STATE OF MICHIGAN

COURT OF APPEALS

RANDALL EVERS and KRISTIE EVERS, as Next Friend of SARAH EVERS, a Minor,

Plaintiffs-Appellants,

v

LOWELL ALDRICH, BRENDA ALDRICH, INDEPENDENCE WOODS, LLC, and CHRISTOPHER GREGORY,

Defendants-Appellees.

UNPUBLISHED
January 22, 2002

No. 223690
Oakland Circuit Court
LC No. 99-012287-NO

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition in this premises liability action. We affirm.

This action arose after plaintiff Randall Evers injured his foot when he fell from a ladder while attempting to clear snow from a roof on defendants' property. Plaintiffs brought this action alleging that the ladder slipped on some ice that was under snow on the driveway, and that the icy driveway constituted a dangerous condition for which defendants were liable because they failed to take precautions to remedy this dangerous condition.

The trial court granted defendants summary disposition pursuant to MCR 2.116(C)(10) on the basis of the independent contractor rule. See *Justus v Swope*, 184 Mich App 91; 457 NW2d 103 (1990) and *Muscat v Khalil*, 150 Mich App 114; 388 NW2d 263 (1986).

We review a trial court's decision on a motion for summary disposition de novo. *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G); *Singerman, supra*. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The reviewing court must determine whether any genuine issue of material fact exists in order to

prevent entering a judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

We agree that the trial court erred when it relied on the independent contractor rule as the basis for its decision granting defendants summary disposition. The independent contractor rule is triggered when an owner of property, an employer, or a general contractor who has hired an independent contractor to perform a job is subject to a negligence suit brought by third parties or employees of the independent contractor arising from the contractor's own negligence or the negligence of his employees. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999). However, the independent contractor himself is not a party intended to benefit from the doctrine, and the rule does not extend to circumstances where the party alleging negligence is in fact the independent contractor. *Muscat, supra* at 118-119. Because the facts here showed that Randall Evers was an independent contractor alleging negligence on the part of defendants, the property owners who hired him to fix their furnace, the independent contractor rule is not applicable.

Nonetheless, we conclude that summary disposition was warranted because there is no genuine issue of material fact that defendants were not liable to plaintiffs. Plaintiffs' theory of liability was based upon Randall Evers alleged status as a business invitee. An invitee is a person who enters the land of another on an invitation that carries with it an implication that the owner has taken reasonable care to prepare the premises and to make them safe. *Hughes v PMG Building*, 227 Mich App 1, 9-10; 574 NW2d 691 (1997). In this case, it was undisputed that defendants invited Randall Evers onto their property to repair their furnace and, as such, he was an invitee.

Although we agree that Randall Evers was an invitee, we do not agree that defendants' property presented an unreasonably dangerous condition resulting in liability to plaintiffs. A landowner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition of the land. *Lugo v Ameritech Corp, Inc*., 464 Mich 512, 516; 609 NW2d 193 (2001). However, the landowner is not required to protect an invitee from an open and obvious danger unless special aspects of the condition make it unreasonably dangerous. *Lugo, supra* at 517. Special aspects that serve to remove a condition from the open and obvious doctrine are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id*. at 519. Further, although, it is the duty of a landowner to take reasonable measures within a reasonable period after an accumulation of snow and ice to diminish the hazard of injury to an invitee, the landowner is not an absolute insurer of the safety of an invitee. *Anderson v Wiegand*, 223 Mich App 549, 553-554; 567 NW2d 452 (1997); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995).

In this case, plaintiffs allege that the ladder slipped on an icy driveway, and defendants were negligent for failing to salt their driveway "when possessed of the knowledge that shoveling could not remedy a danger," i.e., an icy driveway. However, plaintiffs failed to present factual support for this allegation. Rather, their claim that defendants' driveway was unreasonably dangerous rests simply on speculation and conjecture, which is insufficient to create a genuine issue of disputed fact. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Defendants, on the other hand, presented deposition testimony indicating that, by cleaning the driveway, they took reasonable measures within a reasonable time after the accumulation of snow to diminish the hazard of injury. *Anderson, supra* at 553-554.

Further, even if plaintiffs had presented evidence to support their allegation of ice on the driveway, plaintiffs' claim would still be barred by the open and obvious doctrine. It is apparent that there was a large amount of accumulated snow in the area at the time of the accident. In fact, Randall Evers testified that there was "maybe a half inch" of snow on the driveway. Clearly, if plaintiffs' allegation of snow on the driveway was true, then the fact that the driveway was potentially slippery was an open and obvious danger. Defendants would be liable to plaintiff for this open and obvious risk only if plaintiffs established special aspects of the condition that would "differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo*, *supra* at 517. Here, plaintiffs failed to show how the alleged icy condition of the driveway was different from a typical driveway in January in Michigan such that it gave rise to high likelihood of harm or severity of harm. *Id*. at 519.

Accordingly, we conclude that the trial court reached the right result in granting summary disposition to defendants, albeit for the wrong reason. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen