STATE OF MICHIGAN

COURT OF APPEALS

IDA ISAAC and ALEXANDER ISAAC,

Plaintiffs-Appellants,

v

STANDARD PARKING CORPORATION,

Defendant-Appellee,

and

BISHOP INTERNATIONAL AIRPORT AUTHORITY,

Defendant.

UNPUBLISHED
December 12, 2013

No. 303642
Genesee Circuit Court
LC No. 05-082171-NO

Before: MARKEY, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting a directed verdict in favor of defendant Standard Parking Corporation (defendant) after the completion of plaintiffs' proofs following a six-day jury trial. Plaintiff Ida Isaac (plaintiff) was injured on December 14, 2003 in a fall after stepping into a pothole in the long-term parking lot of alleged nonparty at fault Bishop International Airport (the airport) in Flint, Michigan.[1] At the time of plaintiff's fall, defendant was under contract with the airport to operate the airport's parking facilities. The trial court granted defendant a directed verdict on the basis that the evidence viewed in the light most favorable to plaintiff did not establish that defendant owed a duty of care to plaintiff because the pothole was an open and obvious hazard without any special aspects and defendant lacked sufficient possession and control of the parking lot to be subject to premises liability. We affirm on the latter basis without considering the former.

I. FACTUAL BACKGROUND

[1] Plaintiffs' claims against the airport were previously dismissed on the basis of governmental immunity following an interlocutory appeal. *Isaac v Standard Parking Corp*, unpublished opinion per curiam of the Court of Appeals issued February 15, 2007 (Docket No. 272539).

The Isaacs drove to the airport on Friday December 12, 2003, to fly to Virginia to visit their two sons. Plaintiff dropped her husband with the luggage at the terminal entrance and parked the car in the long-term parking lot. The Isaacs returned to the airport from their visit midmorning on Sunday, December 14, 2003. Plaintiff walked out toward where the car was parked; it was snowing and the parking lot was snow covered. Plaintiff testified she was being careful. As she approached her car, she observed a grate in the lane in which she was walking. Plaintiff testified she was walking to the side of the grate when her left foot went into a hole, causing her to fall on her right shoulder. Plaintiff testified that it was stepping into the hole that caused her to fall, but she admitted that the slippery conditions might have also contributed.

Airport police officers John Poisson and Dustin Peterson investigated the incident. Peterson took the photographs of the area that were admitted at trial. Peterson testified that Poison told him that someone had fallen and to take pictures of the area; Poison pointed out the general area. As Peterson walked in the general direction that Poison indicated, he was able to observe the pothole from at least two parking spaces away. Peterson testified, "I could see the hole in advance of getting to it. I cannot give you . . . specific feet but it was a rather obvious difference between [the hole and] the rest of the parking lot."

Officer Poisson testified that about one inch of new snow was on the ground at the time plaintiff fell. When Poisson approached the area, he saw the grate, but he did not initially see the snow-covered pothole. The snow, however, did not fill the pothole. Although he could see the pothole in the parking lot, the pictures that Peterson took did not depict it very well.

At the time of plaintiff's injury, defendant's manager of the airport parking facilities was Michael Rigdon, and defendant's maintenance manager was Jeffrey Davenport. Although defendant's employees had reported the pothole to the airport on certain evaluation forms, both Rigdon and Davenport testified that they believed that their only responsibility was to notify the airport of their observations, not to fix, barricade, or warn parking lot users about potholes. Davenport testified that after plaintiff's fall, the airport patched the pothole, like the airport had fixed all other potholes in the airport's parking lots.

The contract between defendant and the airport provided that defendant would collect the parking fees and remit them to the airport for a monthly operator's fee and payment of operating expenses. The contract required defendant to submit an "operational procedures and policy manual" to the airport's director. Article 11, § 4 of the contract provided that the airport was "responsible for any major maintenance or repair of the parking surface, landscaping, entrance roadways, and areas outside of the Premises." Defendant was required to employ a full-time manager of the premises, subject to the airport's approval. The agreement required defendant to keep "the premises, at all times free of trash and debris," and "be responsible for providing snow and ice removal." Defendant's employees were required to be respectful and courteous to airport customers and defendant was required to "remove from service . . . any employee who is discourteous to any customer or who does not present the professional image" of the airport's own employees. This was reinforced by providing that defendant "shall remove from service· at the Airport immediately any employee the Airport requests for any reason whatsoever."

In Article 19 of the contract, under "Loss Control and Safety," it provides:

> The Operator shall retain control over its employees, agents, servants and subcontractors, as well as control over its invitees, patrons and activities on and about the managed Premises and the manner in which such activities shall be undertaken and to that end, the Operator shall not be deemed to be an agent of the Authority. Precaution shall be exercised at all times by the Operator for the protection of all persons, including employees, and property. The Operator shall make special effort to detect hazards and shall take prompt action where loss control/safety measures should reasonably be expected.

In Article 20, the contract provides for its termination on 90 days notice by the airport, or on 30 days notice for material breach of contract, or in certain circumstances, immediately. Upon its termination, the contract provided that the airport "shall have the right to repossess the Premises in accordance with applicable law without prejudice to any other remedies available to the Authority for such default, absent such reentry."

Rigdon and Davenport presented unrebutted testimony regarding the practical application of the contract. Rigdon testified that the parking premises were owned by the airport; parking rates were established by the airport; all parking fees went to the airport, and parkers used the airport facilities for air travel. The airport provided lighting, kept guard shacks in repair, placed signage, maintained the landscaping, curbs, and sidewalks, fixed potholes in the parking lot surfaces, and provided police patrols of airport property, including parking lots. Peterson testified that his responsibilities included keeping the premises neat by sweeping, picking up trash, fixing gates and the "ticket spitters." With respect to parking lot potholes, his duty was to report them on a parking lot inspection form. Peterson testified that he was neither responsible for fixing potholes nor blocking them off. Before plaintiff's fall, Peterson had reported the pothole in question several times on parking lot inspection forms to his superiors and to the airport. When the pothole was not repaired, he notified an airport employee that it had not been fixed. Rigdon testified that defendant did not have the personnel, heavy equipment, or materials to maintain the parking lot but that the airport employed 15 maintenance workers, with access to heavy equipment and materials necessary to maintain paved surfaces.

After plaintiff's proofs, the trial court heard the parties' arguments on defendant's motion for directed verdict and ruled in part as follows:

> The Court rejects the notion that the contract establishes a duty on the part of Standard Parking to fix the hole in the parking lot. The Court rejects the notion that the hole in the parking lot was anything more than open and obvious. In reaching those conclusions the Court reasons as follows.
>
> The contract language does not support the contention that this type of repair was the obligation of Standard Parking. Rather the Court believes a fair reading of the contract as it relates to duty establishes that Standard Parking was obligated to inform Bishop Airport so that Bishop Airport could take whatever measures it either was obligated to take or chose to take.
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> Standard Parking's employees never fixed potholes, never had in their possession the materials to fix potholes, [and] arguably did not have the

> equipment, although maybe it's not a hard job, but they testified they didn't have the equipment to fix the potholes. They were never asked by Bishop Airport to fix the potholes, pothole, or holes. They were responsible for snow and ice removal, and they were responsible for other things related to the running of the business. Their business was to run the parking lot, not to fix it.
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> As a result the Court believes, based on . . . review of the contract, and . . . evidence, reasonable jurors could not disagree with the proposition that Standard Parking had no duty to warn, guard against, or repair the hole in the parking lot.

II. ANALYSIS

A. STANDARD OF REVIEW

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). A motion for directed verdict should be granted only if the evidence and all legitimate inferences from the evidence, viewed in a light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id*.; *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW 2d 186 (2003).

B. DISCUSSION

We conclude that the trial court reached the correct result: defendant did not possess *and* control the parking lot so as impose a duty on defendant under plaintiff's theory of premises liability. *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980).

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 162; 809 NW2d 553 (2011). Thus, an injured person may maintain a negligence action only if a legal duty exists requiring the defendant to conform its conduct to a particular standard in order to protect others against unreasonable risks of harm. *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992). 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). "Premises liability is conditioned upon the presence of both possession and control over the land." *Merritt*, 407 Mich at 552. The reason for this is that "'the man in possession is in a position of control, and normally best able to prevent any harm to others.'" *Id*., quoting Prosser, Torts (4th ed), § 57, p 351. Here, while defendant occupied the premises for the purpose of performing its contract to collect and remit parking fees to the airport, defendant did not exercise control over the property or the manner in which it was maintained and used; defendant was not in the best position to prevent the harm that occurred. Consequently, defendant did not have the requisite possession *and* control to impose a duty of care under the theory of premises liability. *Kubczak*, 456 Mich at 660; *Merritt*, 407 Mich at 552.

Plaintiff first argues that portions of the defendant's operations manual were erroneously excluded from evidence. But plaintiff did not properly present this issue by including it in a statement of questions presented on appeal. MCR 7.212(C)(5); *Grand Rapids Employees*

Independent Union v Grand Rapids, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Moreover, plaintiff concedes that the exclusion of the evidence did not affect the trial court's directed verdict ruling. As such, the alleged evidentiary error could not warrant reversal. "A trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected, and it affirmatively appears that failure to grant relief is inconsistent with substantial justice." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003).

Plaintiff next argues that the trial court erred by focusing on defendant's status as a possessor, rather than its status as a business invitor. Generally, a property possessor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012); *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 251; 235 NW2d 732 (1975). This duty of care is owed to a business invitee "both by the invitor who solicited his business and by the possessors of the premises. Invitors are liable for known dangerous conditions of property and for dangerous conditions which might be discovered with reasonable care, regardless of whether they have legal title or control over the premises." *Merritt*, 407 Mich at 551. Plaintiff's argument fails.

First, defendant is not a business invitor with respect to the airport's parking facilities. People did not go to the airport simply to park; they go the airport to travel by aircraft and in conjunction with doing so, park vehicles. Air travelers came at the invitation of the airport (or airlines) to use the flight services that were offered at the airport and to park their cars at facilities offered by the airport ancillary to their use of the airlines at the airport. The fees the invitees paid to park, although collected by defendant, were all remitted to the airport. Defendant did not run an independent parking business on the airport's property, but rather it was merely paid a monthly fee and its expenses to collect the parking fees that the airport charged its customers to park on airport property. It then remitted the collected fees to the airport.[2] Defendant merely collected fees the airport charged its invitees to park on the airport's property. While defendant's contract required it to provide the airport's invitees certain services—a shuttle service clearly identified as "Airport Parking Shuttle"—people using the airport parking facilities were the airport's invitees, parking on airport property and paying fees established by the airport.

Moreover, even if defendant as the contract operator of the airport's parking facilities is an invitor, we still conclude defendant did not have the requisite possession and control for premises liability. *Kubczak*, 456 Mich at 660, 664 (premises liability requires both possession and control of the property). Both possession and control are required for premises liability to attach. *Merritt*, 407 Mich at 553. "[T]he invitee status of a plaintiff, alone, does not create a

[2] An owner or lessee of property adjacent to an airport may operate an independent business by offering parking facilities and shuttle bus service to people wanting to use the airport. But the facts do not support that was the case here. Defendant did not lease the premises and operate an independent business but was a contractor the airport hired for the collection and remitting of fees set by the airport and operated under the supervision and direction of the airport.

duty under premises liability law unless the invitor has possession *and* control of the premises on which the plaintiff was injured." *Orel v Uni-Rak Sales Co*, 454 Mich 564, 565; 563 NW2d 241 (1997).

While defendant was the airport's contractual parking fee collector, shuttle bus operator, and snowplow operator, the airport otherwise maintained total control of the premises, established parking fees, policed the premises, exercised complete control over defendant's personnel, and retained responsibility "for any major maintenance or repair of the parking surface." The contract provisions regarding its termination giving the airport the right to repossess the premises and requiring that defendant peaceably surrender and vacate the premises do not diminish the dominion and near total control the airport retained under the agreement and exercised in practice. In *Derbabian v S & C Snowplowing*, 249 Mich App 695, 703; 644 NW2d 729 (2002), the Court quoting both regular and legal dictionaries defined "control" in the context of premises liability as "'exercising restraint or direction over; dominate, regulate, or command,'" and "'the power to manage, direct, or oversee.'" As in *Derbabian*, both the contract with the airport and its application show that defendant did not exercise direction over, dominate, regulate, or command any aspect of the airport's parking lots other than to collect parking fees, operate a shuttle bus service, clear snow and ice, and pick up trash.

Plaintiff also argues that defendant was a property possessor subject to premises liability under the definition found in M Civ JI 19.02. This model civil jury instruction grew out of our Supreme Court's discussion in *Merritt*, quoting the definition of a property "possessor" found in 2 Restatement Torts, 2d, §§ 183-233, pp 183-233:

> "(a) a person who is in occupation of the land with intent to control it or
>
> "(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> "(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." [*Merritt*, 407 Mich at 552, quoting 2 Restatement Torts 2d, § 328 E, p 170.]

The application of M Civ JI 19.02 does not assist plaintiff's argument. The undisputed evidence shows that defendant never occupied the premises with intent to control it, but rather did so only to perform the services it contracted with the airport to perform. Not only was airport's control manifested in the contract's terms, but it was also established by the testimony of defendant's employees. While the trial court in ruling on a motion for directed verdict must view the evidence in a light most favorable to plaintiff, *Kubczak*, 456 Mich at 663, and may not take from the jury its role in determining the credibility of witnesses, *King v Reed*, 278 Mich App 504, 522; 7541 NW2d 525 (2008), the trial court need not ignore evidence that is undisputed. Only when there is evidence on which reasonable jurors could differ must the trial court submit to the jury with the appropriate instructions the question of whether a defendant is a possessor of land. *Orel*, 454 Mich at 569. "[I]f reasonable minds could not differ regarding who had possession of the land, a directed verdict could be granted." *Id*.

Plaintiff's bootstrap argument regarding defendant's contractual obligation under Article 19 requiring defendant to take reasonably expected action regarding hazards is just that. Similarly, defendant's snow plowing obligation under the contract does not make it a possessor subject to premises liability. *Derbabian*, 249 Mich App 703. To the extent plaintiff suggests that defendant might be liable to plaintiff for failing to fulfill its contractual obligations, the argument fails. To establish defendant's liability under this theory plaintiff must establish a duty of care on defendant's part that is "separate and distinct" from defendant's contractual obligations. See *Loweke*, 489 Mich at 168. To establish such a "separate and distinct" duty under premises liability plaintiff must show that defendant both possessed and controlled the parking lot. *Kubczak*, 456 Mich at 660; *Merritt*, 407 Mich at 553.

In summary, defendant possessed the parking lot only to the extent necessary to perform the services it had contracted with the airport to perform: to collect parking fees established by the airport, operate a shuttle bus in a manner dictated by the airport, and keep the premises neat and clear of snow. But the airport maintained total control of the premises, the right to remove defendant's personnel, establish parking fees, police the premises, and retained the responsibility "for any major maintenance or repair of the parking surface." Defendant did not have a right to and did not "exercise direction over, dominate, regulate, or command in relation to the parking lot," *Derbabian*, 249 Mich App at 704, and, therefore, was not a possessor in "control" of the property for purposes premises liability, *Merritt*, 407 Mich at 552-553. Because we affirm the trial court on this basis, we decline to address the trial court's alternative ground for granting a directed verdict in favor of defendant, the open and obvious doctrine. We also decline to reach plaintiff's claim that the trial court erred by permitting defendant to name the airport, after it was dismissed from the case, a nonparty at fault.

We affirm. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens