

IN THE COURT OF APPEALS OF IOWA

No. 8-371 / 97-1828

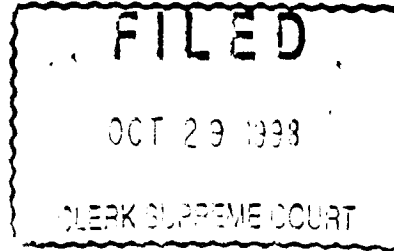
DANNY L. PHELPS, JR.,

Plaintiff-Appellant,

vs.

JUNE I. SCHULTZ,

Defendant-Appellee.



Appeal from the Iowa District Court for Fayette County, James L. Beeghly,
Judge.

Danny Phelps appeals the district court's grant of summary judgment in favor
of June Schultz in Phelps' negligence claims. **REVERSED.**

Morris L. Eckhart of Milroy, Eckhart and Thompson, Vinton, for appellant.

Timothy W. Hamann and Bradley A. Temple of Clark, Butler, Walsh &
Hamann, Waterloo, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Danny Phelps appeals the district court's grant of summary judgment in favor of June Schultz in Phelps' negligence claims. Phelps contends the district court erred in finding there were no genuine issues of material fact. We agree and reverse the district court's ruling.

Phelps either went with or followed Dennis Tharp to Schultz's residence on the day he was injured. Tharp had agreed to fix Schultz's roof and do some other work around her house; Phelps' father went along to assist Tharp. A wooden ladder was already on the site when they arrived that morning. Tharp claims he owns the ladder and maintains he dropped it off the night before Phelps was injured. Phelps' father accompanied Tharp to Schultz's house that night; he testified the ladder was not there at that time.

Shortly after arriving at the property, Tharp left to use the bathroom at a nearby tavern while Phelps' father cleaned out Tharp's truck. Phelps alleged he spoke to Schultz about working for her to earn extra money while Tharp was gone. Phelps alleged he agreed to do some painting on the porch and garage, some window glazing, and some work with the gutter for five dollars an hour. Phelps' father witnessed this alleged conversation, although he could not hear what was said. Schultz and Tharp testified Schultz never spoke to Phelps, never hired Phelps to do any work for Schultz, and there were no gutters on the house on the day Phelps was injured.

Upon returning from the tavern, Tharp climbed onto the roof and began tearing off shingles. Sometime later, Phelps either offered to carry a broom up to Tharp or Tharp asked Phelps to get him a hammer. The wooden ladder broke as Phelps was climbing it.

Phelps was taken to the hospital after he fell. According to Phelps, his father, and his uncle, Phelps asked his father at the hospital to ask his uncle if the uncle could complete the work Phelps had agreed to do for Schultz. Phelps' father and uncle further testified they returned to Schultz's property, and the uncle did some work and was paid by Tharp with money Tharp said he had received from Schultz after telling her the work was finished.

Phelps fractured his right foot when he fell. His right leg was later amputated below the knee because it was chronically infected due to failure of the foot to heal properly.

Phelps apparently attempted to sue Tharp one month after the accident but the claim was dropped after Tharp's attorney contacted Phelps' attorney. Phelps later filed this suit against Schultz claiming: (1) Schultz's negligence injured Phelps while he was working on her property as an independent contractor; (2) *res ipsa loquitur*; (3) Schultz's negligence injured Phelps while he was working on her property as Schultz's employee; and (4) a statutory presumption of negligence under Iowa Code section 87.21.

Schultz filed a motion for summary judgment supported by Schultz's and Tharp's depositions. Phelps resisted, arguing there are at least fifteen material facts

in dispute. Phelps' resistance was supported by the affidavits of Phelps, his father, and his uncle. The district court granted summary judgment in Schultz's favor. The district court concluded: (1) Phelps presented insufficient evidence to show Schultz owned the ladder; (2) Phelps asserted no evidence that climbing the ladder would have been within the scope of his alleged employment; and, therefore, (3) Schultz did not breach any duty of care she might have owed Phelps.

I. STANDARD OF REVIEW. Summary judgment rulings are reviewed for error. *Gerst v. Marshall*, 549 N.W.2d 810, 811 (Iowa 1996). "We examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law." *Id.* at 811-812 (quoting *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 354 (Iowa 1995)). A genuine issue of material fact exists if, viewing the facts in a light most favorable to the party opposing the motion for summary judgment, reasonable minds could differ on how the issue should be resolved. *Id.* at 812; *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 338 (Iowa 1991).

