

STATE OF MICHIGAN
COURT OF APPEALS

TERRY BECK,

Plaintiff-Appellant,

v

DAVID FOOTE, d/b/a ASHLEY AUTO REPAIR

Defendant-Appellee.

UNPUBLISHED

March 20, 1998

No. 202192

Gratiot Circuit Court

LC No. 96-003956

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Summary disposition was granted to defendant on plaintiff's claim of negligence. Plaintiff appeals as of right, and we affirm.

Plaintiff alleged that he was injured when he fell on the asphalt of the street adjacent to the gasoline pumps at defendant's place of business. The property where plaintiff fell is a city street owned by the Village of Ashley. Plaintiff argues that there was sufficient evidence from which a jury could determine that defendant had co-possession or co-control over the property and had a private servitude over the property such that he had a duty to maintain it in a reasonably safe condition. Therefore, plaintiff maintains that it was improper to grant summary disposition. The trial court granted summary disposition, finding that defendant owed no duty to plaintiff. Appellate review of a summary disposition determination is de novo. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997).

One of the necessary elements that a plaintiff must establish in order to prevail in a negligence action is the existence of a duty. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 4; 535 NW2d 215 (1995). The existence of a duty is a question of law for the trial court. *Id.*; *Colangelo v Tau Kappa Epsilon*, 205 Mich App 129, 132; 517 NW2d 289 (1994). Questions of law, like summary disposition determinations, are subject to de novo review on appeal. *Id.* Duty exists where the relationship between the parties gives rise to a legal obligation on the part of one party for the benefit of the other, injured party. *Rodriguez v Detroit Sportsmen's Cong*, 159 Mich App 265, 270; 406 NW2d 207 (1987). In order to establish duty in a premises liability claim, a plaintiff must prove

that the defendant had legal possession and control of the premises at issue. *Merrit v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980); *Stevens v Drekich*, 178 Mich app 273, 276; 443 NW2d 401 (1989). Generally, a defendant's duty "ends at the boundary of his premises." *Id.* However, a defendant's duty may be extended to conditions on adjacent property if the defendant has exercised possession or control over those adjacent properties. *Devine v Al's Lounge, Inc.*, 181 Mich App 117, 120; 448 NW2d 725 (1989); *Rodriguez, supra* at 271.

In order to establish the liability of defendant for plaintiff's injuries, incurred on the abutting publicly owned land, we find that it was necessary for plaintiff . . . to prove at a minimum that in some manner defendant (1) increased the hazards in the parking area which existed at the time of the injury, or (2) created new hazards on the land strip, or (3) had a servitude for his private benefit in the parking area, by a physical intrusion of his premises or otherwise, the enjoyment of which affected the area's safety and thus imposed a duty on defendant to maintain the area in a reasonably safe condition. [*Berman v LaRose*, 16 Mich App 55, 58-59; 167 NW2d 471 (1969).]

In this case, there was no evidence that defendant exercised control or possession over the public property adjacent to his gas station and gas pumps. Deposition testimony indicated that defendant did not repave or assist in the pavement work on the property; did not clean or shovel the property; and did not pay the city for using the property upon which plaintiff was injured. There was also no evidence that defendant created or increased the hazards on the piece of public land where plaintiff was injured. In so ruling, we note that, at the hearing on the motion for summary disposition, plaintiff speculated that defendant had placed wooden forms around his pumps, which may have created depressions in the asphalt where plaintiff fell. Plaintiff's counsel argued that he expected to offer testimony at the time of trial that may support a theory that defendant created a hazard on the property. Where the issue of duty was for the trial court to decide and where plaintiff failed to offer evidence to support a finding of duty at the hearing on the motion for summary disposition, we find that the trial court properly found no duty existed between plaintiff and defendant based upon a theory that defendant exercised control over the premises or created hazards to the property.

We also find that there was insufficient evidence to support that defendant had a servitude in the street adjacent to his property for his private benefit. There was no testimony or evidence that the property was reserved only for patrons of defendant's gas pumps. Presumably any member of the public could park on the public street adjacent to defendant's gas pumps. See *Berman, supra* at 58¹.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ David H. Sawyer

¹ On appeal, plaintiff argues that the actual gas pumps were located on village property and were for the sole benefit of defendant. Therefore, he concludes that there was a servitude for defendant's private

benefit. While this may be true with regard to the actual gas pumps, the injury did not result from the gas pumps. Rather, defendant alleged that he was injured by a defect in the street. Our concern is with whether defendant had a servitude for his private benefit in the street. We find that he did not.