STATE OF MICHIGAN

COURT OF APPEALS

LEONARD DURECKI and LORRAINE DURECKI,

Plaintiffs-Appellants,

v

BEVERLY JOE ALCOCK and LUANN ALCOCK,

Defendants-Appellees.

UNPUBLISHED
November 17, 2005

No. 263640
Oakland Circuit Court
LC No. 2004-059702-NO

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right a circuit court order granting defendants' motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Leonard Durecki ("Leonard") was passing through defendants' neighborhood when he saw a fire. Mistakenly believing defendants' garage to be the fire's point of origin, he ran onto defendants' property unbidden to warn them of the emergency. While there, Leonard was bitten by one of defendants' dogs. Plaintiffs sought damages under the dog-bite statute, MCL 287.351.[1] The trial court agreed with defendants that Leonard was a trespasser and dismissed the action.

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson,* 241 Mich App 611, 616; 617 NW2d 351 (2000). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other

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[1] Plaintiffs also alleged a common-law cause of action relative to dangerous animals, but the parties agreed to dismissal of the claim after plaintiffs conceded that discovery did not turn up any evidence that defendants had knowledge of any dangerous propensities on the part of the dogs.

documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003)(citations omitted).

If a dog bites a person without provocation while that person is lawfully on private property, the dog's owner is liable for damages. MCL 287.351(1). A person is lawfully on the premises if he is an invitee or licensee. MCL 287.351(2). Defendants contend that because Leonard entered their property without their express permission, he was a trespasser and thus was not lawfully on the premises. We disagree.

A licensee is a person who is privileged to enter onto land by virtue of the landowner's consent. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). That consent may be express or implied. *Alvin v Simpson,* 195 Mich App 418, 420; 491 NW2d 604 (1992). "Permission may be implied where the owner acquiesces in the known, customary use of property by the public." *Id.* (citation omitted). However, this is not the only circumstance in which permission may be implied. Permission may be implied by words or conduct. 2 Restatement Torts, 2d, § 330, p 173. Prevailing customs and well-established usages of a civilized community "entitle everyone to assume that a possessor of land is willing to permit him to enter for certain purposes until a particular possessor expresses unwillingness to admit him." *Id.* at 174. Volunteer helpers who enter without first being asked to do so to render assistance are generally considered licensees. *Id.* at § 332, p 177.[2] In so doing, they are "following a cherished American custom of helping a neighbor in need" and are entitled to assume that they have permission to enter onto the land. *Romine v Koehn,* 730 SW2d 558, 560 (Mo App, 1987). There is no evidence suggesting that Leonard was on defendants' property for any reason other than to warn defendants of a perceived impending threat or danger in the form of a fire or to assist in extinguishing the fire. Furthermore, the evidence reflected that Leonard suffered the dog bite before defendants told Leonard to leave their property after it became clear that defendants' property was not on fire, although there was a fire on adjoining property. Defendants did not shoe Leonard off their property at first because of the circumstances, thereby

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[2] "[A] volunteer helper who comes upon land to aid in getting a truck out of a mudhole, or in putting out a fire, without being asked to do so, is a licensee, but not an invitee." Restatement Torts, *supra* at § 332, p 177.

implicitly consenting to his presence. The record indicates, and Mr. Alcock conceded, that Leonard was acting as a Good Samaritan.[3] The trial court erred in concluding that Leonard was a trespasser rather than a licensee.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter

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[3] We wish to make clear that our ruling does not bear on any issues that may exist concerning provocation.