

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

(ORAL ARGUMENT REQUESTED)

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LEGAL ARGUMENT

Defendant reiterated the point that there is a question of fact whether Defendant Merlo has “possession and control” of the area where Plaintiff was injured, due to the contradicting evidence of the testimony of Brian Boudreaux and Plaintiff Smith and the photos of the area where Plaintiff fell. Defendant Merlo’s entire argument that it was in possession and control of the area where Plaintiff was injured, at the time Plaintiff was injured, is based solely on the testimony of its foreman Brian Boudreaux. Mr. Boudreaux, however, testified that he didn’t remember being at the particular location where Plaintiff was injured and that never had all of the barrels been stolen on any project. (**Appendix Ex 5, p 72a.**) When Mr. Boudreaux was presented with the photographs that were taken the day after Plaintiff’s fall depicting no cones, no barrels, no signs, and no caution tape in the area (**Appendix Ex 3, p 57a**), Mr. Boudreaux testified that he did not remember if all of the barricades were stolen from this particular site or if they were just “misplaced” and not visible in any of the photographs. (**Appendix Ex 5, pp 73a - 75a.**)

Plaintiff Smith testified that there was no caution tape, no barrels, and no signs where he was injured on the night he was injured. (**Appendix Ex 2, p 43a - 44a.**) He also testified that when he went back to the spot where he fell the following day to take photos, the area looked the same with no caution tape, no barrels, and no signs in the area, as depicted in the photos. (**Appendix Ex 2, p 43a.**)

In summation, there were photos confirming the sidewalk was not closed and it appeared

no one was in possession or control of the sidewalk at the time of Plaintiff's injury. There was testimony from Plaintiff confirming the sidewalk was not closed. Then there was testimony from Mr. Boudreaux that the usual protocol is to close the sidewalk and put up barrels, signs, and caution tape.

Defendant Merlo suggests that, because the project was not complete at the time Plaintiff was injured, then Defendant Merlo still retained possession and control over the area. Possession for purposes of premises liability, however, 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.) Even if Defendant Merlo had the ability to exercise dominion and control over the property by placing signs, barricades, barrels, or caution tape, Defendant did not place any of those items in or around the area where Plaintiff fell. When Defendant Merlo left the area without doing any of those things, its duty changed from a duty under premises liability to a duty under a theory of ordinary negligence.

CONCLUSION AND RELIEF REQUESTED

Plaintiff respectfully requests this Honorable Court reverse the decision of the Court of Appeals and the Trial Court with regard to the issue of premises liability, 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.

/s/ Gerald H. Acker
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Dated: August 22, 2019

PROOF OF SERVICE

I hereby certify that on August 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