STATE OF MICHIGAN

COURT OF APPEALS

A. ROBERT SOBIESKI

Plaintiff-Appellant-
Cross Appellee,

v

GORDON F. KOCH, KATHLEEN KOCH and K.C. CHEESECAKE, INC., d/b/a KATHY'S CAKES,

Defendants-Appellees-
Cross Appellants.

UNPUBLISHED
January 21, 1997

No. 188922
Wayne County
LC No. 94-428020-NO

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Defendants cross-appeal, challenging the trial court's refusal to rule that plaintiff was a trespasser. We affirm.

Plaintiff alleges that he slipped and fell on some ice and snow while walking across defendant Kathy's Cakes' parking lot, which is located behind defendants' retail establishment. Plaintiff admits that he was not on defendants' property for a purpose connected with defendants' business establishment when he slipped and fell. Rather, plaintiff worked at the adjacent Lewerenz Medical Clinic and was walking across the parking lot en route to the medical clinic.

Posted on defendants' parking lot are signs that read, "Private parking - Kathy's Cakes Only." On the afternoon in question, plaintiff, aware that he was not supposed to park in defendants' lot, parked his car in the street, but then proceeded to cross defendants' lot on foot on his way to the medical clinic when he slipped and fell. Defendant Kathleen Koch testified at her deposition that she observed employees from the medical clinic park in her lot on prior occasions and would always tell

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

them they aren't supposed to park there. Koch denied ever observing plaintiff or any other member of the public use the parking lot to cut across on foot. In contrast to Koch's testimony, plaintiff stated that it was "quite common" for people in the neighborhood to cross defendants' parking lot rather than go all the way to the corner. Plaintiff also claimed that he has crossed defendants' lot on previous occasions without ever being told that he was not permitted to do so.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff was a trespasser and, therefore, they were under no obligation to keep their premises in safe condition for plaintiff's visit. Defendants further argued that, if plaintiff was not a trespasser, he was a licensee, and summary disposition was still appropriate because they were under no obligation to a licensee to remove the natural accumulation of ice and snow from their premises. The trial court ruled that the facts failed to establish that plaintiff was a trespasser, as opposed to a licensee, but agreed that summary disposition was appropriate under the natural accumulation doctrine. On appeal, plaintiff argues that the trial court erred in applying the natural accumulation doctrine. On cross-appeal, defendants argue that the trial court erred in refusing to rule that plaintiff was a trespasser.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. In ruling on such a motion, the trial court must consider not only the pleadings but also any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The court must give the benefit of any reasonable doubt to the opposing party and may grant the motion only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* This Court reviews the trial court's grant or denial of a summary disposition motion de novo. *Lytle v Malady*, 209 Mich App 179, 183-184; 530 NW2d 135 (1995).

Turning first to defendants' issue on cross-appeal, we find that the trial court did not err in refusing to find that plaintiff was a trespasser, as opposed to a licensee. Traditionally, a trespasser is a person who enters upon another's land without the landowner's consent, whereas a licensee is a person who is privileged to enter the land of another by virtue of the possessor's consent, without more. *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987). A licensee includes a person "who is on the premises of another because of some personal unshared benefit and is merely tolerated on the premises by the owner." *Danaher v Partridge Creek County Club*, 116 Mich App 305, 313; 323 NW2d 376 (1982). Consent to grant a license may be express or implied. *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992). Implied consent may arise where the landowner "acquiesces in the known, customary use of property by the public," or from conduct by the possessor "such as to give the other reason to believe that he is willing that he shall enter, if he desires to do so." *Alvin*, *supra*; *Leep v McComber*, 118 Mich App 653, 658; 325 NW2d 531 (1982).

Viewed most favorably to plaintiff, the facts reveal that the parking lot in question is located behind defendants' retail establishment. Although there are signs indicating that parking is for customers only, there are no signs forbidding use of the lot as a walkway, nor are there any fences or barricades to dissuade others from walking across the lot. Furthermore, it is quite common for people in the

neighborhood to walk across defendants' parking lot to gain access to adjoining properties, and plaintiff himself has walked across the lot on prior occasions without ever being told that he was not allowed to do so. These facts are sufficient to create a genuine issue of material fact regarding whether defendants had notice that their parking lot was used as a walkway and whether defendants tolerated or otherwise impliedly consented to such use. Therefore, the trial court did not err in refusing to grant summary disposition on the basis that plaintiff was a trespasser, as opposed to a licensee.

We conclude, however, that summary disposition was properly granted on the basis of the natural accumulation doctrine. Plaintiff does not dispute that he slipped and fell on a natural accumulation of ice and snow. Rather, he argues that application of the natural accumulation doctrine is improper in this case because that doctrine is limited only to situations involving injuries on public property. We disagree.

The natural accumulation doctrine provides that "neither a municipality *nor a landowner* has an obligation to a licensee to remove the natural accumulation of ice or snow from *any location* (emphasis added)." *Morrow v Boldt*, 203 Mich App 324, 327; 512 NW2d 83 (1994); *Hall v Detroit Board of Education*, 186 Mich App 469, 471; 465 NW2d 12 (1990); *Zielinski v Szokola*, 167 Mich App 611, 615; 423 NW2d 289 (1988). As this Court observed in *Mendyk v Michigan Employment Security Comm'n*, 94 Mich App 425, 431; 288 NW2d 643 (1979):

> Historically, the "natural accumulation" rule has been used not only to preclude a plaintiff's recovery against a governmental unit but also to preclude recovery in a suit against a private land owner.

Plaintiff cites *Quinlivan v Atlantic & Pacific Tea Co*, 395 Mich 244; 235 NW2d 732 (1975), in support of his claim that the natural accumulation doctrine is inapplicable to private property. In *Quinlivan*, however, which involved an injury on private property, the Supreme Court merely abrogated the natural accumulation rule in the context of an invitor-invitee relationship; it did not abrogate the rule as applied to private landowners in other contexts. See *Taylor v Saxton*, 133 Mich App 302, 305-306; 349 NW2d 165 (1984); *Mendyk*, *supra*.

Plaintiff does not argue that he was an invitee on defendants' property at the time of his injury, nor do the facts support such a finding. See *Danaher*, *supra* at 312 (an invitee is a person who is invited onto the owner's premises for a purpose mutually beneficial to both parties). Therefore, we find that the trial court properly granted summary disposition on this issue.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof