

STATE OF MICHIGAN
COURT OF APPEALS

IDA RUFINO,

Plaintiff-Appellant,

v

THE KROGER COMPANY,

Defendant-Appellee.

UNPUBLISHED

August 2, 2005

No. 253086

Macomb Circuit Court

LC No. 01-004660-NI

Before: Borrello, P.J. and Bandstra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals of right the trial court orders granting summary disposition to defendant and denying her motion for reconsideration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured when she slipped and fell on ice in a parking lot adjacent to defendant's store. On appeal, plaintiff argues that the trial court erred in granting summary disposition because there were genuine issues of material fact as to whether defendant had possession and control of the parking lot and whether defendant knew or should have known of the danger presented to plaintiff by the ice. We disagree.

This Court reviews the trial court's ruling on a motion for summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review the evidence submitted in the light most favorable to party opposing the motion. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

In *Stitt v Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000), our Supreme Court held:

An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make (it) safe for (the invitee's) reception." *Wymer [v Holmes]*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987).] The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any

discovered hazards. *Id.* Thus, an invitee is entitled to the highest level of protection under premises liability law. *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 256; 235 NW2d 732 (1975).

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. *Id.* at 258, citing Restatement, § 343.

“Premises liability is conditioned upon the presence of both possession and control over the land. This is so because ‘[t]he man in possession is in a position of control, and normally best able to prevent any harm to others.’” *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980), quoting Prosser, Torts [4th ed], § 57, p 351. “Possession” means “to exercise direction over, dominate, regulate, or command.” *Derbadian v S&C Snowplowing, Inc*, 249 Mich App 695, 704; 644 NW2d 779 (2002).

Defendant is not the owner of the premises, but rather, a tenant of Imperial Investments. According to their lease agreement, defendant contracted for the use of the building and Imperial Investments maintained control over the upkeep of the parking lot and walkways, including snow and ice removal. Further, by contract, defendant was not responsible for maintaining the parking lot. See *Quinlivan, supra* at 269-270. Imperial Investments reserved that right for itself in the lease agreement with defendant, and exercised its dominion and control over the parking lot by hiring S & C Snowplowing for removing the snow and maintaining the lot. Defendant did not independently provide for maintenance of the parking lot.

Contrary to plaintiff’s argument, merely because defendant’s employees voluntarily took precautions to keep the area around the entryway free of ice does not put defendant in a position of control over the entire parking lot. Defendant’s employees testified in their depositions that they did not, and could not, salt the entire parking lot. It was for the convenience and safety of their customers and other employees that they salted the doorway and surrounding walkway. This action does not render defendant in possession and control of the parking lot, which remained the sole responsibility of Imperial Investments. Therefore, we hold that plaintiff has not established a genuine issue of material fact as to whether defendant had possession and control over the premises where plaintiff was injured.

Even assuming that defendant was in possession and control of the parking lot, plaintiff has failed to establish a genuine issue of material fact as to whether defendant knew or should have known of the dangerous condition on the lot, such that it was obligated to take remedial action. There is no allegation that defendant’s employees had actual knowledge of the ice on the parking lot at the time of plaintiff’s fall. Nor did the proofs establish that defendant should have known of the icy conditions. One of defendant’s employees testified that the parking lot was wet when he arrived at the store and walked across the lot at 6:45 a.m. on the day of plaintiff’s accident. Plaintiff slipped and fell a little more than one hour later, at 8:00 a.m. Plaintiff

testified that she noticed the ice only after she fell. No evidence was proffered showing that the ice existed for an unreasonable amount of time, such that defendant should have known of it.

In *Derbabin*, we held, on similar facts, that the plaintiff had failed to establish constructive notice of icy conditions where (1) it had not snowed for several days, (2) it had only rained a few hours before reverting to freezing temperature, (3) the ice patch was only the size of two parking spaces, and (4) no other person, including the plaintiff, had observed the ice before the fall. *Derbabin, supra* at 704. In this case, the facts established by the documentary evidence are: (1) the parking lot was wet at 6:45 a.m., (2) no one, including plaintiff, observed ice before the fall, and (3) it had lightly rained the evening before the fall. Accordingly, we hold that that, even if defendant was in possession and control of the parking lot, plaintiff has failed to establish a genuine issue of material fact as to whether defendant had actual or constructive notice of the icy conditions in the parking lot at the time plaintiff slipped and fell.

Affirmed.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly