STATE OF MICHIGAN

COURT OF APPEALS

WYLLIS J. SCHENK AND JOHN SCHENK,

Plaintiffs-Appellants,

v

FIRST OF AMERICA BANK - MICHIGAN NATIONAL ASSOCIATION and SCOTT KITTRIDGE, Individually and d/b/a SCOTTY LEE'S LANDSCAPE & LAWN SERVICE,

Defendants-Appellees.

UNPUBLISHED
December 29, 1998

No. 205916
Oakland Circuit Court
LC No. 96-529838 NO

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

This is a premises liability action resulting from plaintiff Wyllis Schenk's[1] fall in a parking lot in icy conditions. Plaintiff brought suit against both First of America as the owner of the premises and the contractor engaged by First of America to remove snow and ice from the lot. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs appeal as of right, and we affirm.

When considering an appeal of an order granting summary disposition under MCR 2.116(C)(10), a reviewing court must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991); *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). A defendant's motion for summary judgment should be granted only where the plaintiff's claim is so clearly unenforceable as a matter of law that no factual development could justify allowing the plaintiff to prevail. *Young v Michigan Mutual Ins Co*, 139 Mich App 600, 603; 362 NW2d 844 (1984).

Plaintiff argues that the trial court erred in granting First of America's motion for summary disposition, arguing that a question of material fact exists concerning whether the icy state of the parking lot was an open and obvious condition. Plaintiff further asserts that to whatever extent the ice did

constitute an open and obvious condition, that determination relates only to First of America's duty to warn, leaving First of America nonetheless liable for its failure to keep its premises reasonably safe.

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages." *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432; 542 NW2d 612 (1995). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 155; 555 NW2d 738 (1996), summarily aff'd 457 Mich 870 (1998). Whether a duty exists is a question of law for the court. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). Where there is no duty, summary disposition is proper. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

The extent of a premises owner's duty to others on the land depends on the status of the individual at the time of the injury. *Stanley v Town Square Cooperative*, 203 Mich App 143, 146; 512 NW2d 51 (1993). An individual upon another's land may be an invitee, a licensee, or a trespasser. *Id*. at 146-147. A licensee is "'a person who enters on or uses another's premises with the express or implied permission of the owner or person in control thereof.'" *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992), quoting *Cox v Hayes*, 34 Mich App 527, 532; 192 NW2d 68 (1971). Where an owner acquiesces in the known, customary use of property by the public, permission may be implied. *Cox, supra*. Plaintiff characterizes her status at the time she was injured as that of licensee. Because plaintiff has not suggested that she had the greater status of invitee, and because defendants have not suggested that plaintiff had the lesser status of trespasser, we will presume that plaintiff was a licensee for purposes of this appeal.

The trial court granted defendant First of America's motion for summary disposition because it was satisfied that plaintiff would be "unable to establish all of the elements necessary for a determination of liability on the part of the landowner." We agree.

A landowner is subject to liability for physical harm caused to licensees by a condition on the land if

> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved. [*Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759 (1970), quoting 2 Restatement of Torts, 2d, § 342, p 210.]

A premises owner is under no duty to warn an adult licensee of an open and obvious danger. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995). Closely related to the open-and-obvious-danger doctrine is the natural-accumulation doctrine: A premises owner has no duty to a licensee to remove a natural accumulation of ice and snow from any location, unless the landowner has taken affirmative actions that caused, or increased the hazards of, the natural accumulation. See *Hall v Detroit Bd of Education*, 186 Mich App 469, 471; 465 NW2d 12 (1990).

In the instant case, plaintiff testified at her deposition that she was aware of considerable ice on the lot, including in her chosen pathway to the post office, and of her need to be careful of it. Clearly, plaintiff knew of the icy condition of the parking lot and should have realized the risk involved in attempting to walk upon it. The ice on the lot was no hidden danger of which First of America had any duty to warn plaintiff. Further, although plaintiff asserts, and photographs in the record confirm, that there were irregularities in the surface of the lot in question that contributed to the spotty development of patches of ice, plaintiff does not otherwise allege that First of America was in some way responsible for the existence or extent of the hazards of the natural accumulation of ice. Plaintiff cites no authority for the proposition that persons responsible for parking lots must design and maintain them as totally level surfaces in order to take advantage of the natural-accumulation or open-and-obvious defenses. Although severe irregularities in the surface of a lot may give rise to liability stemming from accumulations specifically resulting from, or aggravated or hidden by, those irregularities, the extent of plaintiff's assertion that the lot in question featured an irregular surface is not sufficient factual support for her claim to avoid dismissal under MCR 2.116(C)(10).

For these reasons, we agree with the trial court that there is no question that First of America had no duty to plaintiff to remove the ice upon which she slipped, or to warn plaintiff of its existence.

Next, plaintiff asserts that the trial court erred by granting defendants Scott Kittridge's and Scotty Lee's Landscape & Lawn Service's motion for summary disposition. We disagree.

The duty that accompanies a service contract is the "common-law duty to perform with ordinary care the things agreed to be done." *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995). Individuals foreseeably injured by the negligent performance of a contractual undertaking may charge the contractor with breach of a duty of care. *Id*. at 708.

In this case, because there was no duty on the part of the premises owner to remove the natural accumulation of ice for plaintiff's benefit, plaintiff cannot maintain an action against the contractor hired by the premises owner for failing to remove the ice from the premises. Although this Court has recognized that a snow removal contractor may be held liable for injuries to a third party in certain situations, see, e.g., *Osman*, *supra* (concerning a business invitee), we can find no basis for holding the contractor liable in this case. Although plaintiff asserts that she was injured as a third-party beneficiary of the contract between First of America and Kittridge/Scotty Lee's, the latter maintain that the contract did not call for any service on the day that plaintiff fell, and plaintiff points to no specific provision of the contract that was breached. "When a motion under subrule (C)(10) is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by

affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Further, there is no dispute that Kittridge/Scotty Lee's took no action to remove the ice upon which plaintiff slipped, and did not alter the conditions of the parking lot so as to increase the hazards of winter accumulations. The record thus indicates a lack of evidentiary support for plaintiff's claims that Kittridge/Scotty Lee's breached the snow-removal contract, or that Kittridge/Scotty Lee's acted, or failed to act, in a way that constituted negligence.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] John Schenk, Wyllis Schenk's husband, asserted a claim against defendants, alleging that their negligence caused him to lose his wife's society, services, love, affection, companionship, comfort and consortium. For ease of reference, in this opinion the term "plaintiff" will refer exclusively to Wyllis Schenk.