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 SUPPLEMENTAL BRIEF TO APPLICATION FOR LEAVE TO APPEAL

(ORAL ARGUMENT REQUESTED)

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SUPPLEMENTAL LEGAL ARGUMENT

I. A COMPARISON OF *OREL V UNI-RAK SALES CO INC*, 454 MICH 564 (1997) AND F*INAZZO V FIRE EQUIP CO*, 323 MICH APP 620 (2018), WITH F*RAIM V CITY SEWER OF FLINT*, 474 MICH 1101 (2006)

The matters of *Orel, Finazzo* and *Fraim* are not inconsistent opinions. In *Orel*, the issue before the court was whether a specific instruction regarding possession should have been given to the jury. Plaintiff Orel had been employed by a contractor of Defendant to perform repairs at Defendant's property. Plaintiff was injured when he slipped and fell in a snow-covered parking lot owned by Defendant. The Court reasoned that a question of fact remained as to whether Defendant had actual possession or control over its own parking lot, when the evidence demonstrated that Plaintiff's employer and its agents may have completely taken over Defendant's parking lot and none of Defendant's employees used the parking lot while Plaintiff's employer was working on the premises. The Court held that who had possession of a piece of land presents a factual issue and the jury instruction regarding possession was properly presented to the jury in this matter.

In *Orel*, there was no issue or argument about whether the matter sounded in premises liability or ordinary negligence. The only issue presented was whether Defendant property owner was liable for Plaintiff's injuries for failing to maintain the premises (remove snow) under a theory of premises liability. It did not appear that Plaintiff was alleging an ordinary negligence theory against Defendant. The other issue was whether Defendant could avoid liability under a premises liability theory by loaning or giving up possession and control of its own property to another entity. The *Orel* court held that possession and control of a premises could, in fact, be loaned to another party and it was up to the jury to determine if the Defendant had possession of the premises at the time of Plaintiff's injury.

The *Finazzo* matter is not inconsistent with *Orel*. In *Finazzo*, Plaintiff was injured at work after tripping over a cable which was being installed by Defendant, a contractor hired by Plaintiff's employer. The Court analyzed Plaintiff's potential claims under *both* a premises liability theory and an ordinary negligence theory. The court held that Plaintiff had a claim against Defendant for premises liability because Defendant had possession and control over the area where Plaintiff was injured at the time Plaintiff was injured. While Defendant had not owned the premises where Plaintiff fell, it was in possession of the area when it was performing its work of installing the cable on which Plaintiff fell and, therefore, the Plaintiff's premises liability claims against Defendant were subject to the open and obvious danger doctrine. The Court found no question of fact and summary disposition for Defendant on the premises liability claims was proper based on the open and obvious danger doctrine.

In addition, the *Finazzo* court analyzed Plaintiff's separate claim for ordinary negligence based on how Defendant was performing its work. The Court did not hold that Plaintiff's claims were exclusive to premises liability or that Plaintiff was precluded from an ordinary negligence claim. In fact, the Court specifically indicated that Defendant had a common-law duty to perform its work with ordinary care so as not to unreasonably endanger anyone else lawfully on the worksite. When analyzing Defendant's conduct under an ordinary negligence theory, the Court did not apply the open and obvious danger doctrine.

This brings us to the *Fraim* matter which is also not inconsistent with *Orel* and *Finazzo.* Plaintiff Fraim was injured at work when she tripped over a drain that had been left open and uncovered by Defendant, a contractor for Plaintiff's employer. While the two claims of premises liability and ordinary negligence were not analyzed separately in the *Fraim* opinion, this Court held that the open and obvious danger doctrine did not apply to bar Plaintiff's claims when

Defendant contractor did not have possession and control over the area where Plaintiff was injured. If there is no possession or control, the claim does not sound in premises liability and the open and obvious danger doctrine is only available to premises liability claims. This is consistent with the holding in *Finazzo*.

II. DEFENDANT DID NOT HAVE POSSESSION AND CONTROL OVER THE SIDEWALK AT THE TIME PLAINTIFF WAS INJURED SUCH THAT PLAINTIFF'S CLAIMS DO NOT SOUND IN PREMISES LIABILITY. AT THE VERY LEAST, A QUESTION OF FACT REMAINS AS TO POSSESSION AND CONTROL. PLAINTIFF HAS ALLEGED A SEPARATE CLAIM FOR ORDINARY NEGLIGENCE AGAINST DEFENDANT MERLO.

As indicated in Plaintiff's application for leave in the instant action, Plaintiff's claims sound in ordinary negligence as Defendant Merlo had a 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). Contractors have a common-law duty to perform their work with ordinary care so as not to unreasonably endanger employees of other subcontractors or anyone else lawfully on the worksite. *Clark v Dalman*, 379 Mich 251, 262; 150 NW2d 755 (1967). Just as in *Fraim* and *Finazzo* above, Defendant Merlo had a duty to Plaintiff separate from any duty it may have had under a premises liability theory.

Plaintiff's allegations of liability against Defendant Merlo stem from Defendant Merlo's conduct, as well as a condition of the land, similar to the facts as outlined in *Finazzo*. "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 defendant's conduct . . ." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005).

Plaintiff may also have a claim against Defendant Merlo for premises liability if

Defendant Merlo was in possession and control of the area when and where Plaintiff was injured. *Merritt v Nickelson*, 407 Mich 544; 287 NW2d 178 (1980.) 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).

The Trial Court and the Court of Appeals both seemed to be of the impression that Defendant Merlo was in possession and control of the area where Plaintiff was injured. The Court of Appeals specifically stated that "it would be reasonable to conclude that Merlo actually exercised dominion and control over the sidewalk and possessed it during the construction project." Defendant Merlo, however, specifically as outlined below stated 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. **(Appendix Exhibit 6, Hearing Transcript p 83a.)** 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. **(Appendix Exhibit 7, Excerpts from Defendant's Brief to COA, p 108a – 111a.)** 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. **(Appendix Exhibit 7, p 111a.)** Despite creating the hazard, Defendant Merlo stated that it "simply did not have 'the power to prevent the injury.'" **(Appendix Exhibit 7, p 111a.)**

Defendant then switched positions. In its Response to Cross-Appellant's Application for Leave to this Honorable Court, Defendant stated that it had been "loaned" possession and control of the sidewalk where Plaintiff was injured just like the Defendant in *Finazzo*, pursuant to the

Restatement of Torts, 2d sec. 384, p 289. The difference, however, in the facts of *Finazzo* and the case at bar, is the timing. In *Finazzo*, the Defendant was actively working at the time of Plaintiff's injury and was present on the premises, controlling and possessing the area where Plaintiff was injured. In the instant matter, Defendant Merlo was not working or in the area of Plaintiff's injury at the time of the injury. Defendant Merlo did not have any equipment at the scene and had not closed the sidewalk. More like the Defendant contractor in *Fraim*, Defendant Merlo had completed its work for the day with no intention of returning for five days and without leaving any warnings, signs, cones, barrels, or tape around the removed sidewalk depicted in **Appendix Exhibit 3, p 57a.** There was nothing in the area where Plaintiff was injured that would have supported a finding that Defendant Merlo in any way possessed or controlled the area where Plaintiff was injured at the time Plaintiff was injured. While Defendant Merlo may have had possession of the area of the sidewalk at one point in time, the evidence demonstrates no possession or control by Defendant Merlo at the time of injury.

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 Defendant's employee, 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 had possession and exercised actual control over the area where Plaintiff was injured at the time Plaintiff was injured.

CONCLUSION AND RELIEF REQUESTED

Plaintiff respectfully requests this Honorable Court 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 and the open and obvious danger doctrine does not apply.

Respectfully submitted,

GOODMAN ACKER, P.C.

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Dated: July 22, 2019

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I hereby certify that on July 22, 2019, 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