STATE OF MICHIGAN

COURT OF APPEALS

LESTER J. MYERS and MARLINDA MYERS,

Plaintiffs-Appellants,

v

KEVIN HILGENDORF and VIP PLUMBING, INC.,

Defendants-Appellees,

and

DALE L. CHILES, d/b/a ALLISON BUILDERS and KIRK O'BRIEN and JASON O'BRIEN, d/b/a O'BRIEN BUILDERS,

Defendants.

UNPUBLISHED
November 22, 2005

No. 254879
Genesee Circuit Court
LC No. 03-075640-NO

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's orders granting summary disposition to defendant Kevin Hilgendorf under MCR 2.116(C)(8), and to defendant VIP Plumbing, Inc., under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

Plaintiff Lester Myers is a licensed plumber who is the owner, president, and sole shareholder of defendant VIP Plumbing, Inc., a Michigan corporation. Myers decided to build a house on property owned by VIP Plumbing and hired Allison Builders to act as the general contractor and to subcontract the necessary trades to complete the house, except for the plumbing, which was to be completed by VIP Plumbing. Allison Builders subcontracted the framing work to O'Brien Builders, which in turn subcontracted the work to defendant Hilgendorf. During the framing process, defendant Hilgendorf installed a set of stairs from the main floor to the basement. Myers subsequently came to the home to deliver materials and assess whether it was ready for rough plumbing. While ascending the stairs from the basement, the stairs collapsed, causing Myers to fall and sustain injury.

Plaintiffs filed this lawsuit, alleging negligent construction of the stairs by defendant Hilgendorf. Plaintiff Marlinda Myers asserted a claim for loss of consortium. Defendant VIP

Plumbing was later added as a party defendant, under a premises liability theory. Defendants Hilgendorf and VIP Plumbing each moved for summary disposition. The trial court granted their motions pursuant to separate orders. Plaintiffs now appeal.

I. Defendant Hilgendorf

The trial court dismissed plaintiffs' claims against defendant Hilgendorf pursuant to MCR 2.116(C)(8). As this Court explained in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998),

> [a] motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. In a negligence action, summary disposition is proper if it is determined as a matter of law that the defendant owed no duty to the plaintiff under the alleged facts. [Citations omitted.]

A plaintiff in a negligence case must establish four elements: 1) that the defendant owed plaintiff a duty, 2) a breach of that duty, 3) an injury proximately resulting from the breach, and 4) damages. *Hughes v PMG Building Inc*, 227 Mich App 1, 5, 574 NW 2d 691 (1997).

Relying on *Hughes*, *supra*, the trial court determined that plaintiffs could not prevail on their negligence claim as a matter of law because defendant Hilgendorf, as a subcontractor at a construction site, did not owe a duty of care to Myers, another subcontractor at the site. We disagree.

In *Hughes*, *supra* at 12, this Court held that "[t]he 'common work area' exception under *Funk [v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974)], which can impose liability on a general contractor, does not apply where the employee of one subcontractor seeks to recover from another subcontractor." But as this Court explained in *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719, 722; 683 NW2d 229 (2004):

> [N]othing in our state's jurisprudence absolves a subcontractor—or anyone on a construction job—of liability under the common-law theory of active negligence. In *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), our Supreme Court noted that one person's duty to another may arise "by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." This rule, the Court explained, was embedded in "the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another."

> Nothing in our subsequent law, including *Funk* and *Hughes*, . . . has abrogated that common-law duty.

Here, on review de novo, we find that plaintiffs' complaint sufficiently alleges a cause of action against defendant Hilgendorf under a common-law theory of active negligence arising from his construction of the staircase. The trial erred in dismissing plaintiffs' claim against defendant Hilgendorf as a matter of law.

Defendant Hilgendorf argues, as an alternative basis for affirming the trial court's decision, that dismissal of plaintiffs' action was warranted as a sanction for plaintiffs' failure to preserve the allegedly defective staircase. Defendant Hilgendorf correctly argues that a trial court has the inherent authority to sanction a party for failing to preserve evidence. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). The trial court's decision is reviewed for an abuse of discretion. *Id.* Appropriate sanctions include the exclusion of evidence that unfairly prejudices the other party, an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence, or dismissal. *Id.* at 161-163. The latter option "is a drastic step that should be taken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id.* at 163. In this case, the trial court did not reach this issue and plaintiffs have not briefed it. Under the circumstances, and because the decision whether a sanction is warranted is discretionary with the trial court, and the determination of what sanction is most appropriate, if warranted, should be made by the trial court in the first instance after carefully evaluating all available options on the record, we decline to consider this issue. See *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). Instead, we reverse the trial court's order granting summary disposition in favor of defendant Hilgendorf and remand for further proceedings, without prejudice to defendant Hilgendorf presenting this issue to the trial court in an appropriate motion. We express no opinion on the likely outcome of any such motion.

II. Defendant VIP Plumbing, Inc.

The trial court granted defendant VIP Plumbing's motion pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing the motion, this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). This Court reviews the trial court's decision de novo. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002).

A premises owner has a duty to exercise reasonable care to protect invitees, i.e., persons who enter the premises at the owner's express or implied invitation to conduct business concerning the owner, from an unreasonable risk of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize, or protect themselves against. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, and only if, all of the following are true: the possessor (a) knows, or by

the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001).

In this case, the trial court properly dismissed plaintiffs' claim against defendant VIP Plumbing because plaintiffs failed to present any evidence indicating that VIP Plumbing knew, or should have known, of the allegedly dangerous condition of the staircase. In light of our decision, we need not address the parties' remaining arguments.

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

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood