# STATE OF MICHIGAN

# COURT OF APPEALS

JOAN BOHLEN and JAMES BOHLEN,

Plaintiffs-Appellants,

v

RAMCO-GERSHENSON, INC.,

Defendant-Appellant.

UNPUBLISHED
December 5, 2000

No. 221583
Saginaw Circuit Court
LC No. 98-022183-NI

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

As plaintiff Joan Bohlen walked through the parking lot toward a K-Mart store located on property owned by defendant, she tripped in a plate-sized pothole located in an unoccupied handicapped parking spot and fell to the ground, sustaining injuries. Plaintiffs filed suit alleging that defendant failed to maintain its premises in a reasonably safe condition, and failed to warn of a dangerous and unsafe condition. James Bohlen filed a claim for loss of consortium. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it had no duty to warn of the pothole because the condition was open and obvious. The trial court granted the motion, finding that an issue of fact did not exist as to whether the condition was open and obvious.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Berryman v K-Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient

* Circuit judge, sitting on the Court of Appeals by assignment.

evidence is produced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). If the risk of harm from a dangerous condition remains unreasonable, in spite of the fact that it is open and obvious or that the invitee has knowledge of it, the possessor of land must take reasonable care. *Bertrand*, *supra*, 611.

Plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. The undisputed evidence showed that Joan Bohlen tripped in a plate-sized pothole located in an unoccupied handicapped parking spot. The fact that Joan Bohlen claims that she did not see the pothole is irrelevant. *Novotney*, *supra*, 477. It is reasonable to conclude that Joan Bohlen would not have been injured had she been watching the area in which she was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiffs did not come forward with sufficient evidence to create a question of fact as to whether an average person with ordinary intelligence would have discovered the pothole upon casual inspection. The trial court did not err in concluding that the pothole was an open and obvious danger.

Furthermore, we find that plaintiffs' argument that even assuming that the pothole constituted an open an obvious danger it still presented an unreasonable risk of harm is without merit. Plaintiffs' assertion is based on the fact that the pothole was located in an unoccupied handicapped parking spot near the entrance to the store. However, the pothole was not large, and had Joan Bohlen noticed the pothole, she easily could have avoided it. Had Joan Bohlen noticed the pothole, any risk of harm would have been obviated. See *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997). Summary disposition was proper.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber