STATE OF MICHIGAN

COURT OF APPEALS

ERIKA PAPPAS, Personal Representative of the ESTATE OF CLAYTON JAMES PAPPAS, Plaintiff-Appellant, v RONALD YAKE and SANDRA YAKE, Defendants-Appellees.	UNPUBLISHED March 10, 2005 No. 252438 St. Joseph Circuit Court LC No. 02-000411-NI

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10) in this negligence action. We affirm.

Megan Woods was backing her car out of defendants' driveway and onto E. Lafayette Road when a motorcycle driven by Clayton James Pappas struck the car. Pappas died from injuries sustained during the accident. Plaintiff, the personal representative of Pappas' estate, alleged that defendants' failure to maintain the vegetation on their property contributed to the accident because the vegetation obstructed the views of both Pappas and Woods. The trial court granted summary disposition in favor of defendants, concluding that defendants had no duty to maintain the vegetation on their property that was within the public right-of-way easement. The trial court also concluded that defendants had no duty to maintain naturally occurring vegetation.

Under MCR 2.116(C)(10), summary disposition may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial 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 could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

To maintain a negligence action, a legal duty must exist that requires a defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). Whether a duty exists is a question of law for the court. *Id*. at 49.

The right to recover for a condition or defect of land requires the presence of both legal possession and control of the property. *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83; *Stevens v Drekich*, 178 Mich App 273, 276; 443 NW2d 401 (1989). Landowners of property abutting a street are presumed to own fee title to the property out to the center of the street, subject to the public right-of-way easement. *Thies v Howland*, 424 Mich 282, 291; 380 NW2d 463 (1985); *Loud v Brooks*, 241 Mich 452, 456; 217 NW 34 (1928). The public right-of-way that results from the establishment of a public highway is presumed to be sixty-six feet in width. *Stevens, supra* at 276 (citations omitted). "The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights." *Morrow, supra* at 329-330 (citations omitted). However, the easement owner, rather than the owner of the fee subject to the easement, has a duty to maintain the easement in a safe condition so as to prevent injuries to third parties. *Id*. at 330 (citations omitted). The trial court properly held that defendants had no duty to remove the vegetation from their property to the extent it was in the public right of way easement.

Plaintiff contends, nonetheless, that defendants had a duty to maintain their property beyond the public right-of-way easement. Even assuming that plaintiff's argument is correct, any duty to maintain the vegetation outside the public right-of-way is not at issue in this case in light of the fact that Woods' affidavit establishes that as she was backing out of defendants' driveway she only stopped and checked for traffic on E. Lafayette Road from a point that was within the public right-of-way.[1] These affidavits were uncontroverted by plaintiff, who alleged that the physical evidence would contradict Woods' affidavit, but provided no supporting evidence.

Plaintiff also argues that defendants violated MCL 247.182, which prohibits a person from "erect[ing] a fence along any road, of any material which . . . caus[es] an obstruction to the highway," and MCL 239.5, which requires that a landowner trim hedges or hedge rows along, on, or adjacent to a public highway to a maximum of 4½ feet high and three feet wide. However, these statutes are inapplicable because the record shows that plaintiff never alleged that the vegetation constituted a fence. Further, the evidence established that the vegetation at issue is naturally occurring, rather than a hedge.

Plaintiff next argues that the vegetation located on defendants' property and within the public right-of-way constitutes a public nuisance and that the trial court erred in not allowing plaintiff to amend the complaint to add a nuisance claim. However, plaintiff never sought leave of the trial court to amend the complaint to add a nuisance claim. Thus, this argument is without merit.

Finally, plaintiff argues that defendants had a duty to maintain the public right-of-way because they regularly exercised control over it through mowing and maintenance. A landowner

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[1] Although plaintiff argued that the physical evidence would contradict Woods' affidavit, plaintiff provided no supporting evidence. The existence of a disputed fact must be established by admissible evidence, and a mere promise to offer factual support at trial is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

may be liable for injuries sustained on abutting property if the landowner physically intruded into the property or committed an act that created a new hazard or increased an existing hazard. *Stevens, supra* at 277. In *Devine v Al's Lounge*, 181 Mich App 117, 120; 448 NW2d 725 (1989), this Court held that despite regular plowing and salting of a driveway approach, the defendant landowner did not have a duty to maintain it because the act did not increase the risk of hazard to plaintiff. The present case presents a similar situation, and any mowing did not increase the vegetation, create new vegetation, or create or increase the hazard to passersby. Defendants' occasional mowing is not an exercise of possession and control that warrants the imposition of a duty upon them.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra