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STATE OF MICHIGAN

IN THE SUPREME COURT

KEITH SMITH,

Plaintiff/**Appellee/Cross-Appellant,**

v.

City of Detroit

Defendant/Cross-Plaintiff,

and

MERLO CONSTRUCTION CO, INC,

Defendant/Cross-Defendant/**Appellant/Cross-Appellee**,

and

Rauhorn Electric Inc,

Defendant/Cross-Defendant/Cross-Plaintiff,

and

Parsons Brinkerhoff Michigan Inc and Poco Inc,

Defendants/Cross-Defendants.

Supreme Court
Docket No.: 158300

Court of Appeals
Docket No.: 337708

Wayne Circuit Trial Court
Case No. 15-001269-NO

/

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PLAINTIFF/CROSS-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

(ORAL ARGUMENT REQUESTED)

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EXHIBIT 2: Plaintiff's deposition transcript

EXHIBIT 3: Photographs

EXHIBIT 4: Inspector Daily Reports

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EXHIBIT 6: MSD Hearing Transcript

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STATEMENT OF JURISDICTION

The Court of Appeals issued an unpublished decision on July 24, 2018. **(Exhibit 1, COA 7/24/18 Order.)** Defendant/Cross-Appellee filed and served its Application for Leave to Appeal on August 23, 2018, surrounding the Court of Appeals decision to reverse the trial court's granting of summary decision based on the open and obvious danger doctrine.

This Court has jurisdiction over this timely filed application for leave to cross appeal, pursuant to MCR 7.307(A), which stems from the Court of Appeals' decision regarding whether the case sounds in ordinary negligence or premises liability.

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STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err by finding that Defendant Merlo had possession and control over the sidewalk at the time Plaintiff was injured, rendering the matter a case of premises liability and not ordinary negligence?

Plaintiff/Cross-Appellant answers: **Yes**

Defendant/Cross-Appellee will answer: **No**

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GROUNDS FOR LEAVE TO APPEAL PURSUANT TO MCR 7.305(B)

Pursuant to MCR 7.305(B)(3), the issue of whether a matter sounds in premises liability and/or ordinary negligence involves a legal principle of major significance to the state's jurisprudence.

In addition, pursuant to MCR 7.305(B)(5)(a), the decision of the Court of Appeals is clearly erroneous and will cause material injustice if allowed to stand. Based on Defendant Merlo's own admission, it did not have possession or control over the sidewalk where Plaintiff was injured. That admission on its face precludes a claim of premises liability against Defendant Merlo, yet the Court of Appeals held that Defendant Merlo did have possession of the area where Plaintiff was injured. The Court of Appeals held that Plaintiff's claim was limited to a premises liability claim because of the nature of the hazard. This, however, conflicts with case law which allows for "a separate claim grounded on an independent theory of liability based on the defendant's conduct . . . " *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005).

By allowing such a ruling to stand will result in misinterpretation and misapplication of the principles of distinguishing premises liability cases from ordinary negligence cases and when an entity has possession and control of a premises.

Furthermore, the Court of Appeals decision conflicts with existing Supreme Court and Court of Appeal decisions. The Court of Appeals decision specifically states that whether a case sounds in premises liability or negligence turns on the nature of the hazard and cited *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685; 822 NW2d 254 (2012). In *Buhalis*, there was no issue on whether the defendant owned or possessed the area where plaintiff was injured. The only issue in *Buhalis* was whether an action for ordinary negligence could be pled on those

specific facts, in addition to a claim for premises liability. *Buhalis* is being used to preclude claims for ordinary negligence against defendants who have no ownership or possessory interest in the premises where a plaintiff is injured.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

I. MATERIAL FACTS

On Sunday, October 12, 2014, at approximately 9:00 pm, Plaintiff Keith Smith was riding his bicycle on the sidewalk along the east side of Hayes Street in the City of Detroit. Earlier in the day he had biked to his sister's home. He left his sister's home to meet a friend at her home to give her a quote to paint her basement. After leaving his friend's home, Plaintiff was returning home and travelling in an area that he had not travelled earlier in the day. It was night, the sun had fully set, and it was dark outside. **(Exhibit 2, Plaintiff's dep p 42.)** The minimal street lighting did not illuminate the sidewalk. As Plaintiff was riding his bicycle on the sidewalk, all of a sudden he was thrown forward over his handle bars, landing on his left side. He realized after he fell that there was an entire slab or two of concrete missing. He had not seen the missing concrete before his fall because it was dark. **(Exhibit 2, pp 45-46.)** As shown in the photos, which were taken on the morning after the incident, a portion of the sidewalk and the walkway to the bus stop had been removed. **(Exhibit 3, Photos.)** Granular material for the concrete sub-base had replaced the removed concrete. Also depicted in the photos are no barricades, signs, or warnings indicating that the sidewalk was closed or warning of potential hazards caused by the significant loss of sidewalk. Plaintiff testified that he did not see any orange cones, caution tape, or safety signs before he was injured. **(Exhibit 2, Plaintiff's dep p 44.)**

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It was discovered that several months prior to Plaintiff's fall, the City of Detroit contracted with the Michigan Department of Transportation (MDOT) to use federal funding for certain projects in the city. As part of the agreement with the City of Detroit, MDOT contracted with Defendant Rauhorn Electric to complete a sidewalk restoration project in the City of Detroit, which included among other things, updating sidewalks and ramps on Hayes Street. Defendant Rauhorn then subcontracted with Defendant Merlo for the actual concrete excavation and concrete pouring of the sidewalks.

On October 9, 2015, Defendant Merlo had removed two slabs of concrete from the sidewalk along Hayes Street in the City of Detroit. After portions of the sidewalk were removed on October 9, 2015, the sidewalk was never barricaded, taped off, or closed by any other means. There was no indication contained within the inspector's daily reports that the sidewalk in question had ever been closed or that barricades had been used before or after the concrete was removed and replaced. **(Exhibit 4, Inspector's Daily Reports.)** Plaintiff testified that he did not see any cones, caution tape or safety signs the night he was injured. **(Exhibit 2, Plaintiff's dep p 44.)** The photographs taken after Plaintiff fell but before Defendant Merlo replaced the sidewalk contained no trace (no remnants of caution tape, no barrels, no cones, no "sidewalk closed" signs) of any warning or barricade. **(Exhibit 3, Photographs.)**

Defendant Merlo's foreman, Brian Boudreaux testified that Defendant Merlo was responsible to put up barricades and warning signs after removing portions of the sidewalk. **(Exhibit 5, Boudreaux dep, p 30).** He testified that Defendant "would have left caution tape, barrels and sidewalk closed signs" or "concrete pins" to close the sidewalk before it was finished. **(Exhibit 5, Boudreaux dep pp 21-23.)** Mr. Boudreax, however, testified that he didn't remember being at the particular location where Plaintiff was injured. **(Exhibit 5, Boudreaux**

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dep p 16.) He also testified that he did not remember if all of the barricades were stolen from the area where Plaintiff was injured **(Exhibit 5, p 24)** but he had never encountered a scenario when all of the barrels had been stolen **(Exhibit 5, p 14)** and he was not suggesting that anything had been stolen from the area where Plaintiff was injured. **(Exhibit 5, p 25.)** Further, Mr. Boudreaux indicated that he had no notes contained within his report that would lead him to believe that anything had been stolen from the site where Plaintiff was injured. **(Exhibit 5, pp 25-26.)** No police reports were ever made regarding any stolen barrels or vandalism at the construction site.

Five days later, on October 15, 2015, new concrete was poured. **(Exhibit 5, Boudreaux dep pp 18-19.)** Plaintiff was injured on October 12, 2015.

II. Proceedings in the Lower Courts

Defendants, Rauhorn and Merlo, moved for summary disposition, pursuant to MCR 2.116(C)(10), which the court granted on January 30, 2017. The Trial Court held that Plaintiff's claims stemmed from a premises liability theory, the open and obvious danger doctrine could be asserted as a defense, and the hazard which caused Plaintiff to fall was open and obvious as a matter of law.

Plaintiff appealed to the Court of Appeals as to Defendant Merlo only. On July 24, 2018, the Court of Appeals in a 2-1 per curiam unpublished decision held that the case sounded in premises liability and the open and obvious defense was available. The Court of Appeals then held that there was a question of fact as to the open and obvious nature of the hazard.

On August 23, 2018, Defendant Merlo filed an application for leave to appeal the Court of Appeals decision regarding the issues stemming from the open and obvious danger doctrine. Plaintiff now files this application for leave to cross-appeal the Court of Appeals decision

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regarding whether the matter sounds in ordinary negligence or premises liability.

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LEGAL ARGUMENT

I. STANDARD OF REVIEW

A. Appellate review of trial court's decision granting summary disposition

The Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118 (1999). The Court reviews the entire record to determine if Defendant is entitled to summary disposition. *Groncki v Detroit Edison Co*, 453 Mich 644, 649 (1996). This includes the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10 (2005).

B. Standard of review - MCR 2.116(C)(10)

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. A "material fact" is defined as an ultimate fact issue upon which a jury's verdict must be based. *Neal v Friendship Manor Nursing Home*, 113 Mich App 759 (1982). For the purposes of a motion for summary disposition, the non-moving party is required to establish a genuine issue of material fact by preponderance of the evidence. *Meeka v D & F Corp*, 158 Mich App 688 (1987). In reviewing a motion for summary disposition, a trial court must carefully avoid making findings of fact under the guise of determining that no issue of material fact exists. *Hickman v General Motors Corp*, 177 Mich App 246 (1989). For a proper grant of summary disposition for Defendants, a trial judge must rule that all reasonable persons would agree on the conclusion of the facts presented. *Davis v Thorton*, 384 Mich 138 (1970).

The party opposing the motion "is entitled to all benefits of doubt and all reasonable

inferences must be decided in that party's favor." *Leitch v Switchenko*, 169 Mich App 761 (1988); *Werth v Taylor*, 190 Mich App 141 (1991). A trial court presented with a motion pursuant to MCR 2.116(C)(10) must determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ. The court should always be liberal in finding a genuine issue of material fact does exist. *St Paul Fire & Marine Ins v Quintana*, 165 Mich App 719 (1988).

II. THE COURT OF APPEALS ERRED IN FINDING THAT PLAINTIFF'S CLAIMS SOUNDED IN PREMISES LIABILITY AND NOT ORDINARY NEGLIGENCE BECAUSE DEFENDANT DID NOT MAINTAIN POSSESSION OR CONTROL OVER THE SIDEWALK AT THE TIME PLAINTIFF WAS INJURED

A. Defendant Merlo did not have possession or control of the sidewalk where Plaintiff was injured

Plaintiff's allegations stem from ordinary negligence and not premises liability. In a premises liability action, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685; 822 NW2d 254 (2012). "Premises liability is conditioned upon the presence of both possession and control over the land." (Emphasis added.) *Orel v Uni-Rak Sales Co*, 454 Mich 564, 568; 563 NW2d 241 (1997), quoting *Merritt v Nickelson*, 407 Mich 544, 522; 287 NW2d 178 (1980).

There is no dispute that Defendant Merlo was not the owner of the sidewalk where Plaintiff was injured. Furthermore, there is no evidence to suggest that Defendant Merlo was a "possessor" of the sidewalk where Plaintiff was injured. A "possessor" is defined as:

(a) a person who is in occupation of the land with intent to control it or
(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Orel v Uni-Rak Sales Co, 454 Mich 564, 568; 563 NW2d 241 (1997), citing the Restatement of

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Torts. The exact same language is offered to jurors in premises liability cases with Michigan Civil Jury Instruction 19.02.

In the instant action, Defendant Merlo was not in "occupation of the land" where Plaintiff fell. Defendant Merlo had removed two slabs of the concrete sidewalk on October 9, 2015 and then left the area. Defendant Merlo did not close the sidewalk to public traffic, there were no cones or barrels placed in the area, and there was no equipment left behind by Defendant Merlo after it left the area where Plaintiff was injured. Three days after Defendant Merlo left the area, on October 12, 2015, Plaintiff was injured due to the missing sidewalk. Defendant Merlo had left nothing behind to indicate that the area of the sidewalk was closed for pedestrian traffic. Defendant Merlo did not return to the area where Plaintiff was injured until October 15, 2015, five days after Defendant Merlo had vacated the area.

