used in traffic marking paints and he has never used that type of paint because A-1's machines are not capable of handling a sand paint mixture. Id.

On December 7, 2007, the Wardlows filed a complaint against Kroger, alleging that it was liable for failing to properly maintain the premises and/or warn Norma of a dangerous and/or hazardous condition.[1] Based on various non-party defenses that Kroger advanced, the Wardlows amended their complaint and added the remaining appellees as defendants in the action.

[1] Roland alleged that the appellees' carelessness and negligence caused the loss of "care, comfort, and companionship of his wife." Appellants' App. p. 7.

Thereafter, the appellees moved for summary judgment. Merrifield Plaza and Cressy & Everett filed the initial motion, claiming that they were entitled to summary judgment because "without any foundation for the claim that the paint is defective, the [Wardlows'] claim is nothing more than speculation." Id. at 10. Thereafter, the remaining defendants joined in the motion for the same reasons.

In support of their motion for summary judgment, the appellees submitted the following portions of Zakrzewski's affidavit and deposition testimony:

1. Curbs and sloped sides of handicap ramps are painted yellow to alert people of the presence of a "trip hazard," i.e., a change in elevation of a curb or a ramp.

2. James Zakrzewski, who has been in the traffic-marking business for forty years, and who has owned A-1 Striping Service, Inc., for thirty years, had been hired to repaint the yellow markings in the parking and sidewalk areas of Merrifield Plaza—"to repaint that which had been previously painted."

3. Zakrzewski used HotLine traffic-marking paint purchased from Sherwin-Williams, the paint most commonly used and accepted in the traffic-marking industry, and one which Zakrzewski had used for traffic markings for the past eight years.

4. The paint contained no warnings against using it on inclined surfaces, that concrete covered with the paint would be slippery, or that painted concrete inclined surfaces would be slipperier than surrounding surfaces. Zakrzewski had never received any complaints or notice that this ramp or any surfaces covered with the paint were made slipperier, or that the paint was inappropriate for use on a ramp.

5. There is no paint with a sand mixture available for use as a traffic-marking paint; Zakrzewski has never heard of traffic-marking paints with sand, and he has never used a sand-mixed paint in his business. Zakrzewski has no paint-application machines that could use paint with a sand mixture, and he knows of no machine capable of putting sand-mixed paint through the pumps or the sprays.

Id. at 14, 24-39, 67-68, 71-79, 91-92, 113, 115.

Finally, the appellees designated as evidence Norma's interrogatory responses, where she stated that the yellow paint used on the ramp was not safe for use in inclement weather. Id. at 33, 37.

Thereafter, A-1 filed a motion to strike a portion of Norma's affidavit, which the Wardlows submitted in opposition to the motion for summary judgment. In part, Norma's affidavit provided that

> 5. At the time I fell, it was raining and the ground was wet.
>
> 6. Although I did not realize this until after I fell, I now know that "the yellow-painted area on which I fell was much slipperier than the unpainted concrete areas surrounding the area where I slipped."

Id. at 58. A-1 claimed that these allegations were "speculative in nature and premised on an inadequate factual foundation, thereby failing to meet the requirements of Ind. Evidence Rule 701."[2] Id. at 84.

The trial court did not rule on A-1's motion to strike, and following a hearing on the motions for summary judgment, the following order was issued on April 23, 2009:

> Plaintiffs contend that the breach of duty to Norma Wardlow can be found by her assertion that the paint used to designate the incline or ramp was inappropriate and, therefore, created a hazardous or dangerous condition.

