STATE OF MICHIGAN

COURT OF APPEALS

HELEN SCHOCH,

Plaintiff-Appellant,

v

MICHIGAN PAVING AND MATERIALS CO., a Michigan corporation, d/b/a SPARTAN ASPHALT PAVING CO.,

Defendant-Appellee.

UNPUBLISHED
September 30, 2010

No. 291435
Shiawassee Circuit Court
LC No. 08-007033-NO

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition to defendant in this negligence action. We reverse and remand.

Plaintiff fell and broke a bone in her foot as she was walking across the parking lot back to her car after exiting an Owosso Wal-Mart. Plaintiff testified that she fell as she stepped from a higher level of pavement to a lower level. The general contractor for the parking lot project had subcontracted with defendant to pave the lot in phases. There is testimony that defendant laid a wedge of asphalt about 200 feet long on an eastern portion of the parking lot in order to provide a transition between the new, higher portion of the asphalt and the older, lower level of asphalt. Plaintiff testified that after she fell, she looked at the area where she fell and noticed a difference in height of about two inches. A construction superintendent for the general contractor averred that he inspected the area after plaintiff's fall and determined that the height differential between the wedge and the lower portion of the parking lot was between one-eighth and one-half inch. Plaintiff stated that she was not looking at the pavement as she walked back to her car, but believed that had she been, she probably would have noticed the height differential in the pavement.

The trial court analyzed this case as sounding in premises liability and found that the condition was open and obvious. Plaintiff maintains that her claim was one of ordinary negligence and that the premises liability doctrine does not apply. We review the court's decision de novo, *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008), scrutinizing "the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law," *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition should be granted under MCR

2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The open and obvious doctrine:

> is applicable only to premises-liability actions and certain cases involving a failure to warn in products liability cases. . . . When an injury develops from a condition of the land, rather than emanating from an activity or conduct that created the condition on the property, the action sounds in premises liability. [*Woodman v Kera, LLC*, 280 Mich App 125, 153; 760 NW2d 641 (2008), citing *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001); accord *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005).]

However, a party can only be held liable under a premises liability theory if it had possession and control of the area at issue. *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Title to the property is not necessary. Instead, liability depends upon actual possession and control. *Kubczak*, 456 Mich at 662.

A "possessor" of land is:

> (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). *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702; 644 NW2d 779 (2002), quoting *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980), quoting 2 Restatement Torts, 2d, § 328 E, p 170] .

Derbabian explains that "'possession' in this context, [means] . . . [t]he right under which one may exercise control over something to the *exclusion of all others*.'" *Id.*, quoting Black's Law Dictionary (7th ed) (alteration and emphasis added by *Derbabian* Court). "Control" is understood to mean "'exercis[ing] restraint or direction over; dominate, regulate, or command.'" *Id.* at 703, quoting *Random House Webster's College Dictionary* (1995). Thus, in a premises liability action, the party to be held liable must enjoy the right to dominate, regulate, or command the premises at issue to the exclusion of all others. If there is a dispute regarding possession and control, the issue is a question for the jury. *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 563 NW2d 241 (1997).

The facts of record reveal that defendant did not enjoy the right to dominate, regulate, or command the parking lot to the exclusion of all others. Defendant was the subcontractor that put in the wedge, and a different subcontractor came in and removed it before defendant placed new pavement over the lot. Defendant's employees were present only during the time that the wedge was placed. Consequently, the trial court erred in analyzing plaintiff's claim under a theory of

premises liability and granting summary disposition to defendant based on the open and obvious doctrine.[1]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

[1] We take no position on whether plaintiff has a viable claim against defendant on any other negligence theory.