

injuries.¹ On appeal, the plaintiff argues that the circuit court erred in finding that Plocher had no duty to prevent the injury to the plaintiff based on the open and obvious nature of the condition that caused the plaintiff's injury. For the reasons that follow, we reverse and remand for further proceedings not inconsistent with this order.

¶ 3

FACTS

¶ 4 On February 23, 2009, the plaintiff filed a complaint against Plocher in the circuit court of Marion County. The complaint alleged that Plocher was hired by the City of Salem (the City) to act as the general contractor for the upgrade and construction of the City's wastewater treatment plant. During construction, the wastewater treatment plant was to remain in operation, and employees of the City, such as the plaintiff, were to be present at the construction site continuing to perform their job duties. According to the complaint, on March 13, 2007, the plaintiff, while performing his job duties, was injured when he fell into a hole that was created by the defendant during construction. The complaint alleged that the plaintiff's fall and injuries were proximately caused by negligent acts and omissions of Plocher, including failing to barricade the hole, allowing the hole to remain on the construction site, and failing to warn the plaintiff about the hole.

¶ 5 On January 26, 2011, Plocher filed a motion for a summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)) on the basis that the hole was an open and obvious condition, and, as such, Plocher had no duty to warn or protect the plaintiff from his injury. Plocher also argued that its duty to protect the plaintiff from the hole was extinguished by the City's knowledge of the hole because the City was the plaintiff's employer. Finally, Plocher argued that the hole was not the proximate cause of the plaintiff's injury because the "jolting" of a hose the plaintiff was attempting to

¹Commercial Electric, Inc., has been dismissed as a defendant pursuant to a stipulation for dismissal and is not a party to this appeal.

manipulate was what caused him to fall into the hole.

¶ 6 The plaintiff filed several exhibits in response to Plocher's motion for a summary judgment. Deposition testimony affirmed that the parties contemplated that the construction work would be performed while the plant remained open and operational. The contract between the parties also provided that Plocher would be "solely responsible for *** all safety precautions and programs in connection with the work" and was required to "take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to *** all persons on the site or who may be affected by the work."

¶ 7 On September 19, 2011, the circuit court entered a detailed order granting Plocher's motion for a summary judgment on the basis that the hole was an open and obvious condition, thus eviscerating Plocher's duty to the plaintiff. On September 28, 2011, the plaintiff filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 Because the plaintiff appeals from an order granting a summary judgment in favor of Plocher, our standard of review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). A summary judgment should only be granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* Only when the movant's right to a judgment is clear and free from doubt is a summary judgment appropriate, as it is a drastic measure. *Id.* Where reasonable persons could draw different inferences from undisputed facts, a summary judgment is improper. *Id.* at 102. With these well-established standards in mind, we turn to the issues on appeal.

¶ 10 The circuit court entered a summary judgment in favor of Plocher because it found that the open and obvious nature of the condition Plocher created during its construction at the plant alleviated its duty of care to the plaintiff. In so doing, the circuit court relied upon

section 2 of the Illinois Premises Liability Act (740 ILCS 130/2 (West 2010)). However, we note that the portion of section 2 of the Premises Liability Act that codifies the open-and-obvious exception to the duty owed by owners or occupiers of land to entrants onto the land was declared unconstitutional due to unseverability in 1997. See *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). After the decision in *Best*, all that remained of section 2 of the Premises Liability Act was the abolition of the distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of land, and the statement that the duty owed to entrants on land by an owner or occupier is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them. 740 ILCS 130/2 (West 1996). Accordingly, we must look to the common law in determining the applicability of the open-and-obvious exception to the case at bar.

¶ 11 The open-and-obvious exception to the duty owed by owners and occupiers of land is derived from section 343A of the Restatement (Second) of Torts. See *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 389-90 (1998) (citing Restatement (Second) of Torts § 343A (1965)). According to that section, a possessor of land is not liable for physical harm caused by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Restatement (Second) of Torts § 343A(1) (1965). However, in order to be a "possessor" of land for the purposes of the open-and-obvious exception, a person or entity must occupy land with the intent to control it. See *Esser v. McIntyre*, 169 Ill. 2d 292, 302 (1996) (citing Restatement (Second) of Torts § 328E (1965)).

¶ 12 Here, Plocher was not in possession of the wastewater treatment plant, which remained open and in the control of the City throughout the duration of the construction project. In all of the cases cited by Plocher for the proposition that the open-and-obvious exception to duty can be applied to a contractor, the contractor had complete occupation and

control over the premises at issue for brand-new construction. See *Lange v. Fisher Real Estate Development Corp.*, 358 Ill. App. 3d 962, 965 (2005) (injury occurred on the site of a new condominium construction project); *Jakubowski v. Alden-Bennett Construction Co.*, 327 Ill. App. 3d 627, 630 (2002) (injury occurred in the open stairwell of a partially constructed building); *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1046 (2010) (injury occurred on site of a partially constructed school building). Because in the case at bar, as contemplated by the City and Plocher, the plant remained open and fully operational with employees of the City working on the site, we find that Plocher was not a possessor of the premises, and as such, the scope of its duty is not defined by the common law of premises liability. See *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 589 (2002) (construction contractor could not be liable under a premises liability theory because the Home Depot store had been turned over to Home Depot when construction was substantially completed and employees were on site stocking shelves at the time the injury occurred). For these reasons, we find that the circuit court erred in its finding that Plocher had no duty to protect the plaintiff from injury due to the open and obvious nature of the hole in which the plaintiff fell.²

¶ 13 Having found that the source of Plocher's duty to the plaintiff is not derived from premises liability law, and as such is not negated by the fact that the hole in which the plaintiff fell was open and obvious, in order to complete a *de novo* review of the circuit court's order, we must ascertain whether a duty of care to the plaintiff on the part of Plocher can be derived from another source. Such an inquiry involves a determination of whether Plocher and the plaintiff stood in such a relationship to each other that Plocher was obligated

²As the plaintiff conceded during oral argument, although the open and obvious nature of the hole does not negate Plocher's duty to the plaintiff, it may very well be relevant to issues of breach of duty and contributory negligence.

to act reasonably for the benefit of the plaintiff. See *Kelley v. Carbone*, 361 Ill. App. 3d 477, 480 (2005). Although the existence of such a relationship can be determined by a common law analysis of the foreseeability, magnitude, and burden of preventing the injuries that were suffered (see *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010)), a duty can also arise by virtue of a contract. *Rojas Concrete, Inc. v. Flood Testing Laboratories, Inc.*, 406 Ill. App. 3d 477, 480 (2010). In such a case, although the cause of action sounds in tort rather than contract, the scope of the duty is determined by the terms of the contract. *Id.* Here, we find that, a common law source of duty notwithstanding, a duty on the part of Plocher to exercise reasonable care for the safety of the plaintiff, a City employee, did arise by virtue of the contract between Plocher and the City, which clearly provided that Plocher was to be responsible for the safety of all persons on site.

¶ 14 Plocher argues that because the City, as the plaintiff's employer, was aware of the existence of the hole, any duty on the part of Plocher to warn or otherwise protect the plaintiff from the hole was eliminated. Plocher cites *Briones v. Mobil Oil Corp.*, 150 Ill. App. 3d 41, 45 (1986), in support of its argument. We find *Briones* to be inapposite. In that case, a firefighter was injured when he fell into a hole while on the premises fighting a fire. *Id.* at 44. The assistant chief of the fire department, the first commanding officer at the scene, was told that the building was under demolition and was warned about the holes in the floor. *Id.* at 45. The circuit court held that a summary judgment in favor of the landowner and contractor was appropriate because once the fire department, as the plaintiff's employer, was warned of the hole, it became the fire department's duty to warn the plaintiff. *Id.*

¶ 15 Here, unlike in *Briones*, the location where the plaintiff was injured was in operation and the parties contemplated that employees of the City would be on site for the duration of the construction project. Furthermore, as explained above, Plocher assumed the duty to protect the plaintiff by a contract which required it to "take all necessary precautions for the

safety of, and *** provide the necessary protection to prevent damage, injury or loss to *** all persons on the site or who may be affected by the work." Whether Plocher breached its duty to do so by creating and failing to barricade the hole, whether the hole caused the plaintiff's injuries, and whether, due to the open and obvious nature of the hole or other factors, the plaintiff is contributorily negligent in causing his injuries, are all questions of fact. See *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 6 (2006) (breach of duty and causation are questions of fact); *Pantlen v. Gottschalk*, 21 Ill. App. 2d 163, 172 (1959) (contributory negligence is a question of fact). For all these reasons, we find the circuit court erred in granting a summary judgment to Plocher.

¶ 16

CONCLUSION

¶ 17 For the foregoing reasons, the September 19, 2011, order of the circuit court of Marion County, which granted Plocher a summary judgment in its favor on the plaintiff's negligence complaint, is reversed, and this cause is remanded for further proceedings not inconsistent with this order.

¶ 18 Reversed and remanded.