# STATE OF MICHIGAN

# COURT OF APPEALS

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JAMES B. BAILEY,

Plaintiff-Appellant,

v

THE DETROIT EDISON COMPANY,

Defendant-Appellee.

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UNPUBLISHED
February 15, 2005

No. 250068
Monroe Circuit Court
LC No. 02-015061-NO

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

## I. Standard of Review

We review de novo a trial court's ruling on a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

"This Court is liberal in finding a genuine issue of material fact." *Marlo Beauty Supply, Inc v Farmers Ins Group,* 227 Mich App 309, 320; 575 NW2d 324 (1998). "The question whether a defendant has breached a duty of care is ordinarily a question of fact for the jury and not appropriate for summary disposition." *Latham v National Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000). But if the "moving party can show either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's evidence is insufficient to establish an element of its claim, summary disposition is properly granted." *Id.*

## II. Analysis

### A. Possession and Control

Plaintiff first argues that the trial court erred in determining that there is no genuine issue of fact regarding whether defendant had possession and control over the premises where the accident occurred. We agree.

With respect to premises liability, a party must both possess and control the property at issue before a duty of care arises in favor of persons coming onto the premises. *Kubczak v Chemical Bank & Trust Co,* 456 Mich 653, 660; 575 NW2d 745 (1998). Possession for the purposes of premises liability is not governed by a theoretical right of possession, but rather, depends on the actual exercise of dominion and control over the property. *Id.* at 661.

We hold that a genuine issue of fact exists regarding whether defendant had possession and control over the parking area. The certificate of survey, legal description of the property, and lease documents establish that defendant leased the parking area from Monroe County. However, as premises liability is determined by possession and control, not ownership, defendant, the lessee, is not immunized from premises liability. *Kubczak, supra* at 662. Nor do the lease documents necessarily extinguish defendant's duties to its invitees. Monroe County did not contract by a covenant in the lease to keep the land in repair, and therefore, may not be subject to liability for physical harm to plaintiff, an invitee of defendant, caused by a condition of disrepair that arose after defendant took possession of the parking area. *Woodbury v Bruckner*, 248 Mich App 684, 691; 650 NW2d 343 (2001).

Plaintiff presented evidence indicating that defendant was a "possessor" in occupation of the parking area, with intent to control it. The lease agreement states that defendant is the occupant of the parking area. Defendant has designated the leased property, located adjacent to an alley running behind defendant's Monroe customer building, as a parking area for its customers. The parking area is marked with signs reading, "Detroit Edison Customers Only."

Plaintiff also presented evidence indicating that defendant exercised dominion and control over the property. Defendant's Monroe area supervisor testified that she would consider removing a car parked in the area for an unreasonable length of time. Defendant's Supervisor of Maintenance testified that he received a call from defendant's Monroe customer building, requesting that he patch a pothole in the area. He sent an employee to fill the pothole and later visited the area to ensure that the work was satisfactory. Also, after plaintiff encountered the pothole, he informed a manager at defendant's Monroe customer building. The manager claimed responsibility for the pothole and explained that defendant was required to fix it immediately. In plaintiff's presence, the manager called someone to patch the pothole. When plaintiff returned to the parking area later that afternoon, the pothole had been patched. Viewing the evidence in the light most favorable to plaintiff, a genuine issue of fact exists regarding whether defendant had possession and control over the parking area.

B. Open and Obvious

Plaintiff next argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) because a genuine issue of fact exists regarding whether the pothole was open and obvious. We disagree.

To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Latham, supra* at 340. The defendant's duty to a visitor depends on the visitor's status as a trespasser, licensee or invitee. *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). It is undisputed that plaintiff was an invitee because he was walking through defendant's parking area for a commercial purpose, i.e., to pay his electric bill. An invitor owes the duty to exercise reasonable care to protect its invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Id.* This duty, however, does not extend to the removal of open and obvious dangers. *Lugo v Ameritech Corp,* 464 Mich 512, 516; 629 NW2d 384 (2001). A condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Id.*

We hold that summary disposition pursuant to MCR 2.116(C)(10) was appropriate. Although a genuine issue of fact exists regarding whether defendant possessed and controlled the parking area, the trial court did not err in granting summary disposition to defendant because there is no genuine issue of fact regarding whether the pothole was open and obvious. As in *Lugo,* plaintiff was walking through defendant's parking lot when he stepped into a pothole and fell. *Id.* at 514. The *Lugo* Court held that potholes in parking lots are an "everyday occurrence" that "ordinarily should be observed by a reasonably prudent person," and thus, constitute open and obvious dangers. *Id.* at 520, 523.

Because the test of whether a condition is open and obvious is objective, it is of no consequence that plaintiff did not notice the pothole, or that defendant's Supervisor of Maintenance, a weekly visitor to defendant's Monroe customer building, had no recollection of the pothole in the parking area. Plaintiff alleged that the pothole was approximately three feet by two feet and 3 ½ inches deep. The photographs of the filled pothole depict an average sized, commonplace pothole.

Plaintiff argues that the pothole was not open and obvious because a parked car covered a significant portion of the pothole. But there is nothing unusual about parked cars parking in and partially covering potholes in a parking lot, and thus, the open and obvious doctrine still applies. Additionally, if the uncovered portion of the pothole was large enough for plaintiff to fall into, it was reasonable to expect that an average person of ordinary intelligence would discover the pothole upon casual inspection. Therefore, the trial court did not err in granting summary disposition in defendant's favor.[1]

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[1] Although open and obvious, a danger may impose liability on a premises possessor if it has "special aspects" that "'give rise to a uniquely high likelihood of harm or severity of harm.'" (continued…)

Affirmed

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

(…continued)

*O'Donnell, supra* at 576-578. Plaintiff, however, concedes that this case does not raise a special aspects issue.