STATE OF MICHIGAN

COURT OF APPEALS

MONICA VANDALL,

Plaintiff-Appellant/
Cross-Appellee,

v

POST ELECTRIC CO.,

Defendant-Appellee/
Cross-Appellant,

and

BROADCAST DESIGN & CONSTRUCTION, INC.,

Defendant-Appellee.

UNPUBLISHED
December 19, 1997

No. 198130
Oakland Circuit Court
LC No. 95-505792-NO

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right from the court's order granting summary disposition in her negligence action in favor of defendants Post Electric Co. and Broadcast Design & Construction, Inc., pursuant to MCR 2.116(C)(10). Post Electric cross-appealed, claiming that the trial court erred in failing to grant summary disposition in its favor on additional grounds. We reverse.

This litigation arises from injuries plaintiff suffered after falling in the parking lot of William Beaumont Hospital in Troy, where plaintiff was an employee. Plaintiff alleged that she had stepped onto ground which collapsed beneath her, causing her fall. There had been a project involving underground wiring which required excavation work in the parking lot prior to plaintiff's fall. Defendant Post Electric was the general contractor. Defendant Broadcast Design was a subcontractor who performed the excavation work. Plaintiff alleges that the trial court erred in granting summary disposition to both Post Electric and Broadcast Design based on its finding that the ground which allegedly caused plaintiff's fall was an open and obvious danger. We agree.

In reviewing a trial court's decision regarding a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. *Stevens v Inland Waters, Inc*, 220 Mich App 212, 214; 559 NW2d 61 (1996). This Court then determines whether a genuine issue of material fact exists on which reasonable minds could differ. *Id*. This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Id*. Although summary disposition is not favored in a negligence action, summary disposition is appropriate where the plaintiff has failed to establish a prima facie case of negligence. *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997). To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Id*.

The trial court in ruled favor of defendant Broadcast Design based upon its finding that the area where plaintiff fell was an open and obvious danger. The "open and obvious danger" doctrine applies to premises liability. Social policy imposes on possessors of land a legal duty to protect their invitees on the basis on the special relationship that exists between them. *Bertrand v Alan Ford Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The rationale for imposing liability is that the invitor is in a better position to control the safety aspects of his property when his invitees entrust their own protection to him while entering his property. *Id*. A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless risk of harm remains unreasonable despite its obviousness. *Singerman v Municipal Service Bureau*, 455 Mich 135, 142-143; 565 NW2 383 (1997); *Bertrand, supra* at 610.

We find that the trial court's reliance on the "open and obvious danger" doctrine, and on premises liability in general, was erroneous. Defendants here were not possessors of the land on which plaintiff's injury took place. Defendants were independent contractors hired by the landowner, Beaumont Hospital, to perform work on Beaumont's land. The duties and policy reasons behind premises liability which would apply to Beaumont do not apply to defendants.

However, defendants still owed plaintiff a duty of ordinary care. Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. *Osman v Summer Green*, 209 Mich App 703, 708; 532 NW2d 186 (1995). "Duty of care not only arises out of a contractual relationship, but it also arises by operation of law, a general duty owed by defendant to the public of which plaintiff is a part." *Id*. at 710.

Therefore, defendants owed plaintiff a duty of ordinary care. The record indicates that plaintiff was an employee of the hospital which hired defendants. Plaintiff parked her car in the parking lot near the area where defendants performed construction work. Plaintiff walked over an area previously excavated by defendants, and contends that an air pocket resulting from their excavation activities caused her to fall and suffer injury. Defendants removed or permitted removal of the construction barriers from around the area following the excavation work, but did not personally walk on the re-filled area. Construing these facts in favor of plaintiff, we find that plaintiff has established a prima facie case

for negligence on the part of defendants, and that reasonable minds may differ as to the cause of her injury.

Both defendants emphasize the fact that the control of the traffic area was turned over to Beaumont one to two weeks prior to plaintiff's injury, and therefore, they should not be held liable. However, as premises liability doctrine is not applicable, there is no requirement under an ordinary duty of care to assert that defendants remained in control of the property in question in order to be held liable. Those *foreseeably* injured by the negligent performance of a contractual undertaking are owed a duty of care. *Osman, supra* 708. It was foreseeable that employees of the hospital, who park in the lot where the excavation work was performed, would walk over the recently excavated area after the barricades were taken down. If the area was not properly inspected, and a hollow pocket existed underground, it was foreseeable that plaintiff may be injured as a result of stepping onto such a hollow pocket. Accordingly, the trial court's grant of summary disposition in favor of defendants based upon the "open and obvious danger" doctrine of premises liability was erroneous.

In addition, even assuming premises liability law was applicable, it would have been error to dismiss all of plaintiff's theories of negligence based upon its finding of an open and obvious danger. The defense of open and obvious danger relates to a claim of a duty to warn, but will not exonerate a defendant from liability where the claim is one of a duty to maintain and repair the premises. *Walker v Flint*, 213 Mich App 18, 22; 539 NW2d 535 (1995). Plaintiff claimed negligent maintenance in her complaint.

Next, plaintiff argues that the trial court erred in granting summary disposition in favor of Post Electric on the basis that it did not actually perform the excavation work. We agree.

Plaintiff's complaint asserted that Post Electric was liable based on the theories of negligence, including ordinary negligence; failure to inspect; negligent inspection; failure to supervise; negligent supervision; and failure to warn. The trial court ruled that Post Electric was not liable because it did not perform the actual excavation work at the site. However, as we already stated, an independent contractor may owe a plaintiff a duty regardless of the lack of contractual privity. *Osman, supra* at 710. Plaintiff's claims of negligent inspection and negligent supervision, and negligent removal of construction barriers, are not based upon Post's actual performance of the excavation. Post Electric was the general contractor in charge of the project. The record indicates that a Post employee stated that he inspected the work area after the excavation was complete, but did not personally walk on it. A reasonable trier of fact could conclude that this inspection was inadequate.

In addition, there appears to be a material issue of fact as to which party ordered the removal of the construction barriers and as to which party actually removed the barriers from the site prior to plaintiff's accident--Post, Broadcast Design, or Beaumont. Plaintiff refers to the statement by Dennis Kruszyma, a Post employee, that he inspected the area after the barricades were removed. Kruszyma did not say who removed them. Post refers to the deposition of Richard W. Brandow, an employee of Beaumont Hospital, who contended that Beaumont removed the barriers or permitted their removal. However, Brandow also stated that the "sub-contractor" was permitted to remove the barriers, and that the "contractors" were "responsible" for removing the barriers. Accordingly, summary disposition

in favor of Post Electric due simply to the fact that it did not perform the excavation work was improper.

Reversed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs