STATE OF MICHIGAN

COURT OF APPEALS

BRUCE BONHAM

Plaintiff-Appellant,

v

WYANDOTTE COMMUNITY THEATER and WYANDOTTE PUBLIC SCHOOL SYSTEM,

Defendants-Appellees.

UNPUBLISHED
April 11, 1997

No. 189713
Wayne Circuit Court
LC No. 94-434973-NO

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a September 20, 1995, order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand.

I

This premises liability case involves a slip and fall that occurred on February 26, 1994, in the parking lot of Wilson Middle School. Plaintiff was attending a play presented by Wyandotte Community Theater (the theater) at the middle school which was owned by the Wyandotte Public School System (the school system). As he was leaving the play, plaintiff slipped and fell on a patch of ice in the school's parking lot. As a result, plaintiff suffered an injury to his right ankle which required surgery.

Before this accident, defendants had entered into a "hold harmless agreement" allowing the theater to use the middle school's auditorium for its plays. The hold harmless agreement provided that the theater would "protect, hold harmless, save, and indemnify the Wyandotte Board of Education, its agents and employees from any and all losses, costs, damages, claims or expenses and any and all forms of liability, including but not limited to liability attributable to the Wyandotte Board of Education's

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

sole negligence, arising out of or from any accident or occurrence on or about said facilities during Wyandotte Community Theater use of such facilities causing injury to any person or property owned."

Plaintiff filed his complaint in the Wayne Circuit Court on December 2, 1994. Both defendants later moved for summary disposition. The school system claimed that it was immune from liability on the basis of governmental immunity. The theater argued that it had no control over the parking lot and that it could not be liable for plaintiff's injuries. The trial court agreed with defendants' arguments, and granted summary disposition in favor of both defendants.

II

The trial court held that the school system was immune from liability under MCL 691.1407(1); MSA 3.996 (107)(1). On appeal, plaintiff argues that the school system may be held liable under the natural accumulation doctrine and its exceptions. We review the trial court's decision on a motion for summary disposition de novo. *Glancy v Roseville,* 216 Mich App 390, 391; 549 NW2d 78 (1996). A motion for summary disposition on the basis of governmental immunity is properly brought under MCR 2.116(C)(7). Documentary evidence may be submitted by the parties to support or oppose the grounds asserted in the motion brought under subrule (C)(7). MCR 2.116(G)(2). If documentary evidence is submitted by the parties, such evidence must be considered by the court when ruling on a motion under subrule (C)(7). MCR 2.116(G)(5). Therefore, like the trial court, we will consider the documentary evidence presented when ruling on this motion.

The exceptions to the natural accumulation doctrine do not, in and of themselves, abrogate governmental immunity. A governmental agency is immune from tort liability while engaging in a governmental function, except with respect to activities falling within one of the narrowly drawn exceptions. *Mason v Wayne Co Bd of Comm'rs,* 447 Mich 130, 134; 523 NW2d 791 (1994). This Court has held that a governmental agency's failure to remove the natural accumulation of ice and snow on a public highway does not signal negligence of that public authority. *Dykstra v Dep't of Transportation,* 208 Mich App 390, 391; 528 NW2d 754 (1995); *Reese v Wayne Co,* 193 Mich App 215, 217; 483 NW2d 671 (1992); *Stord v Dep't of Transportation,* 186 Mich App 693, 694; 465 NW2d 54 (1991). However, if the ice on the roadway was the result of unnatural accumulation, the agency may be liable. *Williams v Dep't of Transportation,* 206 Mich App 71, 73; 520 NW2d 342 (1994).

A public parking lot which is owned or operated by a governmental agency is not, however, part of a highway for purposes of the highway exception. *Richardson v Warren Consolidated School District*, 197 Mich App 697, 705; 496 NW2d 380 (1992); *Bunch v City of Monroe*, 186 Mich App 347, 349; 463 NW2d 275 (1990). Thus, the school system had no duty to maintain the parking lot in a condition "reasonably safe and convenient for public travel." MCL 691.1402; MSA 3.996(102). Further, the public building exception, MCL 691.1406; MSA 3.996(106), could not apply to this case because this exception applies to dangers actually presented by the building itself, but not to dangers presented on public property adjacent to a public building. *Richardson, supra,* pp 700-701;

Eberhard v St Johns Public Schools, 189 Mich App 466, 467; 473 NW2d 745 (1991); *Merritt v Dep't of Social Services*, 184 Mich App 522, 523; 459 NW2d 10 (1990).

Plaintiff argues that the natural accumulation doctrine, and its exceptions, should be applied in the instant case pursuant to this Court's decision in *Hall v Detroit Bd of Education*, 186 Mich App 469; 465 NW2d 12 (1990). We disagree. In *Hall*, the plaintiff was injured when she slipped and fell on ice while walking from the grounds of a public school to an adjacent sidewalk. This Court held that summary disposition was properly granted in favor of the defendant board of education because the public building exception does not apply where a dangerous condition exists on school grounds adjacent to a public school building. *Id.*,pp 470-471. Although this Court in *Hall* discussed whether the defendant had a duty to remove the ice under the natural accumulation doctrine, it did so only to determine the liability of Allan Hall, the school custodian. This Court found that because the liability of Hall, as a school employee, was derivative of the school's liability, and because the school was not liable under the public building exception, then Hall could not be liable. *Id.*, p 472. In no way does *Hall* stand for the proposition that the natural accumulation doctrine is, in and of itself, an exception to immunity.

Because plaintiff is unable to identify any exception to governmental immunity, we find that the trial court properly held that the school system was entitled to summary disposition on the basis of governmental immunity.

III

Next, plaintiff argues that the trial court erred in granting summary disposition in favor of the theater. In granting summary disposition in favor of the theater, the trial court held that the theater was not an invitor because it did not have possession and control of the parking lot in which plaintiff fell.

The duty a possessor of land owes to those who come upon the land depends on the status of the visitor. *Stanley v Town Square Cooperative*, 203 Mich App 143, 146; 512 NW2d 51 (1993). Invitees and licensees are two groups of persons who may be present on the land. The distinction between these two groups is critical because it defines the scope of the duty owed to the person on the land by the landowner. The distinguishing characteristic between a licensee and an invitee depends on the presence on the land and is related to the pecuniary interests of the possessor of the land. *Id.*, p 147. If the person's use of the land was related to the pecuniary interests of the landowner, then that person is an invitee. *Id.* That is, an invitee is a person who enters the premises at the owner's express or implied invitation to conduct business concerning the owner. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). However, if the person is a social guest, and not on the property for the pecuniary interests of the landowner, then that person is a licensee. *Preston v Sleziak*, 383 Mich 442, 451-452; 175 NW2d 759 (1970).

In *Merritt v Nickelson*, 407 Mich 544, 551; 287 NW2d 178 (1980), our Supreme Court stated that a business invitee has the right to expect that the premises will be maintained and that the business would be conducted in a reasonably safe manner. This duty of care is owed to the invitee both

by the invitor who solicited the business and by the possessor of the premises. *Id.* Further, invitors are liable for known dangerous conditions of property and for dangerous conditions which might be discovered with reasonable care, regardless of whether the invitor has legal title or control over the premises. *Id.* Our Supreme Court also stated that premises liability is conditioned upon the presence of both possession and control over the land, however, these possessory rights can be loaned to another, thus conferring the duty to make the premises safe while absolving the owner of responsibility. *Id.,* pp 552-553.

In this case, we find that the theater was a business invitor, contrary to the trial court's ruling. It is undisputed that the school system entered into a contract to permit the theater to use the middle school's auditorium for the theater's plays. Plaintiff was a member of the general public invited onto the school grounds by the theater to attend a play for which tickets were purchased. The theater was the sole operator of the business and expected to derive an economic benefit from the public's presence. See *id.,* p 551. Therefore, the invitor impliedly warranted the premises' safe condition in the invitation to the public to attend its plays. *Id.*

Accordingly, we find that the trial court erred in ruling that the theater was not an invitor because it did not have possession and control over the parking lot. The theater was clearly a business invitor who solicited plaintiff's presence on the land and the theater is liable for dangerous conditions of the property which were known or which might have been discovered with reasonable care, regardless of whether the theater had legal title or control over the premises. The trial court's grant of summary disposition in favor of the theater on this basis is, therefore, reversed and we remand for further proceedings.

IV

Lastly, plaintiff argues that the trial court erred with respect to its ruling concerning the hold harmless agreement. The hold harmless agreement is an indemnification agreement between the theater and the school system. Because the school system is entitled to governmental immunity, it cannot be liable for plaintiff's injury and, therefore, will not be indemnified by the theater as a practical matter. The indemnification agreement does not confer any cause of action on plaintiff's behalf. Therefore, the only viable cause of action that plaintiff has is the claim against the theater on a premises liability theory.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky