# STATE OF MICHIGAN

# COURT OF APPEALS

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MURIEL LAYER

Plaintiff-Appellant,

v

JOHN C. & SON CONSTRUCTION COMPANY,

Defendant-Appellee,

and

CITY OF ST. CLAIR SHORES,

Defendant.

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UNPUBLISHED
February 7, 1997

No. 177515

Macomb Circuit Court
LC No. 93-004256-NO

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the order and opinion granting summary disposition to defendant John C. & Son Construction Company.[1] We reverse and remand.

As part of its sidewalk repair program, the city of St. Clair Shores notified homeowners that they would be responsible for repair and/or replacement of sidewalk panels in front of their homes. In this case, after receiving notification, the homeowner on Avalon Street hired defendant to perform the repair work. As a condition of the surety bond obtained in connection with this work, defendant agreed to follow the city's repair specifications and requirements. Defendant's employee testified in his deposition that two by four wooden forms are used when pouring the cement into the sidewalk panel. Defendant's employee also acknowledged that a two inch rut exists between the sidewalk and the grass after the concrete is set and the forms are removed. The city's specifications required that after removing the forms, the area should be finish graded to meet the established street grade or cross slope.

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

Defendant's employee explained that the ruts were generally back-filled, but due to the great number of sidewalks that defendant was repairing, some ruts, including the one at issue in this case, were not back-filled.

Plaintiff has alleged that after turning right onto Avalon Street from Alice Street her bike wheel became caught in the rut between the sidewalk being repaired and the grassy berm, and she was injured after falling from the bicycle. In her complaint, plaintiff alleged that defendant breached its duty to her by performing the sidewalk repair in a negligent manner and by failing to warn plaintiff of the dangerous condition caused by defendant's negligence in repairing the sidewalk. Defendant brought a motion for summary disposition, arguing that any danger posed the sidewalk was "open and obvious" such that defendant did not owe a duty to plaintiff. The trial court concurred and granted defendant's motion for summary disposition.

The trial court explained that, because defendant did not own the premises, plaintiff's allegations contemplated a duty to warn in a products liability context. The court found that a sidewalk is a simple *product*, such that the dangers associated with this *product* were open and obvious. In support, the court pointed to plaintiff's deposition testimony in which she acknowledged that sidewalk repairs were taking place in her neighborhood and that just before her accident plaintiff had passed over recently repaired sidewalks on other streets without incident. Relying on the analysis in *Glittenberg v Doughboy Recreational Indus (On Rehearing)*, 441 Mich 379, 385; 491 NW2d 208 (1992) and *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993), the trial court held that defendant owed no duty to warn of the dangers associated with the sidewalk.

On appeal, plaintiff contends that the lower court improperly dismissed her claims against defendant on the grounds that the danger from the sidewalk was "open and obvious" for two reasons. First, plaintiff argues that the nature of her claim is simple negligence and that the "open and obvious" doctrine has no application outside the context of premises or products liability cases. Secondly, plaintiff argues that there was a genuine issue of material fact regarding whether any danger was apparent to a reasonable person in plaintiff's position. Although the "open and obvious danger" doctrine could apply in this case, we agree that plaintiff's evidence has established a genuine issue of material fact regarding whether the danger was so obvious that a reasonable person in plaintiff's position should have discovered it.

This Court reviews a trial court's grant of summary disposition de novo because this Court must review the record to determine whether the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 86; 520 NW2d 633 (1994). The lower court granted the motion on the grounds stated in MCR 2.116(C)(8) and (10). A motion pursuant to MCR 2.116(C)(8) under this subsection determines whether the opposing party's pleadings alone allege a prima facie case. The court must accept as true all well-pleaded facts. *Stehlik, supra*. A court may grant a motion only where the claim is so clearly unenforceable as a matter of law that no factual development would possibly justify recovery. *Thomas v Board of Law Examiners*, 210 Mich App 279, 280; 533 NW2d 3 (1995). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In reviewing a (C)(10) motion, a court considers pleadings, affidavits, depositions, admissions, and any

evidence in favor of the nonmoving party, granting that party the benefit of any reasonable doubt. *Id*.

Summary disposition is inappropriate where the evidence presents a genuine issue of material fact upon which reasonable minds could differ. *Hill v General Motors Acceptance Corp*, 207 Mich App 504, 507; 525 NW2d 905 (1994).

In general, the "open and obvious danger" doctrine obviates the duty to warn when the alleged danger is readily apparent or so obvious such that a person is reasonably expected to discover it. *Glittenberg*, *supra* at 394; *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). The doctrine has been applied in both premises and products liability cases. *Glittenberg*, *supra* (products liability); *Riddle*, *supra* (premises liability). However, the doctrine does not eliminate liability in all cases. For example, a land owner or possessor is not relieved from exercising reasonable care to protect invitees against known or discoverable dangerous conditions. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 613; 537 NW2d 185 (1995). Similarly, the doctrine does not preclude liability under a defective design theory in the products liability context. *Glittenberg*, *supra* at 396-397. The doctrine is applicable here because plaintiff's claim is comparable to a claim of premises liability.

A premises liability case generally involves a claim against a possessor or owner of land for injuries caused by a dangerous condition on the land. Cf. *Bertrand*, *supra* at 609.

Indeed, plaintiff essentially has alleged that defendant's negligence in repairing the sidewalk created the rut, i.e., a dangerous condition on the land. Although defendant is not a possessor or owner of land, in undertaking the repair work, defendant contractually agreed to meet the city's specifications and requirements. Accompanying defendant's contractual duty to conform to these requirements "is a common law duty to perform with ordinary care the thing agreed to be done." *Clark v Dalman*, 379 Mich 351, 260-261; 150 NW2d 755 (1967).[2] The contract forms the basis from which the duty arises, and that duty encompasses within its scope those who foreseeably may be injured by the negligent performance of a contractual undertaking. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995).[3] Thus, the "open and obvious danger" doctrine could apply to these facts.

Nevertheless, the lower court erred in applying the doctrine because it applied a products liability analysis, starting with the premise that the sidewalk was a simple product. In making this observation, the court relied in part on *Novotney*, *supra*. In *Novotney*, a premises liability case, the plaintiff was injured after slipping and falling on a handicap access ramp, and alleged that the landowner was negligent for failing to warn her of the incline on the ramp. *Novotney*, *supra* at 472. The *Novotney* court concluded that the dangers associated with a handicap access ramp were open and obvious, such that the landowner owed no duty to warn the plaintiff of the incline. *Id*. at 476. The *Novotney* court, relying on *Glittenberg* for guidance, also explained that a sidewalk with a handicap access ramp is a simple product, such that any dangers presented would be observable by casual inspection. *Id*. at 474.

Unlike *Novotney*, plaintiff has not alleged that the danger was created by the sidewalk itself. Instead, plaintiff has alleged that defendant's negligence, i.e, the open *rut*, created the condition that was the proximate cause of her injuries. Because the dangers associated with a sidewalk are not at issue in this case, the lower court erred in applying the "simple product" analysis under these facts.

Nonetheless, having concluded that the "open and obvious danger" doctrine could apply to these facts, we must next determine if there was a genuine issue of material fact concerning whether the dangers associated with the rut were open and obvious. Both parties submitted copies of photographs depicting the sidewalk at issue. It is not clear from these photographs the ruts are readily apparent or whether someone riding a bike could appreciate their width and depth.[4] Defendant introduced the deposition testimony of Larry Doser, engineering aide for the City of St. Clair Shores. Mr. Doser opined that based on the photographs, the ruts were visible from fifteen to twenty feet away. In her deposition, plaintiff testified that she was aware of the sidewalk construction that was occurring in the city, but she could not recall when she observed the construction on Avalon Street.[5] Viewing this evidence in a light most favorable to plaintiff, reasonable minds could differ regarding whether the rut was visible and whether the danger associated with the rut was open and obvious.

Therefore, we reverse the lower court's order granting summary disposition to defendant and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ Harry A. Beach

[1] Defendant City of St. Clair Shores apparently settled with plaintiff prior to the trial court's grant of summary disposition in favor of defendant John C. & Son Construction Company. A stipulation dismissing the defendant City from the case was entered on June 8, 1994.

[2] Michigan courts have consistently recognized that an independent contractor can be held liable for its injuries resulting from its negligent performance of a completed contract. *Hankins v Elro Corp*, 149 Mich App 22, 30-31; 386 NW2d 163 (1986); *Feastor v Hous*, 137 Mich App 783, 789; 359 NW2d 219 (1984); *Hilla v Gross*, 43 Mich App 648, 650; 284 NW2d 712 (1972) ("The contractor continues to be liable for his negligent work subject to the usual requirements of negligence and proximate cause."); *Kapalczynski v Globe Construction Co*, 19 Mich App 396; 172 NW2d 852 (1969). Compare also Restatement 2d, Torts, § 384, which states:

> One[,] who on behalf of the possessor of land[,] erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, *as through he were the possessor of the land*, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge. (Emphasis supplied).

[3] In *Osman*, this Court held that an independent contractor was subject to liability for negligence in removing snow and ice from the premises where the plaintiff's slip and fall accident occurred. *Osman*, *supra* at 709.

[4] Both parties submitted photographs to this Court and the lower court depicting the site of the incident from varying points of view. In considering these photographs, we express no opinion regarding their admissibility into evidence.

[5] In its written opinion, the trial court characterized plaintiff's deposition testimony as a concession that the ruts were open and obvious. After reviewing the testimony, we disagree. Rather, plaintiff testified

to a general awareness of the sidewalk construction project, and at best, her knowledge regarding the ongoing construction would create a factual dispute regarding whether the danger posed by the ruts was open and obvious.