

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

GERALD H. ACKER P32973
AMANDA B. WARNER P74128
Attorneys for Plaintiff-Appellee
17000 W. Ten Mile Road, 2nd Floor
Southfield, MI 48075
(248) 483-5000 f: (248) 483-3131
gacker@goodmanacker.com

JOHN J. SCHUTZA P26338
PATRICK J. KUKLA P60465
Attorneys for Defendant-Appellant Merlo
300 Maple Park Blvd., Ste. 301
St. Clair Shores, MI 48081
(586) 776-6700 f: (586) 776-1501
jschutz@mf-r-law.com

**PLAINTIFF/CROSS-APPELLANT'S REPLY TO DEFENDANT/CROSS-APPELLEE'S
RESPONSE TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL**

(ORAL ARGUMENT REQUESTED)

PROOF OF SERVICE

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I. THIS COURT'S OPINION IN *FRAIM* IS ANALOGOUS WITH THE FACTS AND CIRCUMSTANCES TO THE CASE AT BAR, RATHER THAN THE COURT OF APPEALS' OPINION IN *FINAZZO*

Defendant's reliance on *Finazzo v Fire Equip Co*, __ Mich App __ (2018) is misplaced.

The *Finazzo* court relied on the Restatement of Torts 2d § 384, which states:

One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition **while the work is in his charge**. (emphasis added.)

In *Finazzo*, Defendant was working on the premises at the time of plaintiff Finazzo's injury. Defendant was onsite and admitted being in possession and control of the area where the incident occurred. This makes the *Finazzo* case distinguishable from the case at bar. Here, Defendant Merlo was not in possession or control of the area where Plaintiff Smith was injured. In fact, Defendant Merlo admitted on several occasions that it did not have possession or control of the premises. (See Plaintiff's Exhibit 6, MSD Hearing Transcript p 6; See also Exhibit 7, Defendant's Brief to the COA, pp 8, 9 fn 4, 16, and 19.) There is also no dispute that Defendant Merlo was not on or near the area where Plaintiff was injured at the time of injury. Furthermore, Defendant Merlo only worked in the area on October 9, vacated the area completely, leaving nothing behind, and did not return to the site until almost a week later on October 15, 2015. Defendant Merlo was not working at the time of Plaintiff's injury and was not in possession or control of the area where Plaintiff was injured.

Defendant Merlo's discussion of the issues ignores, either intentionally or by oversight, Plaintiff's citation to *Fraim v City Sewer*, 474 Mich 1101 (2006), which is factually closer to the case at bar than the Court of Appeals decision in *Finazzo*. The defendant in *Fraim* performed work at a Meijer location, left the premises and left an open floor drain in the area where it had

performed work. Plaintiff was then injured when she tripped over the uncovered drain while Defendant was not in possession or control of the drain. *Fraim*, 474 Mich 1101 (2006). In the case at bar, Defendant Merlo removed the sidewalk, left the premises entirely, and Plaintiff came along on a bicycle and was injured by the removed sidewalk. The *Finazzo* court held that the defendant was in actual possession and control of the area where Plaintiff was injured because they were on the premises and working at the time of Plaintiff's injury.

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 Defendant Merlo did not have possession or control of the premises and Plaintiff's claims sound in ordinary negligence.

Respectfully submitted,

GOODMAN ACKER, P.C.

/s/ Gerald H. Acker
GERALD H. ACKER (P32973)
AMANDA B. WARNER (P74128)
Attorneys for Plaintiff/Cross-Appellant

Dated: October 29, 2018

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I hereby certify that on October 29, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
ELIZABETH M. RHODES