

**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 APPENDIX**

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Respectfully submitted by:

**GOODMAN ACKER, PC**

/s/ Gerald H. Acker  
GERALD H. ACKER P32973  
AMANDA B. WARNER P74128  
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**EXHIBIT A:**

**RELEVANT DOCKET ENTRIES FROM LOWER  
COURTS AND FULL DOCKET SHEETS**

## **Relevant Docket Entries**

### **Trial Court**

1/29/2015 – Plaintiff's Complaint filed

1/30/2017 – Order Granting Defendant's Motion for Summary Disposition

3/9/2017 – Order Denying Plaintiff's Motion for Reconsideration

### **Court of Appeals**

3/30/2017 – Plaintiff's Claim of Appeal filed

7/24/2018 – Order to Reverse and Remand to Trial Court

### **Supreme Court**

6/14/2019 – Order Requesting Supplemental Brief on Application for Leave to Appeal as Cross-Appellant

## REGISTER OF ACTIONS

### CASE NO. 15-001269-NO

#### PARTY INFORMATION

		Lead Attorneys
<b>Defendant</b>	<b>Merlo Construction Company, Inc.</b>	<b>Michael T. Ryan</b> <i>Retained</i> (586) 776-6700(W)
<b>Defendant</b>	<b>Rauhorn Electric, Inc.</b>	<b>Michael T. Ryan</b> <i>Retained</i> (586) 776-6700(W)
<b>Plaintiff</b>	<b>Smith, Keith</b>	<b>Gerald H. Acker</b> <i>Retained</i> (248) 483-5000(W)

#### EVENTS & ORDERS OF THE COURT

**OTHER EVENTS AND HEARINGS**

01/29/2015 Service Review Scheduled  
 01/29/2015 Status Conference Scheduled  
 01/29/2015 Complaint, Filed  
 01/29/2015 Case Filing Fee - Paid  
 02/09/2015 Answer to Complaint, Filed  
 02/10/2015 Return of Service, Filed  
 02/17/2015 Jury Demand Filed & Fee Paid  
 02/17/2015 Answer to Affirmative Defenses, Filed  
 02/17/2015 Request for Admissions, Filed  
 02/18/2015 Proof of Service, Filed  
 02/23/2015 Proof of Service, Filed  
 02/23/2015 Request for Admissions, Filed  
 03/13/2015 Proof of Service, Filed  
 04/06/2015 Proof of Service, Filed  
 05/01/2015 Status Conference (10:00 AM) (Judicial Officer Gibson, Sheila Ann)  
     04/30/2015 Reset by Court to 05/01/2015  
     Result: Reviewed by Court  
 05/01/2015 Status Conference Scheduling Order, Signed and Filed (Judicial Officer: Gibson, Sheila Ann )  
 05/05/2015 Settlement Conference Scheduled  
 05/27/2015 Motion to Amend, Filed  
 05/27/2015 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 05/28/2015 Concurrence, Filed  
 06/05/2015 Proof of Service, Filed  
 06/19/2015 Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
     Result: Held  
 06/19/2015 Motion Granting Leave, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
 06/22/2015 Order Granting Leave, Signed and Filed  
 06/23/2015 Amended Complaint - Party  
 06/23/2015 Summons Not Served, Filed  
 06/23/2015 Notice of Taking Deposition, Filed  
 06/23/2015 Proof of Service, Filed  
 06/23/2015 Miscellaneous Pleadings, Filed  
 07/01/2015 Notice of Taking Deposition, Filed  
 07/07/2015 Return of Service, Filed  
 07/08/2015 Answer to Complaint, Filed  
 07/08/2015 Order Substituting Defendant Attorney, Signed and Filed (Judicial Officer: Gibson, Sheila Ann )  
 07/09/2015 Witness List, Filed  
 07/14/2015 Witness List, Filed  
 07/17/2015 Miscellaneous Motion, Filed  
 07/20/2015 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 07/21/2015 Motion to Compel Action, Filed  
 07/21/2015 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 07/23/2015 Witness List, Filed

07/29/2015 Default, Request, Affidavit and Entry Filed  
 08/05/2015 Answer to Motion, Filed  
 08/05/2015 Answer to Motion, Filed  
 08/06/2015 Motion Received for Scheduling  
 08/06/2015 Motion Received for Scheduling  
 08/07/2015 Brief in Support of Motion, Filed  
 08/07/2015 Appearance of Attorney, Filed  
 08/10/2015 Brief in Support of Motion, Filed  
 08/10/2015 Notice of Hearing, Filed  
 08/10/2015 Notice of Hearing, Filed  
 08/10/2015 Order to Set Aside, Signed and Filed (does not change status) (Judicial Officer: Gibson, Sheila Ann )  
 08/17/2015 Answer to Amended Complaint, Filed  
 08/31/2015 Miscellaneous Pleadings, Filed  
 09/01/2015 Miscellaneous Pleadings, Filed  
 09/03/2015 Answer to Motion, Filed  
 09/04/2015 Reply to Answer, Filed  
 09/04/2015 Notice of Hearing, Filed  
 09/04/2015 Motion to Adjourn, Filed  
 09/08/2015 Notice of Hearing, Filed  
 09/08/2015 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 09/11/2015 CANCELED Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
     Dismiss Hearing or Injunction  
     08/14/2015 Reset by Court to 09/11/2015  
 09/11/2015 Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
     08/14/2015 Reset by Court to 09/11/2015  
     Result: Scheduled  
 09/11/2015 Miscellaneous Action (Judicial Officer: Gibson, Sheila Ann )  
 09/14/2015 Motion Received for Scheduling  
 09/22/2015 Motion And/Or Praecipe Dismissed  
 09/23/2015 Order Adjourning Mediation and Settlement Conference, S/F (Judicial Officer: Gibson, Sheila Ann )  
 09/24/2015 Cross Complaint, Filed  
 09/25/2015 CANCELED Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
     Dismiss Hearing or Injunction  
 09/30/2015 Notice of Hearing, Filed  
 09/30/2015 Notice of Hearing, Filed  
 10/06/2015 Witness List, Filed  
 10/07/2015 Notice of Hearing, Filed  
 10/07/2015 Notice of Hearing, Filed  
 10/13/2015 Witness List, Filed  
 10/13/2015 Answer to Cross Complaint, Filed  
 10/29/2015 Motion Hearing (10:30 AM) (Judicial Officer Gibson, Sheila Ann)  
     Result: Held  
 10/29/2015 Motion Hearing (10:30 AM) (Judicial Officer Gibson, Sheila Ann)  
     Result: Held  
 10/29/2015 Motion Denied, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
 10/29/2015 Motion Granted in Part/Denied in Part, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
 11/03/2015 Request for Admissions, Filed  
 11/03/2015 Order for Discovery, Signed and Filed  
 11/03/2015 Order Denying Motion, Signed and Filed  
 11/24/2015 Motion to Compel Answers to Interrogatories, Filed  
 11/30/2015 Motion Received for Scheduling  
 12/01/2015 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 12/01/2015 Motion to Amend, Filed  
 12/02/2015 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 12/04/2015 Response to Request for Admissions, Filed  
 12/04/2015 Answer to Motion, Filed  
 12/04/2015 Motion Received for Scheduling  
 12/08/2015 Motion And/Or Praecipe Dismissed  
 12/11/2015 CANCELED Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
     Dismiss Hearing or Injunction  
 12/18/2015 Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
     Result: Held  
 12/18/2015 Motion to Add/Substitute Proper Party Granted, Order to Foll (Judicial Officer: Gibson, Sheila Ann )  
 12/18/2015 Motion to Extend Time Granted, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
 12/18/2015 Order Adjourning Mediation and Settlement Conference, S/F  
 12/23/2015 Amended Complaint - Party  
 12/23/2015 Summons Not Served, Filed  
 12/23/2015 Summons Not Served, Filed  
 12/23/2015 Summons Not Served, Filed  
 01/05/2016 Answer to Amended Complaint, Filed  
 01/05/2016 Answer to Affirmative Defenses, Filed  
 01/07/2016 Amended Complaint, Filed  
 01/07/2016 Return of Service, Filed  
 01/08/2016 Appearance of Attorney, Filed  
 01/08/2016 Appearance of Attorney, Filed  
 01/11/2016 Answer to Amended Complaint, Filed  
 01/11/2016 Answer to Cross Complaint, Filed  
 01/12/2016 Answer to Affirmative Defenses, Filed  
 01/12/2016 Return of Service, Filed  
 01/14/2016 Appearance of Attorney, Filed  
 01/15/2016 Motion to Compel Answers to Interrogatories, Filed  
 01/15/2016 Motion Received for Scheduling  
 01/15/2016 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )

01/15/2016 Notice of Hearing, Filed  
 01/19/2016 Proof of Service, Filed  
 01/20/2016 Affirmative Defenses, Filed  
 01/20/2016 Answer to Amended Complaint, Filed  
 01/20/2016 Answer to Amended Complaint, Filed  
 01/22/2016 Motion for Summary Judgment/Disposition, Filed  
 01/22/2016 Motion Received for Scheduling  
 01/25/2016 Answer to Affirmative Defenses, Filed  
 01/28/2016 Answer to Cross Complaint, Filed  
 01/28/2016 Affirmative Defenses, Filed  
 01/28/2016 Order for Miscellaneous Action, Signed and Filed  
 01/29/2016 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 02/01/2016 Return of Service, Filed  
 02/02/2016 Motion to Compel Answers to Interrogatories, Filed  
 02/02/2016 Answer to Amended Complaint, Filed  
 02/03/2016 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 02/03/2016 Answer to Cross Complaint, Filed  
 02/03/2016 Answer to Affirmative Defenses, Filed  
 02/04/2016 Answer to Complaint, Filed  
 02/04/2016 Answer to Cross Complaint, Filed  
 02/05/2016 Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
 Result: Motion and/or Praecipe Dismissed  
 02/05/2016 Request for Admissions, Filed  
 02/05/2016 Request for Admissions, Filed  
 02/05/2016 Answer to Affirmative Defenses, Filed  
 02/05/2016 Motion And/Or Praecipe Dismissed (Judicial Officer: Gibson, Sheila Ann )  
 02/08/2016 Motion Received for Scheduling  
 02/17/2016 Special Conference (10:00 AM) (Judicial Officer Gibson, Sheila Ann)  
 Result: Held  
 02/17/2016 Answer to Cross Complaint, Filed  
 02/19/2016 CANCELED Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
 Dismiss Non-Appearance  
 02/22/2016 Miscellaneous Pleadings, Filed  
 03/03/2016 Response to Request for Admissions, Filed  
 03/03/2016 Answer to Request, Filed  
 03/14/2016 Partial Case Dismissal, Signed and Filed (Judicial Officer: Gibson, Sheila Ann )  
 03/28/2016 Answer to Motion, Filed  
 04/04/2016 Reply to Answer, Filed  
 04/05/2016 Motion to Compel Answers to Interrogatories, Filed  
 04/05/2016 Mot to Compel Ans to Interrogatories, Filed-WVD  
 04/06/2016 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 04/06/2016 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 04/06/2016 Motion Received for Scheduling  
 04/06/2016 Motion Received for Scheduling  
 04/07/2016 Party Final - Order Dismissing Party, Signed and Filed (Judicial Officer: Gibson, Sheila Ann )  
 04/12/2016 Motion Hearing (11:00 AM) (Judicial Officer Gibson, Sheila Ann)  
 Result: Held  
 04/12/2016 Motion Denied, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
 04/12/2016 Exhibit, Filed  
 04/13/2016 Notice of Presentment  
 04/13/2016 Notice of Presentment  
 04/21/2016 No Objections Received to 7-Day Order  
 04/21/2016 Motion And/Or Praecipe Dismissed  
 04/21/2016 Motion And/Or Praecipe Dismissed  
 04/22/2016 CANCELED Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
 Dismiss Hearing or Injunction  
 04/22/2016 CANCELED Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
 Dismiss Hearing or Injunction  
 04/22/2016 Order Denying Motion, Signed and Filed  
 04/22/2016 Order Denying Motion, Signed and Filed  
 04/22/2016 Order Compelling Action, Signed and Filed  
 04/22/2016 Order Extending Time, Signed and Filed  
 04/29/2016 Motion to Adjourn, Filed  
 05/02/2016 Partial Case Dismissal, Signed and Filed  
 05/02/2016 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 05/03/2016 Miscellaneous Pleadings, Filed  
 05/06/2016 Order Substituting Defendant Attorney, Signed and Filed (Judicial Officer: Gibson, Sheila Ann )  
 05/06/2016 Concurrence, Filed  
 05/06/2016 Motion Received for Scheduling  
 05/13/2016 Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
 Result: Held  
 05/13/2016 Motion Granted in Part/Denied in Part, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
 05/17/2016 Objection, Filed  
 06/06/2016 Order Adjourning Mediation and Settlement Conference, S/F  
 08/05/2016 Witness List, Filed  
 08/08/2016 Order Extending Time, Signed and Filed  
 08/15/2016 Motion for Summary Judgment/Disposition, Filed  
 08/15/2016 Motion Received for Scheduling  
 08/16/2016 Order for Miscellaneous Action, Signed and Filed  
 08/16/2016 Praecipe, Filed (Judicial Officer: Gibson, Sheila Ann )  
 08/22/2016 Case Evaluation - General Civil  
 08/25/2016 Motion for Summary Judgment/Disposition, Filed  
 08/25/2016 Motion Received for Scheduling  
 08/29/2016 Order for Miscellaneous Action, Signed and Filed

08/29/2016 Praeipce, Filed (Judicial Officer: Gibson, Sheila Ann )  
08/31/2016 Party Final - Order Dismissing Party, Signed and Filed (Judicial Officer: Gibson, Sheila Ann )  
08/31/2016 Motion And/Or Praeipce Dismissed  
09/19/2016 Case Evaluation - No Acceptance  
09/28/2016 Motion for Summary Judgment/Disposition, Filed  
09/28/2016 Case Evaluation - Partial Acceptance  
10/03/2016 Motion Received for Scheduling  
10/11/2016 Answer to Motion, Filed  
10/11/2016 Answer to Motion, Filed  
10/25/2016 Settlement Conference (11:00 AM) (Judicial Officer Gibson, Sheila Ann)  
12/16/2015 *Reset by Court to 03/24/2016*  
12/21/2015 *Reset by Court to 12/16/2015*  
03/24/2016 *Reset by Court to 06/29/2016*  
06/29/2016 *Reset by Court to 10/05/2016*  
10/05/2016 *Reset by Court to 10/25/2016*  
Result: Held  
10/25/2016 CANCELED Motion Hearing (11:00 AM) (Judicial Officer Gibson, Sheila Ann)  
*Dismiss Hearing or Injunction*  
10/25/2016 Motion Hearing (11:00 AM) (Judicial Officer Gibson, Sheila Ann)  
Result: Held  
10/25/2016 Motion for Miscellaneous Action Granted, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
10/25/2016 Order for Miscellaneous Action, Signed and Filed  
10/25/2016 Case Scheduled for Trial (Judicial Officer: Gibson, Sheila Ann )  
10/27/2016 Notice of Presentment  
11/07/2016 No Objections Received to 7-Day Order  
11/07/2016 Party Final- Sum Jdgmnt/Disposition Grantd, Signed and Filed (Judicial Officer: Gibson, Sheila Ann )  
11/09/2016 CANCELED Review Hearing (8:15 AM) (Judicial Officer Gibson, Sheila Ann)  
*Dismiss Hearing or Injunction*  
11/11/2016 Order for Miscellaneous Action, Signed and Filed  
11/14/2016 Brief in Support of Motion, Filed  
11/15/2016 Praeipce, Filed (Judicial Officer: Gibson, Sheila Ann )  
12/06/2016 Final Pre-Trial Order, Signed and Filed  
12/29/2016 Answer to Motion, Filed  
12/29/2016 Motion to Adjourn, Filed  
01/03/2017 Case Reassigned  
01/03/2017 Concurrence, Filed  
01/05/2017 Praeipce, Filed (Judicial Officer: Snow, Martha M. )  
01/05/2017 Notice of Hearing, Filed  
01/05/2017 Reply to Brief, Filed  
01/12/2017 Motion Hearing (11:00 AM) (Judicial Officer Gibson, Sheila Ann)  
01/12/2017 *Reset by Court to 01/12/2017*  
01/12/2017 *Reset by Court to 01/12/2017*  
01/12/2017 *Reset by Court to 01/12/2017*  
Result: Held  
01/12/2017 Motion Hearing (11:00 AM) (Judicial Officer Gibson, Sheila Ann)  
01/12/2017 *Reset by Court to 01/12/2017*  
Result: Motion and/or Praeipce Dismissed  
01/12/2017 Reassignment - Error, Signed and Filed  
01/12/2017 Closed - Summary Judgment/Disposition Granted, Order to Fol (Judicial Officer: Gibson, Sheila Ann )  
01/12/2017 Motion And/Or Praeipce Dismissed (Judicial Officer: Gibson, Sheila Ann )  
01/19/2017 Party Final - Order Dismissing Party, Signed and Filed  
01/19/2017 Notice of Presentment  
01/27/2017 No Objections Received to 7-Day Order  
01/30/2017 CANCELED Trial (9:00 AM) (Judicial Officer Snow, Martha M.)  
*Dismiss Hearing or Injunction*  
01/30/2017 *Reset by Court to 01/30/2017*  
01/30/2017 *Reset by Court to 01/30/2017*  
01/30/2017 Final - Order for Summary Judgment/Disp, Signed and Filed  
02/21/2017 Motion for Reconsideration/Rehearing, Filed  
02/22/2017 Motion Received for Scheduling  
02/27/2017 Motion for Sanctions, Filed  
02/28/2017 Praeipce, Filed (Judicial Officer: Gibson, Sheila Ann )  
03/02/2017 Motion Received for Scheduling  
03/09/2017 Order Denying Motion, Signed and Filed  
03/14/2017 Answer to Motion, Filed  
03/17/2017 Motion Hearing (9:00 AM) (Judicial Officer Gibson, Sheila Ann)  
Result: Held  
03/17/2017 Motion for Miscellaneous Action Granted, Order to Follow (Judicial Officer: Gibson, Sheila Ann )  
03/24/2017 Notice of Presentment  
03/29/2017 CANCELED Review Hearing (8:15 AM) (Judicial Officer Gibson, Sheila Ann)  
*Dismiss Hearing or Injunction*  
03/31/2017 Claim of Appeal, Filed  
04/03/2017 Certificate, Filed  
04/04/2017 No Objections Received to 7-Day Order  
04/04/2017 Order for Miscellaneous Action, Signed and Filed  
07/07/2017 Transcript, Filed  
09/26/2017 File Sent  
07/24/2018 Higher Court Order/Decision Received by Circuit Court  
07/24/2018 Higher Court Order/Decision Received by Circuit Court



08/23/2018 Miscellaneous Pleadings, Filed  
 08/23/2018 Proof of Service, Filed

## FINANCIAL INFORMATION

<b>Cross Complainant - Defendant Parsons Brinckerhoff Michigan, Inc.</b>			
Total Financial Assessment			40.00
Total Payments and Credits			40.00
<b>Balance Due as of 07/16/2019</b>			<b>0.00</b>
09/04/2015	Transaction Assessment		20.00
09/04/2015	Civil File & Serve Payment Receipt # 2015-76961	Parsons Brinckerhoff Michigan, Inc.	(20.00)
08/15/2016	Transaction Assessment		20.00
08/15/2016	Civil File & Serve Payment Receipt # 2016-67390	Parsons Brinckerhoff Michigan, Inc.	(20.00)
<b>Cross Complainant - Plaintiff The City of Detroit, a Municipal Corporation</b>			
Total Financial Assessment			100.00
Total Payments and Credits			100.00
<b>Balance Due as of 07/16/2019</b>			<b>0.00</b>
07/17/2015	Transaction Assessment		20.00
07/17/2015	Civil File & Serve Payment Receipt # 2015-61949	The City of Detroit, a Municipal Corporation	(20.00)
07/21/2015	Transaction Assessment		20.00
07/21/2015	Civil File & Serve Payment Receipt # 2015-62721	The City of Detroit, a Municipal Corporation	(20.00)
01/15/2016	Transaction Assessment		20.00
01/15/2016	Civil File & Serve Payment Receipt # 2016-03987	The City of Detroit, a Municipal Corporation	(20.00)
01/22/2016	Transaction Assessment		20.00
01/22/2016	Civil File & Serve Payment Receipt # 2016-06042	The City of Detroit, a Municipal Corporation	(20.00)
08/25/2016	Transaction Assessment		20.00
08/25/2016	Civil File & Serve Payment Receipt # 2016-70698	The City of Detroit, a Municipal Corporation	(20.00)
<b>Defendant Merlo Construction Company, Inc.</b>			
Total Financial Assessment			20.00
Total Payments and Credits			20.00
<b>Balance Due as of 07/16/2019</b>			<b>0.00</b>
04/29/2016	Transaction Assessment		20.00
04/29/2016	Civil File & Serve Payment Receipt # 2016-36426	Merlo Construction Company, Inc.	(20.00)
<b>Defendant Rauhorn Electric, Inc.</b>			
Total Financial Assessment			60.00
Total Payments and Credits			60.00
<b>Balance Due as of 07/16/2019</b>			<b>0.00</b>
09/28/2016	Transaction Assessment		20.00
09/28/2016	Civil File & Serve Payment Receipt # 2016-81435	Rauhorn Electric, Inc.	(20.00)
12/29/2016	Transaction Assessment		20.00
12/29/2016	Civil File & Serve Payment Receipt # 2016-110070	Rauhorn Electric, Inc.	(20.00)
02/27/2017	Transaction Assessment		20.00
02/27/2017	Civil File & Serve Payment Receipt # 2017-18991	Rauhorn Electric, Inc.	(20.00)
<b>Plaintiff Smith, Keith</b>			
Total Financial Assessment			380.00
Total Payments and Credits			380.00
<b>Balance Due as of 07/16/2019</b>			<b>0.00</b>
01/29/2015	Transaction Assessment		150.00
01/29/2015	Civil File & Serve Payment Receipt # 2015-08130	Smith, Keith	(150.00)
02/17/2015	Transaction Assessment		85.00
02/17/2015	Civil File & Serve Payment Receipt # 2015-13443	Smith, Keith	(85.00)
05/27/2015	Transaction Assessment		20.00
05/27/2015	Civil File & Serve Payment Receipt # 2015-45905	Smith, Keith	(20.00)
11/24/2015	Transaction Assessment		20.00
11/24/2015	Civil File & Serve Payment Receipt # 2015-100954	Smith, Keith	(20.00)
12/01/2015	Transaction Assessment		20.00
12/01/2015	Civil File & Serve Payment Receipt # 2015-102406	Smith, Keith	(20.00)
02/02/2016	Transaction Assessment		20.00
02/02/2016	Civil File & Serve Payment Receipt # 2016-09194	Smith, Keith	(20.00)
04/05/2016	Transaction Assessment		20.00
04/05/2016	Civil File & Serve Payment Receipt # 2016-28661	Smith, Keith	(20.00)
02/21/2017	Transaction Assessment		20.00
02/21/2017	Civil File & Serve Payment Receipt # 2017-16578	Smith, Keith	(20.00)
03/31/2017	Transaction Assessment		25.00

7/16/2019

<https://cmspublic.3rdcc.org/CaseDetail.aspx?CaseID=2450461>

03/31/2017 | Civil File & Serve Payment Receipt # 2017-29118

Smith, Keith

(25.00)

RECEIVED by MSC 7/22/2019 10:16:26 AM

# Case Search

## Case Docket Number Search Results - 337708

### Appellate Docket Sheet

**COA Case Number: 337708**

**MSC Case Number: 158300**

KEITH SMITH V CITY OF DETROIT

1	SMITH KEITH Oral Argument: Y Timely: Y	PL-AT	RET	(32973) ACKER GERALD H
2	CITY OF DETROIT	DF-XP	RET	(75963) PADDISON GREGORY B
3	MERLO CONSTRUCTION COMPANY INC Oral Argument: Y Timely: Y	DF-XD-AE	RET	(26338) SCHUTZA JOHN J
4	RAUHORN ELECTRIC INC	DF-XD-XP	SAM	
5	PARSONS BRINCKERHOFF MICHIGAN INC	DF-XD		
6	POCO INC	DF-XD		

**COA Status:** Case Concluded; File Open

**MSC Status:** Pending on Application

03/30/2017 1 Claim of Appeal - Civil

Proof of Service Date: 03/30/2017

Jurisdictional Checklist: Y

Register of Actions: Y

Fee Code: EPAY

Attorney: 32973 - ACKER GERALD H

01/30/2017 2 Order Appealed From

From: WAYNE CIRCUIT COURT

Case Number: 15-001269-NO

Trial Court Judge: 37512 GIBSON SHEILA ANN

Nature of Case:

Summary Disposition Granted

03/30/2017 3 Other

For Party: 1 SMITH KEITH PL-AT

Attorney: 74128 - WARNER AMANDA B

Comments: Trns Has Been Ordered Per Clm of Appeal

03/31/2017 4 Steno Certificate - Tr Request Received

Date: 01/24/2017

Timely: Y

Reporter: 102 - TURNER VERDA J

Hearings:

01/12/2017

Comments: Amended Indicating Appeal Cancelled 2/6; Filed in COA on 3/30

04/03/2017 5 Steno Certificate - Tr Request Received

Date: 01/27/2017

Timely: Y

Reporter: 102 - TURNER VERDA J

Filed By Attorney: 74128 - WARNER AMANDA B

11a

## Hearings:

01/12/2017

04/03/2017 6 Appearance - Appellee

Date: 04/03/2017

For Party: 3 MERLO CONSTRUCTION COMPANY INC DF-XD-AE

Attorney: 26338 - SCHUTZA JOHN J

04/05/2017 7 Transcript Requested By Atty Or Party

Date: 03/31/2017

Timely: Y

Reporter: 5634 - JONES MANUWELLA

## Hearings:

01/12/2017

04/10/2017 8 Steno Certificate - Tr Request Received

Date: 03/31/2017

Timely: Y

Reporter: 5634 - JONES MANUWELLA

## Hearings:

01/12/2017

04/13/2017 9 Other

Date: 04/13/2017

For Party: 1 SMITH KEITH PL-AT

Attorney: 32973 - ACKER GERALD H

Comments: Dup Cpy of Steno Cert in Evt#8

04/21/2017 10 Docketing Statement MCR 7.204H

For Party: 1 SMITH KEITH PL-AT

Proof of Service Date: 04/21/2017

Filed By Attorney: 74128 - WARNER AMANDA B

05/03/2017 11 Transcript Overdue - Notice to Reporter

Mail Date: 05/04/2017

Reporter: 102 - TURNER VERDA J

Comments: Hrng Date 1/12/17 (Event 8)

05/05/2017 12 Telephone Contact

Reporter: 102 - TURNER VERDA J

Comments: Rptr States Not Rptr of Record - Reassigned to Rptr Jones; Will File Affidavit Today

05/05/2017 13 Transcript Not Taken By Steno

Date: 03/23/2017

Reporter: 102 - TURNER VERDA J

## Hearings:

01/12/2017

06/30/2017 14 Notice Of Filing Transcript

Date: 06/28/2017

Timely: Y

Reporter: 6917 - HOOPER REBA O

## Hearings:

01/12/2017

07/03/2017 15 Transcript Overdue - Notice to Reporter

Mail Date: 07/03/2017

Reporter: 5634 - JONES MANUWELLA

Comments: Hrng Date 1/12/17 (Ev8)

07/17/2017 16 Notice Of Filing Transcript

Date: 06/28/2017

Timely: Y

12a

Reporter: 5634 - JONES MANUWELLA

Hearings:

01/12/2017

Comments: Transcribed by Rptr Hooper R6917; Full Cpy of NFT - Orig NFT Only Included Back Pg

08/23/2017 17 Brief: Appellant

Proof of Service Date: 08/23/2017

Oral Argument Requested: Y

Timely Filed: Y

Filed By Attorney: 32973 - ACKER GERALD H

For Party: 1 SMITH KEITH PL-AT

08/30/2017 18 Other

Date: 08/30/2017

For Party: 1 SMITH KEITH PL-AT

Attorney: 32973 - ACKER GERALD H

Comments: Efiled Exhibits to AT Brf in Evt#17 Left Off at Filing; Linked to Evt#17; Not Printed for File

09/19/2017 19 Brief: Appellee

Proof of Service Date: 09/19/2017

Oral Argument Requested: Y

Timely Filed: Y

Filed By Attorney: 26338 - SCHUTZA JOHN J

For Party: 3 MERLO CONSTRUCTION COMPANY INC DF-XD-AE

09/20/2017 20 Noticed

Record: REQST

Mail Date: 09/22/2017

09/27/2017 21 Record Filed

File Location:

Comments: File(7); Trs

10/09/2017 23 Brief: Reply

Proof of Service Date: 10/09/2017

Oral Argument Requested:

Timely Filed:

Filed By Attorney: 32973 - ACKER GERALD H

For Party: 1 SMITH KEITH PL-AT

10/13/2017 24 Correspondence Sent

For Party: 1 SMITH KEITH PL-AT

Attorney: 32973 - ACKER GERALD H

Comments: advise cnsl of add'l 3 defendants in case title & provide cpy of clm of appl to cnsl for Cty of Det

10/25/2017 25 Other

Date: 10/25/2017

For Party: 1 SMITH KEITH PL-AT

Attorney: 32973 - ACKER GERALD H

Comments: Amended Title Page to AT Brf Due to Pty Changes, Linked to Brf in Evt#23

