

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Partially Covered Pothole in Parking Lot was Open and Obvious

By James P. Molloy

In *Bailey v. The Detroit Edison Company*, an unpublished decision of the Michigan Court of Appeals, Plaintiff filed a lawsuit to recover for his personal injuries when he fell in a pothole while walking through Defendant's parking lot. Plaintiff argued that the pothole was not open and obvious because a parked car covered a significant portion of the pothole.

Before deciding whether the pothole at issue was open and obvious, the Court focused on whether Defendant had possession and control over the premises where the accident occurred. Plaintiff presented evidence indicating that Defendant was a "possessor" of the parking area with intent to control it. The certificate of survey, legal description of the property, and lease documents established that Defendant leased the parking area from Monroe County.

With respect to premises liability, a party must both possess and control the property at issue before a duty of care arises in favor of persons coming onto the premises. *Kubczak v. Chemical Bank & Trust Co.*, 456 Mich. 653, 660 (1998). Possession depends on the actual exercise of dominion and control over the property. *Id.* at 661.

In this case, Monroe County did not contract by a covenant in the lease to keep the land in repair, and therefore, may not be subject to liability for physical harm to Plaintiff, an invitee of Defendant, caused by a condition of disrepair that arose after Defendant took possession of the parking area. Defendant designated the leased property as a parking area for its customers. Furthermore, after Plaintiff fell in the pothole in the parking lot, he informed a manager at Defendant's building. The manager claimed responsibility for the pothole and explained that Defendant was required to fix it immediately. Viewing the evidence in the light most favorable to Plaintiff, the Court ruled that a genuine issue of fact existed for the jury regarding whether Defendant had possession and control over the parking area.

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Bailey presents another example of the application of the open and obvious doctrine to everyday occurrences. As in *Lugo*, Plaintiff was walking through Defendant's parking lot when he stepped into a pothole and fell. The *Lugo* Court held that potholes in parking lots are an "everyday occurrence" and "ordinarily should be observed by a reasonably prudent person," and constitute open and obvious dangers. *Lugo v. Ameritech*, 464 Mich. 512, 520 (2001).

It is of no consequence that Plaintiff did not notice the pothole or that the pothole was partially obscured by a common occurrence, *i.e.*, a parked car. The test of whether a condition is open and obvious is objective. If it is reasonable to expect an average person of ordinary intelligence to discover the particular condition upon casual inspection, then there will be no genuine issue of fact regarding whether it was open and obvious. As the *Bailey* Court illustrates, there is nothing unusual about cars parking in and partially covering potholes which would preclude the application of the open and obvious doctrine.

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Despite there being an issue of fact for the jury regarding whether Defendant possessed and controlled the parking area, the Court held that summary disposition was appropriate because there was no genuine issue of fact regarding whether the pothole was open and obvious.

An invitor owes the duty to exercise reasonable care to protect its invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *O'Donnell v. Garasic*, 259 Mich. App. 569, 573 (2003). This duty, however, does not extend to the removal of open and obvious dangers. *Lugo v. Ameritech*, 464 Mich. 512, 516 (2001). A condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Id.*

In this case, Plaintiff alleged that the pothole was approximately three feet by two feet and three and a half inches deep. Also, alleged Plaintiff that the pothole was not open and obvious because a parked car covered a significant portion of the pothole. The Court found nothing unusual about cars parking in and partially covering potholes. In addition, if the uncovered portion of the pothole was large enough for Plaintiff to fall into, it was reasonable to expect that an average person of ordinary intelligence would discover the pothole upon casual inspection.

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