[2] Indiana Evidence Rule 701 provides that

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

> Defendants collectively, agree that to establish a set of facts leading to such a conclusion would require expert testimony and that Norma Wardlow is not qualified to assert such opinion.
>
> The Court agrees with the Defendants[’] position. This is not a case where cooking oil has been spilled on the tile floor of a store or where ice has accumulated on a sidewalk. In both those instances it is within the knowledge of lay persons to recognize the potential hazard. However, whether of [sic] not a particular paint used on a concrete walkway also creates a hazard would require expert testimony.
>
> The Court determines that the Defendants are entitled to judgment as a matter of law based upon the Plaintiff’s lack of demonstrating a breach of any duty to the Plaintiffs.
>
> Therefore, pursuant to Indiana TR 56 and St. Joseph County Rule 213.4, the Defendants shall collectively prepare and file an appropriate Order on Summary Judgment within 30 days of this Order. The time for appeal of that Order shall not run until the Order is accepted and signed. (Id.)

Id. at 94-95. Thereafter, the trial court entered its order on summary judgment on April 23, 2009:

> Defendants, A-1 Stripping Services, Inc., Kroger Food Stores, Merrifield Plaza, LLC, Arndt Asphalt Sealing, Inc., and Cressy & Everett Management Corporation, having filed their collective motions for summary judgment and memoranda in support thereof, and the Court having examined the motions memoranda and responses thereto and the Court having heard the arguments of counsel on March 13, 2009.
>
> The Court now finds that there is no genuine issue as to any material fact and that under the undisputed and uncontradicted material facts and reasonable and inferences therefrom that defendants are entitled to summary judgment in their favor;
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that judgment be and hereby entered for the defendants, A-1 Stripping Services, Inc., Kroger Food Stores, Merrifield Plaza, LLC, Arndt Asphalt Sealing, Inc., and Cressy & Everett Management Corporation and against the

> plaintiffs, Norma and Roland Wardlow and that the plaintiffs take nothing by way of their complaint.

Id. at 96-97. The Wardlows now appeal.

DISCUSSION AND DECISION

I. Standard of Review

The purpose of summary judgment is to terminate litigation for which there can be no factual dispute and which can be determined as a matter of law. Beradi v. Hardware Wholesalers, Inc., 625 N.E.2d 1259, 1261 (Ind. Ct. App. 1993). When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269 (Ind. 2009). Considering only those facts that the parties designated to the trial court, we must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. Id.; Ind. Trial Rule 56(C). In answering these questions, we construe all factual inferences in the non-moving party's favor and resolve all doubts as to the existence of a material issue against the moving party. N. Ind. Pub. Serv. Co. v. Bloom, 847 N.E.2d 175, 180 (Ind. 2006).

The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Once the movant satisfies that burden, the burden shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact. Mullin v. Mun. City of South Bend, 639 N.E.2d 278, 281 (Ind. 1994). Merely alleging that the plaintiff has failed to produce evidence on each element of a

claim is insufficient to entitle the defendant to summary judgment under Indiana law. Jarboe v. Landmark Cmty. Newspapers of Ind., Inc., 644N.E.2d 118, 123 (Ind. 1994). Rather than merely alleging that the plaintiff has failed to produce evidence on each element, the party moving for summary judgment has the burden to negate an element of the plaintiff's claim. Id. A grant of summary judgment will be carefully reviewed to ensure that a party was not denied his or her day in court. Evan v. Poe & Assocs., Inc., 873 N.E.2d 92, 97-98 (Ind. Ct. App. 2007). If there is any doubt as to which conclusion a jury might reach, then summary judgment is inappropriate. Asbestos Corp. v. Akaiwa, 872 N.E.2d 1095, 1096 (Ind. Ct. App. 2007).

We also note that negligence cannot be established by inferential speculation alone. Ogden Estate v. Decatur County Hosp., 509 N.E.2d 901, 903 (Ind. Ct. App. 1987). In other words, speculative allegations in support of the non-moving party's position are not sufficient to survive summary judgment. Id.

Finally, we do not owe deference to the findings and conclusions entered by the trial court in a summary judgment order. Trans-Care, Inc. v. Comm'rs of Vermillion, 831 N.E.2d 1255, 1258 (Ind. Ct. App. 2005). Although such findings and conclusions may assist our review, we will affirm if the trial court's grant of summary judgment can be sustained on any theory or basis in the record. Beck v. City of Evansville, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006).

II. The Wardlows' Claims

The Wardlows argue that the grant of summary judgment for the appellees must be set aside because the designated evidence creates a genuine issue of material fact as to

whether the appellees breached a duty of reasonable care to Norma and caused her injuries. The Wardlows contend that the facts that the appellees designated from Zakrzewski's affidavit and deposition testimony offer no probative value regarding the appropriateness of the particular paint that was used on the ramp.

To prevail on a claim of negligence, the plaintiff must show (1) a duty owed by the defendant to the plaintiff; (2) a breach of the duty; and (3) injury proximately caused by the breach. Williams v. Cingular Wireless, 809 N.E.2d 473, 476 (Ind. Ct. App. 2004). Whether a duty exists is generally a question of law for the trial court. Schoop's Rest. v. Hardy, 863 N.E.2d 451, 454 (Ind. Ct. App. 2007). A duty exists "'where a reasonably foreseeable victim is injured by a reasonably foreseeable harm.'" Clary v. Dibble, 903 N.E.2d 1032, 1040 (Ind. Ct. App. 2009) (quoting Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991)), trans. denied. In the absence of a duty there can be no breach, and therefore, no recovery in negligence. Williams, 809 N.E.2d at 476.

The Wardlows direct us to Zakrzewski's deposition testimony and affidavit set forth above in support of their claim that the grant of summary judgment in the appellees' favor was erroneous. Indeed, Zakrzewski testified that he was not aware of any traffic-marking paints that are more frictional than others. Appellants' App. p. 70-71. Zakrzewski did not know of any traffic-marking paint that is more frictional than the HotLine paint, and he was not aware of any type of coating that could be put over the paint to make it skid-resistant. Zakrzewski also testified that while he was familiar with the concept of mixing sand with paint to render a surface more adhesive and skid resistant, he never used a sand mixture paint in his business. Id. at 72-76.

The Wardlows point out—and we agree—that notwithstanding this evidence, the appellees have failed to show that a more frictional paint does not exist and/or that A-1 investigated to determine whether the paint it was using was appropriate to apply on an incline ramp. Although Zakrzewski testified that representatives from Sherwin-Williams never told him that the paint he used would be slippery or unsafe on the area where the accident occurred, it was not established whether Zakrzewski ever asked Sherwin-Williams if the paint he used was appropriate to apply to the ramp. Thus, contrary to the appellees' position, this evidence suggests that a reasonable jury could find that A-1 failed to employ measures that would have made the painted surface less slippery and more skid resistant such as adding sand to the paint mixture.

Similarly, although Zakrzewski testified that there were no warnings on the paint container regarding the use of HotLine on inclined surfaces, that it would be slippery when applied to concrete, or that the paint would create a slipperier surface than unpainted concrete, those facts do not compel us to find that the appellees were not negligent as a matter of law. Rather, a jury could consider those facts when deciding the reasonableness of the appellees' conduct.

Also, while Zakrzewski testified that he used the "most common paint in the industry," appellants' app. p. 78, the common nature of the paint does not mean that A-1 used the correct paint or properly applied it. See P-M Gas & Wash Co., Inc. v. Smith, 178 Ind. App. 457, 458-59, 383 N.E.2d 357, 358 (1978) (holding that, while custom in a trade or business may be considered by the factfinder as evidence in determining what is or is not negligent conduct, the only standard of care in negligence cases is that of

reasonable care under the circumstances). Indeed, a reasonable jury could find that the appropriate manner for applying the paint would have been to outline the inclined area rather than to paint the entire area. In other words, painting an outline around the area would have served the intended purpose, which was to warn pedestrians of the incline, while also significantly reducing the size of the slippery area. In light of these possibilities, doubt exists as to which conclusion a jury might reach.

In sum, the facts designated by the appellees fail to negate the possibility that a jury could find that the appellees breached a duty of reasonable care to Norma. More specifically, the designated evidence failed to establish that Kroger, Merrifield Plaza, and Cressy & Everett can avoid liability as a matter of law regarding their duty of care to Norma while she was on the premises. Similarly, the designated evidence fails to show that Arnt and A-1 should be excused from potential liability to the Wardlows as a matter of law. See Peters v. Forster, 804 N.E,2d 736, 743 (Ind. 2004) (holding that a contractor generally has a duty to use reasonable care both in his work and in the course of performance of the work). As a result, we must conclude that summary judgment was improperly granted in the appellees' favor.[3] The judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.[4]

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[3] As an aside, we note that Arnt maintains that it was entitled to summary judgment because it did not select or apply the paint to the ramp and "the general contractor does not owe a duty to a third party allegedly harmed by the actions of its subcontractor, merely because it hired the subcontractor." Arnt Br. p. 8 (citing Ozinga Transp. Sys., Inc. v. Mich. Ash Sales, Inc., 676 N.E.2d 379 (Ind. Ct. App. 1997)). However, A-1 acknowledged that it repainted the ramp pursuant to instructions from "the general contractor and/or the property owners." A-1 Striping Br. p. 5. Moreover, A-1's job was to "repaint that which had previously been painted," as dictated by the general contractor and property manager. Appellant's App. p. 63. In light of these circumstances, we reject Arnt's claim that it is entitled to summary judgment on the grounds that it did not owe or breach a duty to Norma as a matter of law. Our

The judgment of the trial court is reversed and remanded.

RILEY, J., concurs.

BROWN, dissents with opinion.

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review of the designated evidence does not clearly establish that Arnt, the general contractor, surrendered control of the painting project to A-1.

[4] In light of our conclusion that the designated evidence set forth in Zakrzewski's affidavit and his deposition testimony failed to establish the lack of a genuine issue of material fact with regard to the appellees' breach of duty, we need not determine whether Norma's affidavit is deficient because she failed to offer expert testimony in support of her claim. See Jarboe, 644 N.E.2d at 123 (holding that a defendant's mere allegation that the plaintiff has failed to produce evidence on each element of a claim will not entitle the defendant to summary judgment). In any event, Norma's averment that the "yellow-painted area . . . was much slipperier than the unpainted concrete area," is rationally based on her own perception and would be helpful to the determination of whether an unreasonably dangerous condition existed outside the Kroger store. Evid. R. 701.

IN THE
COURT OF APPEALS OF INDIANA

NORMA WARDLOW and RONALD WARDLOW,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 71A03-0906-CV-248
A-1 STRIPING SERVICES, INC., KROGER FOOD STORES, MERRIFIELD PLAZA, LLC, ARNT ASPHALT SEALING, INC., and CRESSY & EVERETT MANAGEMENT CORPORATION,	)	
Appellees-Defendants.	)	

BROWN, Judge dissenting

I respectfully dissent from the majority's conclusion that the trial court erred in granting summary judgment for the Appellees. Specifically, I disagree with the majority's conclusion that the Appellees failed to make a prima facie showing that there were no genuine issues of material fact and were therefore entitled to judgment as a

matter of law. Once the Appellees satisfied their burden, the burden then shifted to the Wardlows to "designate and produce evidence of facts showing the existence of a genuine issue of material fact." Mullin v. Mun. City of South Bend, 639 N.E.2d 278, 281 (Ind. 1994). Based upon the record, I believe that the evidence presented by the Wardlows amounted to nothing more than "inferential speculation," thereby failing to demonstrate a genuine issue of material fact. Ogden Estate v. Decatur County Hosp., 509 N.E.2d 901, 903 (Ind. Ct. App. 1987), reh'g denied, trans. denied.

While our standard of review is the "same as that of the trial court," Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269 (Ind. 2009), "[t]he trial court's decision on a motion for summary judgment enters the process of appellate review clothed with a presumption of validity. The party appealing from the grant of summary judgment must persuade the appellate tribunal that the judgment was erroneous." Stephenson v. Ledbetter, 596 N.E.2d 1369, 1371 (Ind. 1992). I believe that the Appellees in this case met their burden in negating an element of the Wardlows' case. Specifically, I believe that the evidence designated by the Appellees made a prima facie showing that the Appellees did not breach their duty to Norma Wardlow.

