Homeowner does not have Possession or Control of Easement between Sidewalk and Street

By: Ryan Koss **June 28, 2016**

SECREST WARDLE NOTES

A defendant is only liable for an injury caused by a condition of land if the defendant had possession and control of the land that contained the injury-causing condition. In *Morelli v The City of Madison Heights*, the Court held that a homeowner does not possess or control the grassy area between the sidewalk and street adjacent to the homeowner's home, which was a City-owned easement, notwithstanding the local ordinance requiring the homeowner to maintain and clear the easement of overgrowth. Consequently, it is the owner of the easement, not the owner of the land the easement crosses, that may be held liable for injuries caused by a hazardous condition on the easement.

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It is well-established that "premises liability is conditioned upon the presence of both possession and control over the land." *Kubczak v Chem. Bank & Trust Co*, 456 Mich 653, 660 (1998). "The purpose behind the principle requiring actual possession and control was best expressed in *Nezworski v Mazanec*, 301 Mich 43, 56 (1942): 'It is a general proposition that liability for an injury due to defective premises ordinarily *depends upon power to prevent the injury* and therefore rests primarily upon him who has control and possession.'" *Id.* at 661-62.

In *Morelli v City of Madison Heights*, ___ Mich App ___ (2016), the Michigan Court of Appeals held, in a published decision, that a homeowner did not owe a legal duty to the public with respect to a hole left by the city in the grassy-berm area between the sidewalk and the street adjacent to the homeowner's land. The homeowner did not have possession or control of the grassy berm-area. It was a public right-of-way easement possessed and controlled by the City of Madison Heights.

In *Morelli*, Plaintiff was walking on a summer evening and crossed a street in an effort to avoid an obstacle in the sidewalk she was walking on. As she attempted to access the sidewalk on the opposite side of the street, she tripped and fell in a hole on the grassy strip between the street and the sidewalk in front of Defendant homeowner's home.

The grassy strip, or "berm area," is "that portion of the public right-of-way lying between the sidewalk and the edge of the street excluding driveway aprons." Madison Heights Ordinances, §23-55. The City had an easement over this area. The homeowner adjacent to this grassy strip is required to maintain the "berm area" by preventing "any growth of weeds, grass or other vegetation" over 6 inches. Madison Heights Ordinances, §27-17, 18, 19.

The hole in which Plaintiff fell on the easement was the remnant of a tree that was removed by the City of Madison Heights in 2006. The City left a stump in the ground at the time of the tree removal, which eventually decomposed and formed a hole. Plaintiff sued and argued that the homeowner was liable for her injuries for failing to repair, or fill, the hole. The homeowner moved for summary disposition arguing that he did not have possession or control of the area where the fall occurred. The motion was denied.

The Court of Appeals reversed the trial court's denial of the homeowner's motion for summary disposition. The *Morelli* Court first held that whether a duty exists in a premises liability case is a question of law for the Court to decide. The *Morelli* Court then determined that the homeowner did not owe the Plaintiff a duty as a matter of law because he did not have possession or control of the strip of grass where the hole was located.

The Court found that the case was similar to *Morrow v Boldt*, 203 Mich App 324 (1994). In *Morrow*, the Court of Appeals held that a homeowner could not be held liable for a fall that occurred in the driveway approach area because the homeowner did not have possession or control of the approach. In that case, the city maintained an easement for driveway approaches, but delegated responsibility for maintaining the approach to the homeowner, who was responsible for clearing snow and ice on the approach. The *Morrow* Court concluded that the property owner did not have possession or control of the approach because "it is the owner of an easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties." 203 Mich App at 329-330.

The *Morelli* Court applied the holding of *Morrow* to the facts of this case:

> We find *Morrow* analogous to this case. In this case, an ordinance provides that the berm area in which [the plaintiff] fell is part of a public right-of-way. While Madison Heights delegates responsibility to maintain the grass on the berm, Madison Heights retains an easement over the public right-of-way. Accordingly, it was Madison Heights – the owner of the easement – who had the duty to maintain the public right-of-way in a safe condition. As in *Morrow*, that [the property owner] regularly mowed the grass pursuant to a second ordinance did not render him liable for Morelli's injuries.

The City of Madison Heights, which had possession and control of the easement, should have filled in the hole – not the homeowner.

Additionally, the *Morelli* Court rejected Plaintiff's second argument that the homeowner negligently altered" the state of the right-of-way. "A defendant has no duty to alter a hazardous condition in a public right-of-way, but once the defendant makes an attempt, the defendant must do so with proper care." In this case, while the homeowner mowed the grass around the hole, he simply left the condition where it was and "did not make the hazard itself different." The homeowner could not be held liable for attempting to alter, or repair, the hole.

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