Further, possession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property. *Derbabian v Mariner's Pointe Assocs LP*, 249 Mich App 695, 697; 644 NW2d 779 (2002.) In *Derbabian*, Plaintiff fell on ice in a Kroger parking lot and brought suit against Defendant S & C Snowplowing under a premises liability theory. The trial court denied defendant's motion for summary disposition and defendant appealed. Defendant argued that because it did not have possession and control of the parking lot when plaintiff fell, it should not be held liable under a premises liability theory. The Court of Appeals agreed, reasoning that Defendant S & C Snowplowing did not control the parking lot to the exclusion of all others. *Derbabian*, 249 Mich App at 704, citing *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653; 575 NW2d 745 (1998). Thus, in the case at bar, even if Defendant Merlo was granted the theoretical right to control the sidewalk where Plaintiff was injured, there is no evidence that

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Defendant actually exercised that right on the day of plaintiff's injury.

Defendant has admitted on several occasions that it was not in possession of the land where Plaintiff was injured. Defense counsel, in his argument to the Trial Court during the motion for summary disposition, stated Defendant Merlo was not the premises owner and was not the premises possessor. **(Exhibit 6, Hearing Transcript p 6.)** Defendant Merlo also admitted in its Brief to the Court of Appeals that it was not in possession of the area where Plaintiff was injured. **(Exhibit 7, Defendant's Brief to the COA, pp 8, 9 fn 4, 16, and 19.)** Defendant specifically stated, "there was no claim or evidence below that Merlo had been conferred exclusive authority over the public sidewalk under construction or had actual possession of the sidewalk at the time of Smith's mishap. **(Exhibit 7, Defendant's Brief to COA, p 19.)** Defendant Merlo admits that it "simply did not have 'the power to prevent the injury.'" **(Exhibit 7, p 19.)**

The instant action is similar to the facts in *Fraim v City Sewer*, 474 Mich 1101 (2006). The defendant in *Fraim* was hired by Meijer to repair some drains at one of its stores. Defendant left one of the drains open and left the premises. The plaintiff in *Fraim* worked at Meijer and tripped as a result of the uncovered drain Defendant had left behind. The Michigan Supreme Court held that the defendant did not have possession and control over the area where Plaintiff fell and, therefore, the open and obvious danger doctrine did not apply. *Fraim v City Sewer*, 474 Mich 1101; 711 NW2d 83 (2006).

During the five days when Defendant Merlo had left the area where the sidewalk had been removed, Defendant Merlo neither "occupied" nor "possessed" the sidewalk. Defendant Merlo was not exercising dominion or control over the sidewalk at the time Plaintiff was injured. Also, Defendant Merlo did not exercise control over the sidewalk "to the exclusion of all others."

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Therefore, Defendant Merlo did not own, possess, or control the land where Plaintiff was injured and, as such, Plaintiff's claims against Defendant Merlo do not stem from a theory of premises liability. At the very least, a question of fact exists regarding whether Defendant Merlo was in possession of the sidewalk where Plaintiff was injured. Who had possession of a piece of land presents a factual issue for resolution by the jury. *Orel v Uni-Rak Sales Co*, 454 Mich 564, 569; 563 NW2d 241 (1997).

If Defendant Merlo did not own, possess, or occupy the land where plaintiff fell, Plaintiff's claims sound in ordinary negligence and not premises liability. A premises liability claim only survives if the Defendant has the requisite possession and control of the land where Plaintiff fell and, in the instant action, Defendant Merlo, based on its own admission, did not possess or control the sidewalk where Plaintiff fell. In the instant action, the "possession and control" analyses as described in the published opinions of *Orel*, *Kubczak*, *Fraim*, and *Derbabian* control. Therefore, Defendant Merlo did not have possession or control of the sidewalk when and where Plaintiff was injured, and, therefore, Plaintiff's claims against Defendant Merlo do not sound in premises liability.

B. Defendant Merlo is liable under a theory of ordinary negligence

Defendant Merlo is liable to Plaintiff under a theory of ordinary negligence, by actively creating a hole in the sidewalk and by failing to barricade or close the sidewalk when Defendant left the area of the sidewalk for the next five days.

Defendant Merlo alleged that it did not create a new, dangerous, or hazardous condition that resulted in injury to Plaintiff. There is no dispute, however, that Defendant actively removed the area of sidewalk where Plaintiff fell. There is no dispute that the sidewalk was removed on October 9, 2014 and not replaced until October 15, 2014. **(Exhibit 5, Boudreaux dep pp 18-19.)**

There is no dispute that Plaintiff was injured on October 12, 2014.

Defendant specifically created a new and dangerous hazard. Defendant Merlo removed the sidewalk. By removing the sidewalk, there was a significant height differential between the remaining sidewalk and the granular dirt that remained after the concrete was moved. **(Exhibit 3, Photos.)** Defendant did not close the sidewalk. Defendant did not warn or attempt to prevent injuries that could be caused by the hazard Defendant created, and, then Defendant left the area, having no control or possession over the premises when Plaintiff fell. Therefore, Plaintiff can maintain a claim against Defendant for ordinary/active negligence.

Because Defendant Merlo did not have possession or control over the land where Plaintiff was injured, Defendant Merlo is not liable under a theory of premises liability. Where, as here, a defendant's *conduct* is the basis for liability, the claim sounds in negligence rather than premises liability. *Laier v Kitchen*, 266 Mich App 482, 493-94; 702 NW2d 199, 209 (2005) (citing *James v Alberts,* 464 Mich 12, 19, 626 NW2d 158 (2001)). This remains true even when the conduct has a connection to the land or premises. *E.g., Hiner v Mojica*, 271 Mich App 604; 722 NW2d 914 (2006) (claim failing to supervise or restrain a dangerous dog on the property); *Woodman v Kera, LLC*, 280 Mich App 125, 129; 760 NW2d 641, 644 (2008) (claim for failing to install safety devices on, or failing to supervise users of, a large children's inflatable trampoline); *Wheeler v Cent Michigan Inns, Inc*, 292 Mich App 300, 304; 807 NW2d 909, 911 (2011) (claim for failing to provide lifeguard at a pool).

The case at bar includes allegations consistent with a condition of the land and the conduct of the defendant and its agents. "In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability based on the

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defendant's conduct . . . " *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005).

"Negligence is the failure to use that reasonable care and caution which an ordinarily prudent man would use under like or similar circumstances." *Carter v CF Smith Co*, 285 Mich 621 (1938). At the time of trial, the jury will be instructed that "Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably prudent person would use. Therefore, by 'negligence,' I mean the failure to do something that a reasonably careful person would do, or that a reasonably careful person would not do, under the circumstances that you find existed in this case." M Civ JI 10.02.

"Ordinarily, it is for the jury to determine whether a defendant's conduct fell below the general standard of care. Stated another way, the jury usually decides the *specific* standard of care that should have been exercised by a defendant in a given case." *Case v Consumers Power Co*, 463 Mich 1 (2000). (*Emphasis added*.) Contrary to defense counsel's assertions during the motion hearing that Defendant Merlo did not have a duty independent of its contract with Defendant Rauhorn (Motion Transcript pp 10-11), a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract. *Loweke v Ann Arbor Ceiling and Partition Co LLC*, 489 Mich 157; 809 NW2d 553 (2011), citing *Davis v Venture One Constr, Inc*, 568 F3d 570, 575, 577 (CA 6, 2009).

Further, Defendant Merlo was a contractor hired to perform a specific task in the City of Detroit. Defendant Merlo did not own, occupy, or possess the land where Plaintiff was injured. Defendant, however, did have a duty to exercise reasonable care when exercising the task of removing and replacing the sidewalk, as well as warning of the missing concrete, so that the public, and specifically Plaintiff, was not injured. *Loweke v Ann Arbor Ceiling and Partition Co*

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LLC, 489 Mich 157; 809 NW2d 553 (2011).

Defendant Merlo breached the common-law duty to exercise reasonable care and avoid harm when one acts. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 171-72; 809 NW2d 553 (2011). After it removed the sidewalk slabs, Defendant Merlo did not place any warnings or barricades to warn the public of the hazard. Based on the Inspector Daily Reports, on approximately October 9, 2014, three days before the Plaintiff was injured, Defendant Merlo removed the sidewalk slab at issue. **(Exhibit 4, Inspector Daily Reports.)** Based on the photographs and Plaintiff's testimony, there is no question that, after portions of the sidewalk were removed, the sidewalk was never barricaded, taped off, or closed by any other means. It was not until October 15, 2014, two days after Plaintiff fell, that new concrete was poured by Defendant Merlo. There was no indication contained within the inspector's daily reports that the sidewalk in question had ever been closed or that barricades had been used before or after the concrete was removed and replaced. Plaintiff testified that he did not see any cones, caution tape or safety signs the night he was injured. **(Exhibit 2, Plaintiff's dep p 44.)** The photographs taken after Plaintiff fell but before Defendant Merlo replaced the sidewalk contained no trace (no remnants of caution tape, no barrels, no cones, no "sidewalk closed" signs) of any warning or barricade. **(Exhibit 3, Photographs.)**

Defendant Merlo's foreman, Brian Boudreaux testified that Defendant Merlo was responsible to put up barricades and warning signs after removing portions of the sidewalk. **(Exhibit 5, Boudreaux dep, p 30).** He testified that Defendant "would have left caution tape, barrels and sidewalk closed signs" or "concrete pins" to close the sidewalk before it was finished. **(Exhibit 5, Boudreaux dep pp 21-23.)** Mr. Boudreaux, however, testified that he didn't remember being at the particular location where Plaintiff was injured. **(Exhibit 5,**

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Boudreaux dep p 16.) He also testified that he did not remember if all of the barricades were stolen from the area where Plaintiff was injured **(Exhibit 5, p 24)** but <u>he had never encountered a scenario when all of the barrels had been stolen</u> **(Exhibit 5, p 14)** and <u>he was not suggesting that anything had been stolen from the area where Plaintiff was injured</u>. **(Exhibit 5, p 25.)** Further, Mr. Boudreaux indicated that he had no notes contained within his report that would lead him to believe that anything had been stolen from the site where Plaintiff was injured. **(Exhibit 5, pp 25-26.)** No police reports were ever made regarding any stolen barrels or vandalism at the construction site.

Given the testimony of Plaintiff that he did not see any warnings, signs, cones, or barrels in the area where he fell, together with the photographs from the day of the injury and the testimony of Mr. Boudreaux that he was not suggesting anything had been stolen from the site, at the very least, there is a question of fact as to whether Defendant Merlo exercised reasonable care in placing warnings or barricades in the area to avoid injury to the public, and specifically to Plaintiff.

Through this appeal process, Defendant has cited numerous cases which all indicate that an injury sustained due to a condition on land is a premises liability claim and not ordinary negligence. Defendant's cited cases, however, are not applicable because in each of the cited cases, the defendants were all the property owner or possessor of the land where plaintiffs were injured. (*Buhalis v Trinity Continuing Care Svcs*, 296 Mich App 685 (2012); *Jahnke v Allen*, 308 Mich App 472 (2014); *James v Alberts*, 464 Mich 12 (2001); *Compau v Pioneer Resource Co LLC*, 498 Mich 928 (2010); *Kachudas v Invaders Self Auto Wash Inc*, 486 Mich 913 (2010); *Millikin v Walton Manor Mobile Home Park Inc*, 234 Mich App 490 (1999.) In these six cases, there was no dispute that the Defendants owned the property. The issues in these cases were

whether Plaintiff could bring a claim for ordinary negligence against these Defendant property owners in addition to or exclusive of a premises liability claim.

Therefore, because Defendant Merlo did not own, occupy or possess the sidewalk where Plaintiff fell, and it was Defendant Merlo's actions or lack thereof that caused injury to Plaintiff, Plaintiff's claims against Defendant Merlo sound in ordinary negligence. As such, the open and obvious danger doctrine is not an available defense for Defendant Merlo.

C. THE OPEN AND OBVIOUS DANGER DOCTRINE IS NOT A DEFENSE TO CLAIMS FOR ORDINARY NEGLIGENCE CASES

The open and obvious doctrine is not a defense to a claim of ordinary negligence. "We have determined that this doctrine is applicable only to premises-liability actions and certain cases involving a failure to warn in products-liability cases. We have explicitly held the [open and obvious] doctrine not to be applicable to claims of ordinary negligence." *Woodman* citing *Hiner v Mojica*, 271 Mich App 604, 615-616; 722 NW2d 914 (2006); see also *Laier v Kitchen*, 266 Mich App 482 (2005). The open and obvious doctrine is inapplicable where the defendant did not possess or control the premises within which plaintiff was injured. *Fraim v City Sewer*, 474 Mich 1101; 711 NW2d 83, 84 (2006), citing *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

CONCLUSION AND RELIEF REQUESTED

Plaintiff respectfully requests this Honorable Court to grant Plaintiff's application and reverse the decision of the Court of Appeals and the Trial Court, and remand Plaintiff's case to the trial court for entry of an Order denying Defendant Merlo's Motion for Summary Disposition, consistent with the finding that Plaintiff's claims sound in ordinary negligence.

Respectfully submitted,

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