Whether a party breached its common law duty of care to another may be decided as a question of law "when the facts are undisputed and only a single inference can be drawn from the facts." Id. at 1372. Here, based on the evidence designated by the parties, there exists no factual dispute as to the following: (1) Appellees used HotLine traffic-marking paint; (2) Appellees had been using HotLine paint for the last eight years, and it is "the paint that's most commonly used in the industry;" (3) "[a] paint with a sand

mixture which would cause more adhesion is not available in traffic-marking paints although [Appellee Zakrzewski] has heard of such an aggregate mixture;" (4) Appellees have never heard of a sand mixture paint being used for traffic-marking; (5) Appellees' machines used for painting would not be able to use a "paint with a sand mixture in it;" (6) Appellees are unaware of any machine that is designed to handle a sand mixture paint; (7) Appellees are "unaware of any type of coating that can be put over the paint to make it skid-resistant;" (8) the HotLine paint was not equipped with any warnings about applying it to inclined surfaces or to concrete, or that its application to concrete would make the concrete "more slippery than the surrounding concrete that was not painted;" and (9) in the eight years that Appellees have been using HotLine traffic marking paint, they have never received another complaint that the painted surface was dangerously slippery. Appellants' Appendix at 62-64. Based on these facts, I believe Appellees have made a prima facie showing that they did not breach their duty to the Wardlows.

Because Appellees met their burden, under the summary judgment standard, the burden shifted to the Wardlows to show the existence of a genuine issue of material fact. Mullin, 639 N.E.2d at 281. The evidence designated by the Wardlows to show a breach by the Appellees comes from Norma Wardlow's affidavit that "[a]lthough [Norma Wardlow] did not realize this until after she fell, [Wardlow] now knows that the yellow-painted area on which she fell was much slipperier than the unpainted concrete area surrounding the area where she slipped." Appellants' Appendix at 49. As stated in the Appellees' brief, this evidence designated by the Wardlows does not "stat[e], or even suggest[], that the paint was inappropriate or not designed for rainy use." Appellees'

Brief at 3. In its order, the trial court stated that it agreed with the Appellees that the Wardlows did not meet their burden to demonstrate a genuine issue of material fact. **(Appellant's Appendix at 94)** The trial court stated that:

> This is not a case where cooking oil has been spilled on the tile floor of a store or where ice has accumulated on a sidewalk. In both those instances it is within the knowledge of lay persons to recognize the potential hazard. However, whether of [sic] not a particular paint used on a concrete walkway also creates a hazard would require expert testimony.

Appellant's Appendix at 94-95.

I agree with the reasoning of the trial court. Once the Appellees made a prima facie showing that there was no genuine issue of material fact, the burden was on the Wardlows to refute that showing. Here, the Wardlows had to demonstrate that the Appellees breached their duty of care to Norma Wardlow by submitting competent evidence. One way the Wardlows could have shown this was to have designated expert testimony that the paint used by the Appellees was inappropriate for the handicap ramp Norma Wardlow slipped and fell on. The Wardlows failed to make such a showing. See Stephenson, 596 N.E.2d at 1372-1373 (holding that summary judgment in defendant's favor was appropriate where the plaintiff failed to establish a genuine issue of material fact that a breach of duty occurred); Lincke v. Long Beach Country Club, 702 N.E.2d 738, 740 (Ind. Ct. App. 1998) (noting that plaintiff did not provide expert testimony in golf course design to the effect that the course was negligently designed and concluded that the plaintiff's response to defendant's motion for summary judgment failed to meet his burden of setting forth specifically designated facts regarding a breach of duty), reh'g denied, trans. denied.

For these reasons, I respectfully dissent.