05/09/2018 30 Brief: Supplemental Auth'y

Proof of Service Date: 05/09/2018

Oral Argument Requested:

Timely Filed:

Filed By Attorney: 26338 - SCHUTZA JOHN J

For Party: 3 MERLO CONSTRUCTION COMPANY INC DF-XD-AE

06/13/2018 29 Submitted on Case Call

District: D

Item #: 18

Panel: WBM,KJ,AK

06/13/2018 31 Oral Argument Audio

07/24/2018 36 Opinion - Per Curiam - Unpublished  
View document in PDF format  
Pages: 5  
Panel: WBM,KJ,AK  
Result: Reversed and Remanded

07/24/2018 37 Opinion - Partial Concurrence/Dissent  
View document in PDF format  
Pages: 2  
Author: KJ

08/23/2018 38 SCt: Application for Leave to SCt  
Supreme Court No: 158300  
Answer Due: 09/20/2018  
Fee: E-Pay  
For Party: 3  
Attorney: 26338 - SCHUTZA JOHN J

08/23/2018 39 SCt Case Caption  
Proof Of Service Date: 08/23/2018  
Comments: Case caption (modified to reflect cross-application filed on 9-20-18).

08/23/2018 40 Other  
Date: 08/23/2018  
For Party: 3 MERLO CONSTRUCTION COMPANY INC DF-XD-AE  
Attorney: 26338 - SCHUTZA JOHN J  
Comments: Notice of filing application for leave to appeal in the Supreme Court; hard copy not placed in file.

08/30/2018 41 Supreme Court - Record Sent To  
File Location:  
Comments: sc#158300 7 lcf;tr

09/20/2018 43 SCt: Answer - SCt Application/Complaint  
Filing Date: 09/20/2018  
For Party: 1 SMITH KEITH PL-AT  
Filed By Attorney: 32973 - ACKER GERALD H

09/20/2018 44 SCt Motion: Cross-Appeal  
Party: 1  
Filed by Attorney: 32973 - ACKER GERALD H

10/03/2018 45 SCt: Reply - SCt Application/Complaint  
Filing Date: 10/03/2018  
For Party: 3 MERLO CONSTRUCTION COMPANY INC DF-XD-AE  
Filed By Attorney: 26338 - SCHUTZA JOHN J  
Timely: Y

10/08/2018 46 SCt: Miscellaneous Filing  
Filing Date: 10/08/2018  
For Party: 3 MERLO CONSTRUCTION COMPANY INC DF-XD-AE  
Filed By Attorney: 26338 - SCHUTZA JOHN J  
Comments: Errata - missing exhibits F & G to app

10/08/2018 47 SCt: Answer - SCt Cross-Application  
Filing Date: 10/08/2018  
For Party: 3 MERLO CONSTRUCTION COMPANY INC DF-XD-AE  
Filed By Attorney: 26338 - SCHUTZA JOHN J

10/10/2018 48 SCt: Trial Court Record Received  
1 tr; 7 files

10/29/2018 49 SCt: Reply - SCt Cross-Application

Filing Date: 10/29/2018

For Party: 1 SMITH KEITH PL-AT

Filed By Attorney: 32973 - ACKER GERALD H

Timely: Y

06/14/2019 52 SCt Order: MOAA -Oral Argument on Lv Appl

View document in PDF format

Comments: MOAA on cross-appeal only. The direct application remains pending. Invited AC=MI Assn for Justice, MI

Defense Trial Counsel, Negligence Section of SBM.

Case Listing Complete

RECEIVED by MSC 7/22/2019 10:16:26 AM

**EXHIBIT B:**

**1/30/17 TRIAL COURT ORDER GRANTING  
DEFENDANT'S MOTION FOR SUMMARY  
DISPOSITION**



Claim No: C0054730  
CATHY M. GARRETT  
/s/ Kimberly Clifton

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KEITH SMITH, an individual,

PLAINTIFF,

vs.

C.A. No. 15-001269-NO  
HON. SHEILA A. GIBSON

RAUHORN ELECTRIC, INC., a Michigan  
Corporation; and MERLO CONSTRUCTION  
COMPANY, INC., a Michigan Corporation;

15-001269-NO

DEFENDANTS,

GERALD H. ACKER P32973  
Goodman Acker, P.C.  
ATTORNEYS FOR PLAINTIFF  
17000 W. 10 Mile Rd., 2<sup>nd</sup> Floor  
Southfield, Michigan 48075  
248-483-5000 / 248-483-3131- FAX  
[gacker@goodmanacker.com](mailto:gacker@goodmanacker.com)

MICHAEL T. RYAN (P53634)  
PATRICK J. KUKLA (P60465)  
Merry, Farnen & Ryan, P.C.  
ATTORNEYS FOR DEFENDANTS  
MERLO AND RAUHORN  
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586-541-0117 (PJK direct)  
586-776-1501- FAX  
[mryan@mfr-law.com](mailto:mryan@mfr-law.com)  
[pkukla@mfr-law.com](mailto:pkukla@mfr-law.com)

**ORDER GRANTING DEFENDANTS, RAUHORN ELECTRIC, INC. AND  
MERLO CONSTRUCTION COMPANY, INC.'S  
MOTION FOR SUMMARY DISPOSITION**

At a session of said Court, held in the City of Detroit, County of  
Wayne, State of Michigan on: 1/30/2017

PRESENT: HONORABLE SHEILA A. GIBSON  
Wayne County Circuit Court Judge

This matter having come before the Court on Defendants, Rauhorn Electric, Inc. and  
Merlo Construction Company, Inc.'s Motion for Summary Disposition against Plaintiff; oral  
argument having been heard on January 12, 2017; and the Court being otherwise fully advised in  
the premises;

**IT IS HEREBY ORDERED** that Defendants, Rauhorn Electric, Inc. and Merlo Construction Company, Inc.'s Motion for Summary Disposition against Plaintiff is granted for the reasons stated on the record.

**This is a final order under MCR 7.202(6)(a)(i).**

/s/ Sheila A. Gibson  
HONORABLE SHEILA A. GIBSON  
Circuit Court Judge

ORDER PREPARED UNDER MCR 2.602 BY:  
**PATRICK J. KUKLA (P60465)**

**EXHIBIT 1:**

**7/24/18 COURT OF APPEALS ORDER REVERSING  
AND REMANDING TO TRIAL COURT**

STATE OF MICHIGAN  
COURT OF APPEALS

---

KEITH SMITH,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant/Cross-Plaintiff

and

MERLO CONSTRUCTION COMPANY INC,

Defendant/Cross-Defendant-  
Appellee,

and

RAUHORN ELECTRIC INC,

Defendant/Cross-Defendant/Cross-  
Plaintiff

and

PARSONS BRINCKERHOFF MICHIGAN INC  
and POCO INC,

Defendants/Cross-Defendants.

---

Before: MURPHY, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant Merlo Construction Company, Inc. (Merlo), concluding that the case constituted a premises liability action rather than ordinary negligence, and that the hazard—missing slabs of a concrete sidewalk that allegedly caused plaintiff's bike to flip, throwing plaintiff to the ground—

was open and obvious. We agree that the case sounds in premises liability, but we find a question of fact regarding openness and obviousness. Consequently, we reverse and remand for further proceedings.

Plaintiff asserted that he was riding his bicycle on a sidewalk in the city of Detroit on an October evening in 2014 around 9:00 p.m. when all of a sudden he was thrown forward over his handle bars, landing on his side and incurring various injuries. After he fell, he noticed that a couple slabs of concrete from the sidewalk were missing, with just granular material of the concrete sub-base remaining. Plaintiff claimed that he did not see the hazard beforehand because it was dark and the minimal street lighting was not sufficient to illuminate the sidewalk. Plaintiff contended that there were no barricades, orange cones, caution tape, safety signs, or warnings indicating that the sidewalk was closed or otherwise in disrepair. It was later discovered that the Michigan Department of Transportation (MDOT), through an agreement with the city and the use of federal funds, hired Rauhorn Electric, Inc. (Rauhorn), as the general contractor for purposes of a sidewalk restoration project, which included updating the sidewalk area where the accident occurred. Rauhorn then subcontracted with Merlo to do the actual concrete excavation and pouring of the sidewalk pertinent to this case. Merlo had removed the two slabs of concrete a few days before the accident and poured new concrete for the sidewalk three days after the fall. Merlo maintained that it always placed appropriate barricades and warning materials when doing such projects.

The ensuing litigation involved multiple parties, with plaintiff suing the city, Rauhorn, Merlo, and a couple of other companies, Parsons Brinckerhoff Michigan, Inc., and Poco, Inc., on the basis that they shared some liability for the accident. There were various cross-claims between the parties, motions for summary disposition, stipulations to dismiss, and other procedures that ultimately have no relevancy to this appeal; plaintiff did not recover from anyone.<sup>1</sup> Toward the end of the litigation, with only Rauhorn and Merlo left as defendants, those parties filed a motion for summary disposition, arguing that there was no evidence of negligence by Rauhorn and that both defendants could not be held liable, given that the hazard was open and obvious. Rauhorn and Merlo maintained that the open and obvious danger doctrine applied because plaintiff's suit was plainly a premises liability action. Plaintiff argued that the lawsuit against Rauhorn and Merlo involved claims of ordinary negligence; therefore, the open and obvious danger doctrine played no role in the case. Plaintiff additionally asserted that, assuming the doctrine was implicated, there was a genuine issue of material fact regarding whether the missing section of sidewalk was open and obvious, especially considering that it was dark when plaintiff was thrown from his bike and that a cyclist would not be looking down while pedaling. The trial court ruled that plaintiff's action sounded in premises liability, not ordinary negligence, and that the hazard was open and obvious, as a reasonable cyclist would have been looking at the upcoming sidewalk and seen the large hazard ahead. Accordingly, the court granted summary disposition in favor of Rauhorn and Merlo. Plaintiff appeals as of right, but only with respect to the dismissal of Merlo.

---

<sup>1</sup> The case against the city was summarily dismissed, apparently because the defect had not been in existence for 30 days prior to the accident. See MCL 691.1402a.

We review de novo a trial court's ruling on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). With respect to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), explained:

In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

Plaintiff argues that the trial court erred in finding that his lawsuit against Merlo sounded in premises liability and not ordinary negligence, where defendant did not maintain possession or control over the sidewalk at the time of the accident. Plaintiff further contends that, assuming the case constituted a premises liability action, the trial court erred in ruling that the missing sidewalk section posed an open and obvious danger as a matter of law, given that the documentary evidence created a genuine issue of material fact on the issue.

First, we hold that the claim against Merlo regarding the missing concrete slabs of sidewalk plainly and clearly sounded in premises liability. "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id.* Here, plaintiff asserted that the condition of the sidewalk was dangerous because of the missing section of sidewalk and that Merlo created the hazardous condition. Indeed, the case presents a classic example of premises liability.

Plaintiff attempts to avoid the label of premises liability by arguing that Merlo did not maintain possession or control over the sidewalk where he was injured and, therefore, the case could not be a premises liability action. We find this argument self-defeating. As discussed, whether a case sounds in premises liability or negligence turns on the nature of the hazard. Whether a particular person or entity is in control or possession of the land at issue affects whether that person or entity owes a duty, which in premises liability cases is premised on the expectation that control or possession of property comes with the power to prevent the injury. See *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660-662; 575 NW2d 745 (1998). If

Merlo lacked the necessary possession or control, that would only absolve Merlo of a duty, not change the nature of the case.

We note that a contract between the owner of premises and a possessor of those premises may show that the possessor had authority to exercise dominion and control over the land. See *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 704; 644 NW2d 779 (2002). It would be reasonable to conclude that Merlo actually exercised dominion and control over the sidewalk and possessed it *during the construction project*, considering that Merlo was operating under a subcontract with Rauhorn, who in turn had proceeded on MDOT's authorization, with MDOT working in conjunction with the city. In its role as the subcontractor working directly on the sidewalk, Merlo certainly had the power to prevent the injury, ostensibly subjecting it to potential liability under a premises liability cause of action, while also triggering the application of the open and obvious danger doctrine.

Plaintiff contends that in the event that his suit against Merlo is characterized as one sounding in premises liability, there existed a genuine issue of material fact concerning whether the sidewalk hazard was open and obvious. We construe this as an alternative argument to plaintiff's assertion that Merlo lacked possession or control over the property, as plaintiff is entitled to pursue. MCR 2.111(A)(2). We find that the evidence presented, when viewed in its entirety, does establish a genuine question of fact whether the hazard was open and obvious.

The evidence must be considered in the light most favorable to plaintiff. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). That evidence includes, significantly, photographs taken of the site of the incident the morning after plaintiff allegedly suffered the injury. Those photographs unambiguously show no warnings, barriers, or any other indication that a large slab of sidewalk was missing beyond the pure fact that the slab is missing. Defendant contends that it did erect warnings and barriers, and speculated that perhaps they had been stolen by third parties, but that is a classic example of a genuine question of fact that may not be resolved by summary disposition. The courts are constrained to conclude that there is a question of fact whether any warnings or barriers existed to notify anyone using the sidewalk that a portion was missing.

The above question of fact is material because the incident allegedly occurred at night and in the absence of street illumination. In the context of black ice, our Supreme Court appears to hold that poor illumination is not sufficient to make black ice not open and obvious *if* there were sufficient indicia otherwise that the black ice was present. *Ragnoli v North Oakland-North Macomb Imaging, Inc*, 500 Mich 967; 892 NW2d 377 (2017). Notably, black ice is not open and obvious *per se* in the absence of any such indicia. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483-484; 760 NW2d 287 (2008). More importantly, it is well established that open chasms that would have been blatantly obvious in good light may be rendered too difficult to discern by darkness to be open and obvious *as encountered by the plaintiff*, even where darkness itself was open and obvious. *Abke v Vandenberg*, 239 Mich App 359, 362-363, 608 NW2d 73 (2000); *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 126-128, 492 NW2d 761 (1992). Slabs missing at seam joints, where in dim light one might reasonably expect to perceive a contrast difference, are not the kind of hazard one would expect to find until one finds it.

By default, one generally expects surfaces intended for traversal to be safe; even in black ice cases, our Supreme Court has consistently emphasized that black ice is not open and obvious without some indicia that it is present. Darkness is not a *carte blanche* to ignore any indicia of a hazard that are perceptible despite the darkness. However, in the absence of explicitly-placed warnings, we are unaware of what naturally occurring indicia might exist that a section of sidewalk, the entire point of which is to be a reliable non-vehicular transportation surface, was missing. That a large slab of sidewalk is obviously missing during the day does not necessarily establish that its absence would be so readily discernable at night in the dark. This case presents significant and material questions of fact as to whether the missing slab could have been perceived in the dark conditions present when plaintiff was allegedly injured, and whether any indicia that the hazard existed were present such that the missing slab would have been open and obvious despite the darkness. Summary disposition was therefore improper.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Amy Ronayne Krause



STATE OF MICHIGAN  
COURT OF APPEALS

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KEITH SMITH,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant/Cross Plaintiff,

and

MERLO CONSTRUCTION COMPANY INC.,

Defendant/Cross Defendant-  
Appellee,

and

RAUHORN ELECTRIC INC.,

Defendant/Cross Defendant/Cross  
Plaintiff,

and

PARSONS BRINCKERHOFF MICHIGAN INC.,  
and POCO INC.,

Defendants/Cross Defendants.

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UNPUBLISHED

July 24, 2018

No. 337708

Wayne Circuit Court

LC No. 15-001269-NO

Before: MURPHY, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

Although I agree with the majority that this matter is a premises liability action rather than an ordinary negligence action, I disagree that a question of fact remains regarding whether the missing slab was an open and obvious danger. For that reason, I dissent.

A possessor of land does not owe a duty to an invitee relative to dangers that are open and obvious. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). This is “because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may

then take reasonable measures to avoid.” *Id.* at 461. “A condition of the land is open and obvious when it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection.” *Finazzo v Fire Equipment Co*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2018) (Docket No. 338421); slip op at 3 (quotation marks and citation omitted).

As articulated by our Supreme Court in *Hoffner*,

exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations. Thus, an “unreasonably dangerous” hazard must be just that – not just a dangerous hazard, but one that is *unreasonably* so. And it must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances. An “effectively unavoidable” hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. [*Hoffner*, 492 Mich at 472-473 (citations omitted; emphasis in original).]

In my view, a missing slab of concrete in the sidewalk, even in darkness and without warnings or barriers, is observable to an average person with ordinary intelligence. Although plaintiff may not have had the benefit of daylight, there is no dispute that at least minimal street lighting was present; plaintiff was not traveling in total darkness. Furthermore, a missing sidewalk slab is not impassable, especially on a bicycle. Had plaintiff been more observant, he could easily have avoided the missing sidewalk slab.<sup>1</sup> To be clear, I cannot conclude that any record facts indicate that the hazard plaintiff faced was so unreasonably dangerous that it constitutes an exception to the open and obvious doctrine.

Based on the foregoing, I would affirm the trial court’s grant of summary disposition in favor of defendant, Merlo Construction Company, Inc.

/s/ Kathleen Jansen

---

<sup>1</sup> I would also note that it would be unreasonable to expect that a sidewalk will always be clear of any obstructions, and that plaintiff has an ongoing duty to remain observant of his surroundings. For example it would not be uncommon to encounter children’s toys, fallen tree branches, or people when riding a bicycle on a sidewalk. This may be the reason why some municipalities require bicycles to be ridden on residential streets or city roads, not sidewalks.

**EXHIBIT 2:**

**PLAINTIFF'S DEPOSITION TRANSCRIPT**

Keith Smith  
5/4/2016

Page 1

1 STATE OF MICHIGAN  
2 IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE  
3  
4 KEITH SMITH, an individual,  
5 Plaintiff,  
6 vs. Civil Action  
7 No. 15-001269-NO  
8 HON. SHEILA ANN GIBSON  
9 CITY OF DETROIT, a Municipal  
Corporation; PARSONS BRINCKERHOFF  
10 MICHIGAN, INC., a Michigan  
Corporation; RAUHORN ELECTRIC,  
11 INC., a Michigan Corporation;  
MERLO CONSTRUCTION COMPANY, INC.,  
12 a Michigan Corporation; and POCO,  
INC., a Michigan Corporation,  
13 Defendants,  
14 and  
15 CITY OF DETROIT, a Municipal  
Corporation,  
16 Cross-Plaintiff,  
17 vs.  
18 PARSONS BRINCKERHOFF  
MICHIGAN, INC., a Michigan  
19 Corporation; RAUHORN ELECTRIC,  
INC., a Michigan Corporation;  
20 MERLO CONSTRUCTION COMPANY, INC.,  
a Michigan Corporation; and POCO,  
21 INC., a Michigan Corporation,  
22 Cross-Defendants.  
23 and  
24 RAUHORN ELECTRIC, INC., a Michigan  
Corporation,  
25 Cross-Plaintiff,

Keith Smith  
5/4/2016

Page 2

1 vs.  
2 MERLO CONSTRUCTION COMPANY, INC.,  
3 a Michigan Corporation,  
4 Cross-Defendant.  
5  
6 PAGE 1 TO 113  
7  
8 The Deposition of KEITH SMITH,  
9 Taken at 17000 West Twelve Mile Road,  
10 Second Floor,  
11 Southfield, Michigan,  
12 Commencing at 2:13 p.m.,  
13 Wednesday, May 4, 2016,  
14 Before Gay Ann Nosek, CSR 2515.  
15  
16 APPEARANCES:  
17 CHARLES W. WOJNO P46725  
18 Goodman Acker, P.C.  
19 17000 West Ten Mile Road  
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24 Appearing on behalf of the Plaintiff.  
25

Page 4

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9 jberger@clarkhill.com  
10 Appearing on behalf of Parsons Brinckerhoff.  
11  
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14  
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Page 3

1 APPEARANCES: (CONTINUED)  
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11  
12 PATRICK J. KUKLA P60465  
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16 St. Clair Shores, Michigan 48081  
17 (586) 776-6700  
18 pkukla@mfr-law.com  
19 Appearing on behalf of the Defendant,  
20 Merlo Construction and Rauhorn Electric.  
21  
22  
23  
24  
25

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SMITH EXHIBIT 7	95

2 (Pages 2 to 5)

Keith Smith  
5/4/2016

Page 6

1 Southfield, Michigan  
2 Wednesday, May 4, 2016  
3 2:13 p.m.  
4 KEITH SMITH,  
5 having first been duly sworn, was examined and testified  
6 on his oath as follows:  
7 MR. KUKLA: Good afternoon, sir. Could you  
8 state your full name for the record, please?  
9 THE WITNESS: Keith Edward Smith, Jr.  
10 MR. KUKLA: The record should reflect that  
11 this is the deposition of Keith Smith being taken  
12 pursuant to notice and agreement of the parties and is  
13 intended to be used for any and all purposes permitted  
14 under the Michigan Court Rules and Michigan Rules of  
15 Evidence.  
16 EXAMINATION BY MR. KUKLA:  
17 Q. Good afternoon, Mr. Smith. My name is Patrick Kukla and  
18 I introduced myself to you before we started. I'm one  
19 of the attorneys representing two of the defendants in a  
20 lawsuit that you filed. I'm representing Rauhorn  
21 Electric and Merlo Construction. And as indicated, this  
22 is the date and time set for your deposition.  
23 Have you ever had your deposition taken  
24 before?  
25 A. No.

