STATE OF MICHIGAN

COURT OF APPEALS

DANIEL DAILY,

Plaintiff-Appellant,

v

ALBERT CHESLEY and BETTY CHESLEY,

Defendants-Appellees.

UNPUBLISHED
November 9, 2004

No. 249083
Wayne Circuit Court
LC No. 01-141787-NO

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

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

A land owner is subject to liability for physical harm caused to his invitees by a condition on the land only if the owner (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (b) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect his invitees against the danger.

The evidence showed that defendants had a hole in their roof. The hole had been repaired many years earlier and plaintiff was injured by an alleged defect in the repair, i.e., the repair did not include placement of a board over the hole and under the shingles or otherwise render the situs of the repair capable of supporting a man's weight. Defendants were unaware of the alleged defect, which was not capable of detection upon reasonable inspection. Therefore,

defendants were not liable for plaintiff's injury. See *Goldsmith v Cody*, 351 Mich 380, 388; 88 NW2d 268 (1958).

Plaintiff's claim that defendants were liable for the workman's negligence in repairing the hole is unpersuasive. Had plaintiff been injured as a result of a hole in the roof of which defendants knew or should have known, defendants would not be absolved of their duty to make the roof safe for plaintiff to work on or to warn plaintiff of the unsafe condition simply because they had hired someone to fix the hole and he was in the process of making repairs.[1] See *Bradley v Burdick Hotel Co*, 306 Mich 600, 604; 11 NW2d 257 (1943); *Misiulis v Milbrand Maintenance Corp*, 52 Mich App 494, 507-508; 218 NW2d 68 (1974). In this case, however, the hole had long since been repaired and did not render the premises unsafe. Rather, it was the repair itself, which concealed the lack of support beneath the shingles, that rendered the premises unsafe and caused plaintiff's injury. Because it is conceded that defendants did not know of that defect and a reasonable inspection of the roof after the repairs were completed would not have revealed the defect, defendants did not breach their duty to plaintiff.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[1] This of course presupposes that the hole was not open and obvious. See *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995).