STATE OF MICHIGAN

COURT OF APPEALS

DANIEL SCHWARTZ,

Plaintiff-Appellant,

v

MELVIN PETERSON,

Defendant-Appellee.

UNPUBLISHED
June 5, 2001

No. 223480
Gogebic Circuit Court
LC No. 98-000307-NO

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right from an order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

Defendant is an elderly gentleman who lives in Ironwood, Michigan. Although defendant was able to plow his own driveway with a snowblower during winter months, health considerations prevented him from shoveling snow from his garage roof. Plaintiff and defendant were personal friends who had known each over the course of thirty years. Plaintiff frequently performed odd jobs for defendant, such as putting up eaves troughs on defendant's home, tilling defendant's garden, and removing snow from defendant's roof. Typically, the parties did not discuss payment for plaintiff's services in advance of the work. However, defendant usually paid plaintiff five or ten dollars after he completed work at defendant's home.

On February 9, 1998, defendant asked plaintiff to salt the ice that had accumulated at the eaves of defendant's garage. Although plaintiff had removed snow from defendant's garage roof on thirty or forty occasions, he had never salted ice or snow on the roof. Defendant frequently allowed plaintiff to use an aluminum extension ladder that was stored in defendant's garage, in order to perform work on defendant's premises. On the day in question, according to the parties' customary practice, defendant left the garage door open for plaintiff. Plaintiff testified that he removed the ladder from defendant's garage and set it up himself, as he had done on numerous occasions. Plaintiff testified that he was accustomed to checking the feet of the ladder, and that he examined them on the day in question but discovered no apparent problems. Plaintiff then checked the surface of defendant's driveway, where he set the base of the ladder. Although he indicated that the driveway was icy in spots, plaintiff claimed that he set the ladder in a dry spot. Plaintiff also testified that he felt the ladder was secure. He ascended the ladder and salted the

ice on defendant's roof. While descending the ladder, plaintiff fell to the ground and sustained injuries.

Plaintiff filed suit, alleging that he was an invitee on defendant's premises at the time of injury and further alleging that defendant breached the legal duties owed to invitees on his property. Plaintiff argues that defendant should have inspected the driveway for snow and ice before defendant began the work. In addition, plaintiff argues that defendant supplied a dangerous and defective ladder and that defendant should have held the ladder steady while defendant performed the work. In the trial court, defendant conceded that plaintiff was an invitee on his premises but moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that he was entitled to judgment as a matter of law because the allegedly dangerous conditions were open and obvious. The trial court agreed and granted defendant's motion.

We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). Reviewing a grant of summary disposition, this Court must evaluate the affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties in the light most favorable to the non-movant. *Id*. at 357-358. After reviewing the record evidence in the light most favorable to plaintiff, we must decide whether a genuine issue of material fact existed to warrant a trial. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

A prima facie claim of negligence requires the plaintiff to prove (1) that the defendant owed plaintiff a duty, (2) that defendant breached that duty, (3) causation, and (4) damages. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). At issue here is the duty that defendant owed to plaintiff. With regard to premises liability actions, persons who enter upon the land or premises of another are either trespassers, licensees or invitees, with each category having a corresponding standard of care owed by the possessor of real property. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). The trial court concluded that plaintiff was an invitee on defendant's premises at the time of injury and applied the corresponding duties on defendant as a landowner. Based on our Supreme Court's holding in *Stitt*, we conclude as a matter of law that plaintiff was a licensee on defendant's premises, rather than an invitee. Given the standard of care owed by a landowner to a licensee, we conclude that the trial court properly granted summary disposition in defendant's favor, albeit for a different reason.

The trial court apparently based its decision that plaintiff was an invitee on *Hottmann v Hottmann*, 226 Mich App 171, 175; 572 NW2d 259 (1997) and *Leveque v Leveque*, 41 Mich App 127, 131; 199 NW2d 675 (1972), both of which stand for the proposition that an individual who is on another's premises to perform services beneficial to that person is an invitee. However, the trial court's decision was rendered without the benefit of our Supreme Court's decision in *Stitt*, *supra*. We believe that the Court's holding in *Stitt* requires the conclusion that plaintiff was a licensee at the time of injury, not an invitee.

In *Stitt*, *supra* at 603, the Court held that the "public invitee" concept set forth in 2 Restatement Torts, 2d, § 332, did not apply in Michigan. Rather, the Court held that invitee status applies only when the premises at issue are held open for a commercial purpose. *Id*. at 604. As the Court explained:

> [W]e conclude that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests. It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose. [*Id.* at 604 (emphasis in original).]

In the instant case, there is no indication in the record that defendant held his home open for a commercial purpose. Consequently, under *Stitt*, plaintiff cannot be said to have held the status of an invitee while on defendant's land. Instead, plaintiff is properly classified as a licensee.[1]

Because we conclude that plaintiff was a licensee at the time of his injury, rather than an invitee, we must now apply the correct standard of care that defendant owed to plaintiff:

> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Id.* at 596 (citations omitted).]

In our view, the trial court properly granted summary disposition to defendant. A review of the record in the light most favorable to plaintiff demonstrates that defendant did not breach the duty owed to plaintiff as a licensee. Neither the icy condition of the land nor the allegedly defective condition of defendant's ladder can be characterized as "hidden dangers," given plaintiff's testimony that he saw the icy condition of the driveway and that he checked the ladder's feet to make sure that they were secure. Further, defendant did not owe plaintiff a duty to inspect either the driveway or the ladder to make either safe for plaintiff's visit. *Id*. at 596.

Finally, we reject plaintiff's argument that the trial court erred in concluding that the standards set forth in the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*.; MSA 17.50(1) *et seq*. (MIOSHA), do not apply to plaintiff's cause of action. The statute expressly provides that its requirements do not apply to "domestic employment." MCL 408.1002(1); 17.50(2)(1). The statute further defines "domestic employment" to mean "that employment involving an employee specifically employed by a householder to engage in work or an activity relating to the operation of a household and its surroundings, whether or not the

[1] We recognize that defendant occasionally paid plaintiff nominal amounts for the odd jobs that plaintiff performed on defendant's premises. Defendant undoubtedly benefited from plaintiff's willingness to perform odd jobs at his home. However, in light of *Stitt*, that is not sufficient grounds for bestowing the status of invitee on plaintiff.

employee resides in the household." MCL 408.1004(6); MSA 17.50(4)(6). We agree with the trial court's conclusion that the facts of the present case involve "domestic employment." As this Court stated in *Hottmann*:

> Nothing in the language of the MIOSHA suggests that it should be applied to homeowners' do-it-yourself projects, nor is it reasonable to expect the average homeowner engaging in such a project to be familiar with and comply with the MIOSHA regulations. [*Hottmann*, *supra* at 179.]

The trial court correctly concluded that MIOSHA standards do not apply in this case.

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski
/s/ William C. Whitbeck