STATE OF MICHIGAN

COURT OF APPEALS

KEVIN ROTH,

Plaintiff-Appellant,

v

RYAN'S TAVERN AT IRONWOOD, INC.,

Defendant-Appellee.

UNPUBLISHED
January 19, 1999

No. 205696
Oakland Circuit Court
LC No. 96-532483 NO

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting summary disposition in favor of defendant Ryan's Tavern pursuant to MCR 2.116(C)(8) and (10). We affirm.

On appeal, this Court reviews the grant or denial of a motion for summary disposition de novo. *International 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. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Amorello v Monsanto Corp*, 186 Mich App 324, 329; 463 NW2d 487 (1990). Such a motion 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. *Id*. The party opposing the motion must show that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

In general, negligence is conduct involving an unreasonable risk of harm. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) that the defendant owed a legal duty to the plaintiff; (2) that the

defendant breached or violated the legal duty; (3) that the plaintiff suffered damages; and (4) that the breach was a proximate cause of the damages suffered. *Id*. Questions concerning the existence of a duty are for the court to decide as a matter of law. *Id*. When determining whether a duty exists, the court must examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk. *Id.* See *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993).

The duty a possessor of land owes to an individual who comes onto his land depends 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. "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, supra*, 227 Mich App 9-10. To be an invitee, the plaintiff's presence on the defendant's premises must have been related to an activity that is of some tangible benefit to the defendant. *White v Badalamenti*, 200 Mich App 434, 436; 505 NW2d 8 (1993). Here, Jeff Johnson, the contractor who was working at defendant's premises, asked plaintiff to visit the construction site to evaluate a roofing problem that he had encountered. When plaintiff arrived at the construction site, he was greeted by the owner of Ryan's Tavern. Plaintiff informed the owner that he stopped by to evaluate a problem on the roof. Because plaintiff was asked to evaluate a problem on the roof and was hurt while attempting to assess the problem, plaintiff was an invitee and was not, as defendant contends, a trespasser.

A premises owner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitee will not discover or protect himself against. *Hughes, supra,* 227 Mich App 9. Although the premises owner must warn of hidden defects, there is generally no duty to warn of "open and obvious" dangers. *Id*. at 10. However, even if a danger is open and obvious, a premises owner may still have a duty to protect invitees against foreseeably dangerous conditions. *Id*. In other words:

> [I]f the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).

Whether a danger is open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). Plaintiff admitted that if he had looked, he would have noticed the stack of plywood laying on top of the roof. Even assuming that Ryan's Tavern was aware of the dangerous condition, it had no reason to believe that an invitee would fail to discover the stack of plywood and fail to take proper measures to avoid the danger. While a premises owner may have a duty to protect invitees against

foreseeably dangerous conditions even if they are open and obvious, we believe that the loose plywood stack did not pose an unreasonable risk of danger. Because an average person of ordinary intelligence would have discovered the danger posed by the loose stack of plywood upon casual inspection, the danger was open and obvious. The fact that plaintiff, himself, did not see the stack is not of consequence in determining the open and obvious nature of the hazard as long as the plywood would have been discovered by an average person of ordinary intelligence upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Therefore, we believe that the trial court did not err in granting summary disposition in favor of defendant Ryan's Tavern based on the open and obvious doctrine.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell