[Cite as *Dysart v. Estate of Dysart*, 2010-Ohio-1238.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

MARY DYSART, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 2009 CA 24

v. : T.C. NO. 2008 CV 626

ESTATE OF PETE DYSART : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 26th day of March, 2010.

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JOHN J. SCACCIA, Atty. Reg. No. 0022217, 536 West Central Avenue, Second Floor, Springboro, Ohio 45066
Attorney for Plaintiffs-Appellants

ROBERT J. JANES, Atty. Reg. No.0030234, 130 West Second Street, Suite 1850, Dayton, Ohio 45402
Attorney for Defendant-Appellee

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HARSHA, J. (by assignment)

{¶ 1} In this slip and fall personal injury action, Mary Dysart and her husband appeal a summary judgment granted to the Estate of her husband's father, Pete Dysart. Their complaint alleged that as Mary left Pete's home, she fell into a hole in the grassy area used for accessing the premises. This access route is located upon a highway right of way.

The trial court applied a rule of general premises liability to conclude that the Estate owed no duty to Mary because it did not own the grassy area where she fell. Mary and her husband contend the trial court ignored the presence of genuine issues of material fact in reaching its decision. Specifically, she argues that genuine issues remain concerning whether (1) Pete owed her a duty of care under premises liability law; (2) Pete is liable under exceptions to the general rule that a property owner is not responsible for conditions on municipal property that abuts his premises.

{¶ 2} To evaluate Mary's claims, we must first determine if the trial court erred by relying on the affidavit of the Estate's registered surveyor, who opined that the hole was located outside of Pete's property lines. We conclude that the surveyor's opinion was admissible as evidence of the location of the hole because he was qualified as an expert and the methodology he used was sound and objectively verifiable. Because Mary did not rebut the surveyor's opinion with her own evidence, the trial court properly concluded no genuine issue of material fact existed here.

{¶ 3} Our holding concerning the location of the hole is dispositive of Mary's claim involving general premises liability. In it, she argues that Pete owed her a duty to warn her of the hole because she was an invitee, rather than a licensee, and the hole was a dangerous condition. Regardless of her status as an invitee or licensee, Pete did not owe Mary a duty of care under general premises liability law because the hole was not located on Pete's property.

{¶ 4} Mary also contends that if the hole was not on Pete's property, genuine factual issues exist about Pete's liability under the exceptions to the general rule set forth in

Eichorn v. Lustig's, Inc. (1954), 161 Ohio St. 11, and its progeny. Under that line of cases, the owner of premises abutting municipal property may be liable for defects in the abutting areas if: (1) a statute imposed a specific duty on the owner to keep the abutting area in good repair; (2) the owner's affirmative acts created or negligently maintained a defective or dangerous condition in the abutting area causing the injury; or (3) the owner negligently permitted a defective or dangerous condition to exist on the abutting area for some private use or benefit. Mary does not allege that any ordinance imposed a duty on Pete, but she does argue that a genuine issue of fact exists about whether the second and third *Eichorn* exceptions apply. Initially, we hold that the hole was not a "defective or dangerous condition." Such imperfections in natural ground are to be expected when one leaves a paved area and walks upon natural ground. Moreover, even if the hole was a dangerous condition, we hold there is no factual issue concerning whether Pete created or negligently maintained the hole. The hole was created by the eventual rotting of a tree stump and was not the result of Pete's direct, affirmative action. Nor did Pete negligently "maintain" the hole by occasionally refilling it with dirt. Finally, there is no evidence that Pete used the hole for his own private benefit. Thus, none of the *Eichorn* exceptions apply and we affirm the trial court's judgment.

I. Summary of the Case

{¶ 5} In the summer of 2006, Mary and her husband Simeon visited the home of Simeon's father, Pete, for a family reunion. Pete did not attend the reunion as he was in poor health and staying at a nursing home. Over several days, the family spent time together at Pete's home. On the last day of her visit, Mary was at Pete's house saying

goodbye to relatives. When she finished, Mary walked out of the home with her granddaughter and headed towards her car.

{¶ 6} Photographs in the summary judgment record show a paved walkway leading from the front of the home to the street, U.S. Route 40. The walkway leads through a gated fence surrounding the home. The fence is set back approximately fifteen feet from the street. There is a grassy area between the fence and street.

{¶ 7} After passing through the fence, but before reaching the end of the paved walkway, Mary stepped off of the walkway. She went into the grassy area between the fence and street and headed towards her car. Mary explained that she was not looking where she was walking as she entered the grassy area. Instead she was looking down toward her granddaughter. Approximately three feet after leaving the walkway, she stepped into a hole that caused her to fall and injure herself.

