STATE OF MICHIGAN

COURT OF APPEALS

FRANK HOLZER and JANET HOLZER,

Plaintiffs-Appellants,

v

BILLY DUBS, a/k/a BILLY DUBBS, d/b/a DUBS CARPENTRY,

Defendant-Appellee.

UNPUBLISHED
August 28, 1998

No. 201088
Oakland Circuit Court
LC No. 96-512907 NO

Before: Sawyer, P.J., and Bandstra and J.B. Sullivan*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Before this Court is a negligence action resulting from the fall of Frank Holzer (plaintiff[1]) from a roof while he was removing shingles. Defendant was hired by the property owner to perform certain repairs to her home.

On appeal, this Court reviews the grant or denial of a motion for summary disposition de novo. *Int'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 442; 543 NW2d 25 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.*; *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Marcelletti, supra.* A motion pursuant to MCR 2.116(C)(10) may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994); *Int'l Brotherhood, supra*. The party

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

opposing the motion must show that a genuine issue of disputed fact exists. *Skinner, supra; Int'l Brotherhood, supra*.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (a) the defendant owed a duty to plaintiff; (b) the defendant breached that duty; (c) the defendant's breach of duty was a proximate cause of the plaintiff's injuries; and (d) that the plaintiff suffered damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Questions concerning the existence of a duty are for the court to decide as a matter of law. *Simko, supra* at 655; see, also, *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997).

The duty a possessor of land owes to individuals who come upon the land rests on the status of the individual. *Stanley v Town Square Coop*, 203 Mich App 143, 146; 512 NW2d 51 (1993). Based on a three-tiered approach to defining duties, an individual may be classified as an invitee, a licensee, or a trespasser. *Id*. at 146-147. On appeal, plaintiff argues he was an invitee, or at the very least, a licensee. However, these arguments are inapposite because the classifications of invitee, licensee, and trespasser determine the duty of care owed in a premises liability action against the possessor of land, *id*, and plaintiff provides no authority by which any duty arising out of his status might be owed by defendant, *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997) ("this Court will not search for authority to support a party's position").

Defendant did, however, have a duty as a contractor. Anyone foreseeably injured by the negligent performance of a contractual undertaking is owed a duty of care. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 708; 532 NW2d 186 (1995). Even though plaintiff was not a party to the contractual relationship between defendant and the homeowner, defendant had a common-law duty of care apart from the contract itself. *Id.* at 708-710. A contractor has the general duty to act so as not to unreasonably endanger the well-being of employees or persons lawfully on the site of a project. See *Clark v Dalman*, 379 Mich 251, 262; 150 NW2d 755 (1967).

Defendant argues that plaintiff was a trespasser at the time he entered onto the roof. According to defendant, he did not owe a duty of care to a trespasser who was not lawfully on the premises. However, there is no evidence to support the contention that plaintiff was a trespasser. The owner of the home testified at her deposition that plaintiff was welcome in her home and was not a trespasser. Plaintiff worked on the roof for over three hours before his accident with at least the tacit approval of both the homeowner and defendant. Because plaintiff was lawfully on the premises, defendant had the general duty to act so as not to unreasonably endanger plaintiff's well-being. Accordingly, the trial court properly denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) because defendant owed plaintiff a legal duty. However, plaintiff has failed to prove that defendant breached his duty to plaintiff; thus, the trial court's grant of summary disposition on this basis was proper. Although plaintiff alleged in his complaint that he fell through a hole on the roof, which defendant created and concealed with a tarp, the evidence presented for the motion proved the contrary. Defendant, defendant's son, and Keith Thiel testified at their depositions that they did not replace or remove any of the wooden roof boards. The men testified that the wooden roof boards were in good shape and that there were no holes. Even plaintiff testified at his deposition that, although shingles had been removed, there were no holes in the roof.

Instead, the evidence, considered in a light most favorable to plaintiff, establishes only that he simply walked off the edge of the roof. Thiel testified at his deposition that plaintiff walked over to the edge of the roof with an extension cord used for the radio. Seconds later, Thiel turned around to warn plaintiff to watch his step, but plaintiff was gone. Plaintiff himself has no recollection of how or why he fell. Plaintiff produced no evidence that defendant breached his duty of care by creating an unsafe condition on the roof or by negligently failing to protect plaintiff from any dangerous condition.[2]

Plaintiff argues that defendant failed to comply with American National Standards Institute guidelines during the roofing project. However, plaintiff has offered no support for his theory that the safety guidelines promulgated by a private business association for the apparent protection of contractors' employees are applicable in this case. See *Hottman v Hottman*, 226 Mich App 171, 177-180 n 1; 572 NW2d 259 (1997) (MIOSHA regulations applicable only in an employer/employee case). Further, even if these guidelines were otherwise applicable, plaintiff has cited no authority to suggest that the guidelines are anything more than recommendations and that they can form the basis of liability even though plaintiff was obligated to watch out for his own safety in confronting the "open and obvious" danger presented by the roof's edge.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan

[1] Because Janet Holzer's claim is derivative of her husband's claim, the use of the term "plaintiff" will hereinafter refer to Frank Holzer.

[2] To the extent that the edge of the roof was hazardous, it presented an "open and obvious" danger for which defendant cannot be liable. See *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995). Our review of the record supports the trial court's characterization of the slope of the roof here as "relatively slight," in contrast to that of the average house. Cf. *Hottmann v Hottmann*, 226 Mich App 171, 173-177; 572 NW2d 259 (1997) (majority held that the open and obvious danger doctrine did not prevent liability where the plaintiff fell on two-by-four boards that were affixed to an "unusually steep" roof because there were an insufficient number of roof jacks).