Although claims of negligence are seldom capable of summary adjudication, the threshold determination of whether the defendant owes the plaintiff a duty of care is always a legal question for the court. *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 875 (Iowa 1996). However, if the facts underlying the plaintiff's claim of duty are disputed, summary judgment is improper. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990).

II. PHELPS' STATUS ON SCHULTZ'S PROPERTY. Before Phelps may recover for damages allegedly caused by Schultz's negligence, Phelps must establish a legal duty owed him by Schultz. *Ries v. Steffensmeier*, 570 N.W.2d 111, 114 (Iowa 1997). Phelps' claims depend chiefly upon his status on Schultz's land at the time of the accident; a different standard of care will apply depending upon whether Phelps was an invitee or a trespasser. *Sheets v. Ritt, Ritt, & Ritt, Inc.*, 581 N.W.2d 602, 606 (Iowa 1998) (we no longer recognize a distinction in duty owed a licensee and an invitee in premises liability cases, but the distinction persists with regard to trespassers).

Phelps must show two things to establish his status as an invitee at the time he was injured. First, Phelps must prove he was either an independent contractor or an employee. *Baumler v. Hemesath*, 534 N.W.2d 650, 653 (Iowa 1995) (employee is an invitee); *Greenwell v. Meredith Corp.*, 189 N.W.2d 901, 905 (Iowa 1971) (employee of an independent contractor is an invitee). Second, Phelps must prove climbing the ladder was within the scope of his invitation or employment. *Casey v. Hansen*, 238 Iowa 62, 68, 26 N.W.2d 50, 54 (1947); *Keeran v. Spurgeon Mercantile Co.*, 194 Iowa 1240, 1242-1243, 191 N.W. 99, 100 (1922).

"A business invitee is one 'who is invited to enter or remain on land for the purpose directly or indirectly connected with business dealings with the possessor of land.'" *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990) (quoting Restatement (Second) of Torts § 332, at 175). Here, Phelps alleges he was an invitee based either on being an employee or an independent contractor. Schultz and Tharp

deny Schultz hired Phelps to do any work. However, Phelps and his father say Schultz did hire Phelps to do some work. Phelps' father and uncle testified Schultz paid Phelps' uncle after he completed some of the work Phelps was allegedly hired to do; this lends additional support to Phelps' claim of employment. Reasonable minds could differ on whether or not Schultz and Phelps had an employment relationship.

Phelps must also show he was acting within the scope of his employment when he attempted to climb the wooden ladder. The scope of a person's employment depends upon what they were hired to do and what they actually did do with the knowledge and approval of their employer. *Bell v. Brown*, 214 Iowa 370, 374-375, 239 N.W. 785, 788 (1932). The employee need not be doing a specifically prescribed task; the employee could be found to be within the scope of his employment if he is in a place where he might reasonably be in performing his duties or does some act which he deems necessary for the benefit or interest of his employer. *Casey*, 238 Iowa at 68, 26 N.W.2d at 54.

Phelps claims he was hired to do some painting on the porch and garage, some window glazing, and some work with the gutter. Phelps would have been acting within the scope of his employment if Schultz could reasonably have expected Phelps to use the ladder to perform his work. *Keeran*, 194 Iowa at 1242-1243, 191 N.W. at 100. Schultz and Tharp deny there were any gutters on the house; however, Schultz testified she wanted to have the underside and edge of the overhang of her porch painted. Schultz could have reasonably expected this task would require the use of

a ladder. Alternatively, since Tharp and Phelps seem to have arrived together (in Tharp's truck or separate vehicles), Schultz could have reasonably expected Phelps would help Tharp by taking tools or materials up to the roof for Schultz's benefit. Again, reasonable minds could differ on whether climbing the ladder was within the scope of Phelps' employment.

III. OWNERSHIP OF THE LADDER. Schultz and Tharp claim the ladder belongs to Tharp. Phelps and his father claim it belongs to Schultz. Phelps' appellate brief indicates he is prepared to present additional evidence. Phelps states Tharp is unable to present any documentation to support his claim of ownership; other people whom have been at job sites with Tharp can testify Tharp never had or used the wooden ladder at job sites prior to his work on Schultz's home. Depending upon their assessment of the credibility of the witnesses, reasonable minds could differ on how to resolve this ownership issue.

The facts underlying the legal determination of what duty of care Schultz owed Phelps are in dispute. Therefore, summary judgment should not have been granted in favor of Schultz. *Sankey*, 456 N.W.2d at 207.

For these reasons, we reverse the district court's grant of summary judgment in Schultz's favor.

REVERSED.