{¶ 8} In her deposition testimony, Mary testified that the hole was in the same general area where a maple tree used to be. For years there had been a row of maple trees in the grassy area between the fence and the street. There is some evidence that Pete had the trees cut down in 2000. On a visit in 2001, Mary remembered noticing a visible stump where one of the maple trees had been. On a subsequent visit, she noticed that the stump was cut even with the ground.

{¶ 9} The evidence indicates that this stump eventually rotted and created a hole. Affidavits allege that Pete would occasionally fill the hole with dirt, and refill it after rainwater washed away the dirt. After Pete's health deteriorated, his guardian took over refilling the hole.

{¶ 10} Although Mary knew about the maple trees and the stump removal, she claimed she did not know there was a hole in the ground. She claimed that on the day of the injury, the hole was concealed, covered by freshly cut grass. In other words, the area of the hole blended uniformly with the rest of the grassy area. After the accident Mary learned that Pete's guardian had stepped in the same hole. He did not suffer an injury and did not warn anyone about its presence.

{¶ 11} Pete passed away soon after the accident. Mary and Simeon then initiated this lawsuit against his Estate, seeking damages under various theories, including premises liability.

{¶ 12} During her deposition, Mary identified the location of the hole by marking an " X" on a photograph of the grassy area near the paved walkway. The Estate later hired a registered surveyor, Daniel Turner, who examined recorded deeds of the property and the deposition photograph. He then measured from the center of U.S. Route 40 and determined that the hole as marked on the photograph was outside the property lines for the home. In an affidavit, Turner opined, with a "reasonable degree of probability," that the hole was located in the eighty-foot right-of-way of U.S. Route 40.

{¶ 13} After obtaining Turner's opinion, the Estate filed its motion for summary judgment and supporting evidence, which included his affidavit. The trial court subsequently granted the motion. It found that Mary was a licensee because there was no evidence that she was expressly invited to Pete's home. Next, the trial court concluded that Pete owed Mary no duty of care under premises liability law because he did not "willfully or wantonly" cause her harm and because he did not own the grassy area where the hole was

located. Finally, the trial court found that Pete could not be liable under the *Eichorn* exceptions because he did not create, negligently maintain or permit the hole to exist for his own private benefit. The court found that the hole was "created" by the eventual rotting of the tree stump, that occasionally re-filling small holes did not amount to negligent "maintenance" of a dangerous condition, and that there was no evidence that Pete used the hole for his own personal benefit.

{¶ 14} Mary timely filed her appeal of that decision.

II. Assignment of Error

{¶ 15} Mary's brief contains a single error assigned for our review:

{¶ 16} "ASSIGNMENT OF ERROR NUMBER 1: THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."

III. Legal Analysis

{¶ 17} Mary divides her assignment of error into three arguments. She contends that the trial court erred by finding no genuine issue concerning: (1) whether Pete, as an owner of abutting property, engaged in affirmative acts to "create or maintain" the hole; (2) the location of the hole, i.e., by improperly relying on the Turner affidavit; and (3) whether Pete owed Mary a duty to warn her of the dangerous condition on his property. We will address her arguments in a manner that facilitates our review.

A. Standard of Review of the Summary Judgment Motion

{¶ 18} When reviewing a trial court's decision on a motion for summary judgment,

we conduct a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Accordingly, we must independently review the record to determine whether summary judgment was appropriate and do not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment is appropriate when the movant has established: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, with the evidence against that party being construed most strongly in its favor. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. See Civ.R. 56(C).

{¶ 19} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107. To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any," which affirmatively demonstrate that the non-moving party has no evidence to support the non-moving party's claims. Civ.R. 56(C). Once the movant supports the motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E).

B. Admissibility of the Turner Affidavit

{¶ 20} Because of its effect on Mary's other arguments, we first address whether the trial court erred in determining that there was no genuine issue concerning the location of the hole. Mary argues that the court improperly relied on the Turner affidavit because it was inadmissible. She specifically contends that Turner's opinion was based on "cursory measurements" that did not conform to Ohio boundary surveys regulations under Ohio Adm. Code 4733-37.

{¶ 21} Civ.R. 56(E) controls the admissibility of summary judgment evidence and provides in part: "Supporting and opposing affidavits shall be made on *personal knowledge,* shall set forth *such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.*" (Emphasis supplied.)

{¶ 22} Evid.R. 702 states:

{¶ 23} "A witness may testify as an expert if all of the following apply:

{¶ 24} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶ 25} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶ 26} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure,

test, or experiment, the testimony is reliable only if all of the following apply:

{¶ 27} "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶ 28} "(2) The design of the procedure, test, or experiment reliably implements the theory;

{¶ 29} "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶ 30} There is little doubt that a registered surveyor can testify as an expert to the existence of a boundary line; in fact, a surveyor's testimony can "constitute substantial evidence to establish the line." *Bella v. Pollack* (May 5, 1989), Lucas App. No. L-88-200, citing *Santilli v. Martin* (Feb. 26, 1985), Mahoning App. No. 83 C.A. 107; *Kramp v. Toledo Edison Co.* (1961), 114 Ohio App. 9, 18; and *Zipf v. Dalgarn* (1926), 114 Ohio St. 291. Furthermore, "[a] deed, will, or other written instrument is admissible to prove the boundaries of the land conveyed thereby." 2 Ohio Jurisprudence 3d (2009), Adjoining Landowners, Section 95, citing *Banning v. Banning* (1861), 12 Ohio St. 437; *Doe ex dem. Eaton v. Longworth* (1859), 10 Ohio St. 20; and *Dresback v. M'Arthur* (1835), 7 Ohio 146.

{¶ 31} Turner's affidavit sets forth that he is licensed by the State of Ohio as a registered engineer and surveyor. It explains that he first examined recorded deeds in Miami County concerning the two lots upon which Pete's home sits. He then visited the home, measured from the center line of U.S. Route 40, and determined, in conjunction with the known width of the right-of-way of U.S. Route 40, and the photograph that Mary marked

with an "X," that the hole was within the right-of-way of U.S. Route 40.

{¶ 32} Assuming the affidavit was submitted as an "expert opinion," it was admissible for summary judgment purposes. The existence and location of boundary lines requires knowledge typically beyond that of a layperson. As a registered engineer and surveyor, Turner has the specialized knowledge, skill, experience, training, or education required to give his opinion on matters involving boundary lines. The affidavit clearly sets forth Turner's methodology: an examination of recorded deeds, an in-person inspection and measurement of the right-of-way, and a comparison to the marked photograph.

{¶ 33} Nonetheless, Mary contends that Turner's methodology was deficient because the measurements were not up to the standards set forth in Ohio Adm. Code 4733-37. That section of the administrative code is entitled "Standard for Boundary Surveys." The prefatory language to that section indicates that "[t]hese rules are intended to be the basis for all surveys relating to the establishment or retracement of property boundaries in the state of Ohio." Ohio Adm. Code 4733-37-01.

{¶ 34} Ohio Adm. Code 4733-37 does not preclude the admissibility of Turner's affidavit. That section of the administrative code establishes rules for conducting a recorded survey. But, the Turner affidavit was not a survey – it simply constituted Turner's opinion concerning the location of the hole. Accordingly, we hold that Turner's affidavit was admissible because the methodology he used could yield accurate results and was conducted in a manner that could be objectively verified by another surveyor.

{¶ 35} Importantly, Civ.R. 56(E) also states:

{¶ 36} "When a motion for summary judgment is made and supported as provided in

this rule, *an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial*. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." (Emphasis supplied.)

{¶ 37} Mary did not refute the Turner affidavit, either by way of her own expert opinion, or by other evidence admissible in Civ.R.56 proceedings. Therefore, Mary has failed to present a genuine issue for trial. Accordingly, the trial court properly relied on the Turner affidavit and concluded that there was no genuine issue of fact about the location of the hole.

C. Pete Dysart's Duty under Premises Liability Law

{¶ 38} We look next to Mary's argument concerning whether Pete owed her a duty under general premises liability law to warn her of the hole. Specifically, she argues that the court mistakenly labeled her a "licensee." She claims her affidavit and those of several others establish that she was a social guest or invitee, and that Pete was aware of the hole, which she claims was a dangerous condition or defect.

{¶ 39} Ohio's general premises liability law adheres to the common law classifications of invitee, licensee, and trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, citing *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 417, 1994-Ohio-427; *Boydston v. Norfolk S. Corp.* (1991), 73 Ohio App.3d 727, 733. However, we find it unnecessary to

resolve Mary's status under general premises liability law.

{¶ 40} Regardless of an injured party's status, in order to have a duty to keep premises safe for others one must be in possession and control of the premises. *Wireman v. Keneco Distrib., Inc.*, 75 Ohio St.3d 103, 108, 1996-Ohio-152, citing *Wills v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186. And we have held (in the context of business invitees) the duty to provide reasonably safe ingress and egress to the property only apply to routes *on the property*. *Young v. Local 775 Housing Assn.* (May 30, 1997), Montgomery App. No. 16226, citing *Weaver v. Standard Oil Co.* (1989), 61 Ohio App.3d 139.

{¶ 41} Here, the hole was undeniably outside Pete's property lines. Regardless of whether Mary was an invitee or licensee, Pete was under no duty to warn her of potential dangers outside of his property. Thus, he cannot be liable under a general premises liability theory.

D. Pete Dysart's Liability Under *Eichorn*.

{¶ 42} Mary's final argument is that Pete is liable under exceptions to the general rule as an owner of abutting property. In *Eichorn*, supra, the Supreme Court of Ohio set forth the rule that "[o]rdinarily, the duty to keep streets, including sidewalks, open, in repair and free from nuisance rests upon a municipality and not upon the abutting owners." Id. at 13, citing *Wilhelm v. Defiance* (1898), 58 Ohio St. 56. This rule has been extended to grassy areas or "lawn strips" in between the curbing of paved streets and sidewalks. See, e.g., *Mudrak v. KK & H Realty Corp.* (Oct. 12, 1994), Belmont App. No. 93-B-31.

{¶ 43} In *Quinn v. Montgomery Co. Edn. Serv. Ctr.*, Montgomery App. No. 20596, 2005-Ohio-808, we acknowledged the three exceptions to the general rule that *Eichorn*

recognized: (1) if a statute or ordinance imposes upon an abutting owner a specific duty to keep the sidewalk adjoining his property in good repair[1]; (2) if by *affirmative acts* the abutting owner *created* or *negligently maintained* the defective or dangerous condition causing the injury; or (3) the abutting owner negligently permitted the defective or dangerous condition to exist *for some private use or benefit*. (Emphasis added). Id. at ¶20.

{¶ 44} Mary asserts that the trial court improperly weighed the evidence in Pete's favor when it determined that Pete did not "create or negligently maintain" the hole. She argues that Pete conceivably "created" the hole by cutting the maple tree down and then cutting the stump even with the ground and allowing it to rot. She also argues that Pete negligently "maintained" the hole by filling it with dirt and re-filling it after the dirt washed away. Finally, she argues that Pete may have negligently allowed the dangerous condition to exist for his own private use and enjoyment because he took down the maple trees in order to create a parking area and walkway for his visitors.

{¶ 45} Initially we consider if there is a genuine issue of fact about whether the hole represents a defective or dangerous condition. In *Stein v. Oakwood* (May 8, 1998), Montgomery App. No. 16776, we held that when an injured invitee chooses to leave the usual path of pedestrian traffic and step into an area of natural ground, she must expect to encounter defects, such as hidden "ruts" in the grass. Id. In that case, the plaintiff was crossing a street that had a raised grassy median dividing the eastbound and westbound traffic. As she approached the center of the grassy median, she became distracted by her

[1]Neither party alleged that any statute or ordinance imposed a duty on Pete to keep the grassy area free of defects. Mary's arguments are confined to the second and third *Eichorn* exceptions.

dog and a passing driver. She stepped into a hidden hole in the center of the median, approximately six to eight inches deep, injuring herself. The plaintiff admitted that she was aware of holes existing in the median. She also knew that a tree stood at or near the place where she crossed the median. She said that she had not seen any holes in the median in the years before the accident and assumed that they had been either filled in by the city or natural causes. Id.

{¶ 46} Nonetheless, we held in *Stein* that the hole was not an unreasonably dangerous condition because such defects are to be expected when a pedestrian leaves the safety of pavement. Id. We regarded the hole as an ordinary hazard one would expect to encounter in natural ground. Id. Also, relevant to our analysis was the fact that the plaintiff "had knowledge of conditions that should have caused her to recognize that the *** ground was potentially hazardous. The fact that the hole she stepped into was obscured by grass does not obviate her general knowledge of the ground conditions."

{¶ 47} And, though we acknowledged that a six to eight inch hole could not be regarded as trivial, we held "natural ground is not pavement *** [s]ome ground defects could exist that pose such risk that no reasonable person should expect to encounter them. A premises owner would bear liability for the injuries such defects cause. Other defects, however, are so likely to occur that no duty should exist to remove them and, regarding them, no premises owner should be expected to bear even the burden of going to trial." Id.

{¶ 48} Photographs submitted with Pete's motion for summary judgment clearly show a paved walkway leading from Pete's home, through the fence, and toward the street. Mary admitted in her deposition testimony that she voluntarily stepped off of the paved

walkway before it ended, and into the grassy area in essence to take a shortcut or more direct route to her car. Mary further admits that she was looking at her granddaughter and was not paying attention to where she was walking. Thus, Mary accepted the risks attendant with walking upon a natural grass area. The fact that the hole was not apparent made no difference to us in *Stein*, and it makes none here. And like the plaintiff in *Stein*, Mary had some knowledge that there had been trees in the ground where she was walking. Even if she was unaware that rotting stumps had created a hole in the ground, she should have expected to encounter defects and ruts in the ground where they once stood. Accordingly, we hold as matter of law that the hole in this case was not a defective or dangerous condition.

{¶ 49} Next we will assume without deciding that the hole is a defect or dangerous condition. We still must determine what sort of affirmative acts of "creation" or "maintenance" of a defect are sufficient to give rise to liability under the second *Eichorn* exception. The case law strongly suggests that actions creating the condition must be "active," "affirmative," or "direct" in nature. In *Morris v. Woodburn* (1897), 57 Ohio St. 330, the Court held that the condition complained of must have been "actively" created by the owner of the abutting property. Id. at 334. Otherwise stated, the condition "cannot be the result of ordinary wear and tear but must [be] due to some affirmative misconduct by the landowner." *Guder v. Kuhr* (July 26, 1995), Hamilton App. Nos. C-940517, C940521, C940539, citing *Crowe v. Hoffman* (1983), 13 Ohio App.3d 254, 255-56, and *Purdom v. Sapadin* (1960), 111 Ohio App. 488, 489-90.

{¶ 50} Courts have held that the abutting landowners "created" or negligently

"maintained" the condition in the following circumstances: installing a trapdoor in a sidewalk, *Herron v. Youngstown* (1940), 136 Ohio St. 190; installing a coal vault under the sidewalk and maintaining a defective covering, *Morris*, supra; placing a five gallon plastic bucket filled with concrete on the sidewalk to prop open a door, *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (Nov. 27, 1996), Cuyahoga App. No. 69523, (from the dissenting opinion), reversed on other grounds, 81 Ohio St.3d 677, 1998-Ohio-602.

{¶ 51} In comparison, the following are examples of where the abutting landowner was held not to have "created" or negligently "maintained" the condition: occasionally filling small snakes holes, *Morgan v. Gracely*, Washington App. No. 05CA36, 2006-Ohio-2344, at ¶10; ice accumulating on a sloping sidewalk and the owner was not responsible for the sloping, *Cavanaugh v. Struthers Bowling Ctr.* (1954), 99 Ohio App. 530; where there was a bed of stones surrounding a tree bed on the abutting owner's property and a few stones somehow found their way on to the adjoining sidewalk, *Merriweather v. Flender Diversified, Inc.* (June 18, 1992), Cuyahoga App. No. 62815; water possibly coming from the owner's premises and freezing in holes in the abutting sidewalk, but the holes were not created by the owner, *Coleman v. Reagan* (1953), 97 Ohio App. 286.

{¶ 52} Our review of the cases reveals that the affirmative acts of "creating" or "maintaining" the condition must be directly tied to the defective condition. In other words, there can be no intervening forces between the direct action alleged and the ultimate harm. In the present case, Pete's direct action is cutting down the trees and leveling the stumps. However, the eventual rotting of the stumps was a natural intervening force that "created" the hole. Likewise, if Pete or his guardian "maintained" the condition by occasionally

refilling the resulting holes with dirt, this occasional conduct does not rise to the level of "active" maintenance sufficient to give rise to liability here. See *Morgan*, supra. Therefore we hold, as a matter of law, that Pete did not "create" or "maintain" the condition for purposes of the second exception to *Eichorn*.

{¶ 53} Finally, even if we once again assume the hole was a defect or dangerous condition, we have little trouble dismissing Mary's contention that Pete negligently permitted the hole to exist for his own private use or benefit. There is no evidence that Pete used the hole for some private use or benefit for purposes of the third *Eichorn* exception.

{¶ 54} Accordingly, we hold that there are no genuine issues of material fact concerning whether Pete can be liable to Mary under the second or third exceptions to *Eichorn*.

IV. Conclusion

{¶ 55} We affirm the decision of the trial court to grant summary judgment in favor of the Estate. The court properly relied on the Turner affidavit in concluding that the hole lay outside Pete's property lines. Under premises liability law, Pete owed Mary no duty to warn her of the hole because it lay outside his property lines and was not a dangerous defect. Finally, Pete is not liable under the second and third exceptions to *Eichorn* because there is no evidence that he created or negligently maintained the hole, or used it for his own benefit.

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DONOVAN, P.J. and GRADY, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

John J. Scaccia
Robert J. Janes
Hon. Robert J. Lindeman