Page 8

1 A. I'm 46 today. My birthday is October 2nd, 1969.  
2 Q. And where do you presently reside? Where do you live  
3 presently?  
4 A. 5045 Fairview in Detroit.  
5 Q. How long have you lived at that address?  
6 A. For a year and one month.  
7 Q. Does anyone live there with you?  
8 A. Yes.  
9 Q. Who is that?  
10 A. My son -- my 14-year-old son.  
11 Q. And what is your son's name?  
12 A. Keiron Smith. K E I R O N Smith Montgomery.  
13 Q. Where did you live immediately prior to 5045 Fairview?  
14 A. 15251 East State Fair.  
15 Q. And how long did you live at the address on State Fair?  
16 A. It was actually two houses but I lived at -- oh, for  
17 seven-and-a-half years.  
18 Q. What was the other address before --  
19 A. It was right next door 15245. Right next door.  
20 Q. 15245?  
21 A. Yes.  
22 Q. Then you lived at 15251?  
23 A. Yes.  
24 Q. I'm looking at your Answers to the Interrogatories and  
25 am I correct that at the time of the -- well, my

Page 7

1 Q. Okay. A couple of ground rules and I'm sure your  
2 attorney probably covered some of these with you  
3 already. As you see, we have a court reporter here who  
4 is going to be transcribing what you and I -- any  
5 questions I ask, any answers you give, questions from  
6 other counsel, as well as any objections or questions  
7 your attorney might ask or raise. Therefore, we'll need  
8 to have a verbal response. People have a tendency when  
9 they're engaging in conversation to shake their head or  
10 nod their head, that can't get picked up for the court  
11 reporter. Also, if at any point you don't understand a  
12 question that I've asked you, just let me know and I'll  
13 do my best to rephrase it.  
14 A. Okay.  
15 Q. If you answer a question, I'm going to assume you  
16 understood it; fair enough?  
17 A. Right.  
18 Q. If at any point in time you need to stop and take a  
19 break, let me know that. We can do that as well. And  
20 also if you could try to let me get my question out  
21 before answering, I'll do my best to let you answer the  
22 question before interposing another just so we're not  
23 talking over each other.  
24 A. Okay.  
25 Q. What is your age and date of birth, sir?

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1 understanding is that the incident that we're here to  
2 talk about happened on October 12th, 2014; is that  
3 right?  
4 A. Yes.  
5 Q. On that date, were you living at 15245 State Fair?  
6 A. 15251.  
7 Q. I'm sorry?  
8 A. My ID the four or five address on it. That's what I  
9 gave the doctor. I actually resided at the 51 address.  
10 Q. 15251?  
11 A. Yes.  
12 Q. At that time, did anyone live with you at that address?  
13 A. Yes.  
14 Q. Who was that?  
15 A. My son.  
16 Q. Same individual you identified before?  
17 A. Yes.  
18 MR. KUKLA: And can we go off the record for  
19 one second.  
20 (An off the record discussion was held)  
21 MR. KUKLA: Back on.  
22 BY MR. KUKLA:  
23 Q. What is your highest level of education?  
24 A. High school graduate.  
25 Q. And where did you graduate high school?

3 (Pages 6 to 9)

Keith Smith  
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Page 10

1 A. Denby High School.  
2 Q. And what year?  
3 A. 1988.  
4 Q. Any post high school education?  
5 A. No.  
6 Q. And do you currently have a driver's license?  
7 A. No.  
8 Q. Have you ever had a driver's license?  
9 A. Yes.  
10 Q. Do you remember when you last had a driver's license?  
11 A. 2008.  
12 Q. Was that a Michigan driver's license?  
13 A. Yes.  
14 Q. Are you presently married?  
15 A. No.  
16 Q. Have you ever been married?  
17 A. Yes.  
18 Q. Are you divorced?  
19 A. Yes.  
20 Q. Only married one time?  
21 A. Yes.  
22 Q. And what is your ex-wife's name?  
23 A. Lashenia Irwin Smith. L A S H E N I A.  
24 Q. And when were you divorced?  
25 A. 2005.

Page 11

1 Q. And you mentioned that you have a 14-year-old son?  
2 A. Yes.  
3 Q. Do you have any other children?  
4 A. Yes.  
5 Q. Just to speed it up, I think in your Answers you had  
6 indicated -- Answers to Interrogatories, Keith Smith,  
7 III?  
8 A. Yes.  
9 Q. How old is --  
10 A. Keith Smith? PJ is 26 and Joseph is 24 and Pookie is  
11 19.  
12 Q. Is that Cheryl?  
13 A. Yes, Cheryl, yes.  
14 Q. And Joseph Smith is 24?  
15 A. Yes.  
16 Q. And then -- is it Keiron?  
17 A. Yes. He'll be 15 on the 19th of this month.  
18 Q. Any other children?  
19 A. No.  
20 Q. And the only one that's presently residing with you is  
21 Keiron?  
22 A. Yes.  
23 Q. Have you ever served in the U.S. military?  
24 A. No.  
25 Q. Have you ever been involved in lawsuit before?

Page 12

1 A. No.  
2 Q. Ever been sued -- never been sued by anyone, never sued  
3 anyone else?  
4 A. No.  
5 Q. Have you ever been convicted of a crime involving theft  
6 or dishonesty?  
7 A. No.  
8 Q. Have you ever been convicted of a felony?  
9 A. Yes.  
10 Q. The -- what was that -- what felony were you convicted  
11 of?  
12 A. Possession with intent to deliver.  
13 Q. Were those changes brought in Wayne County?  
14 A. Yes.  
15 Q. Did you serve any jail time?  
16 A. No.  
17 Q. Probation?  
18 A. Yes.  
19 Q. How long ago were you convicted?  
20 A. 1997.  
21 Q. Are you currently employed?  
22 A. Yes.  
23 Q. Where do you work?  
24 A. Right now I work for Sentech Temp Services?  
25 Q. How long have you worked for Sentech?

Page 13

1 A. Since September of '15.  
2 Q. Do they assign you to different jobs?  
3 A. Yes.  
4 Q. Where are you presently -- where do they have you  
5 presently assigned?  
6 A. Well, they just recently took me off the schedule  
7 because I had to see a doctor but I was working at NCS,  
8 New Center Stamping.  
9 Q. What did you do at New Center Stamping?  
10 A. Press operator.  
11 Q. And you testified that you started in -- working for  
12 Sentech in September of 2015?  
13 A. Yes.  
14 Q. Since you started for -- working for Sentech, were you  
15 always assigned to New Center Stamping?  
16 A. For the first few months, yes.  
17 Q. Did they ever assign you anywhere else?  
18 A. Well, I was supposed to go somewhere else but I didn't  
19 go.  
20 Q. What was the reason for that; do you know?  
21 A. I started hurting so I -- I had to go see a doctor. So  
22 they took me off the schedule until I got a doctor's  
23 excuse.  
24 Q. And when did this happen? When did they take you off  
25 schedule?

4 (Pages 10 to 13)

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5/4/2016

Page 14

1 A. March 10th.  
2 Q. Of this year?  
3 A. Yes.  
4 Q. So from September, 2015, through March 10th, 2016, you  
5 worked for Sentech Temp Services and were working for --  
6 working at New Center Stamping as a press operator?  
7 A. Yes.  
8 Q. Who are you paid by when you worked there?  
9 A. I'm paid by Sentech.  
10 Q. How much were you paid?  
11 A. It was minimum wage. It went up. \$8.75 an hour in  
12 January but I started at \$8.25.  
13 Q. How many hours a week did you work?  
14 A. 32.  
15 Q. What days of the week typically?  
16 A. Monday through Thursday or if we work on Friday, Monday  
17 through Friday.  
18 Q. Was it usually an eight hour day?  
19 A. Oh, yes.  
20 Q. So four days a week roughly?  
21 A. Four days, yes.  
22 Q. And you testified that you have not worked since March  
23 10th, 2016?  
24 A. Well, I worked off and on a couple days here. And it  
25 wasn't a whole schedule, maybe two days a check, one day

Page 16

1 something written out saying that I was able to work  
2 again.  
3 Q. Just so I'm clear -- maybe I'm misunderstanding your  
4 testimony. Was it a case where you missed a day because  
5 you had a doctor's appointment?  
6 A. I missed a week.  
7 Q. Because you had a doctor's appointment?  
8 A. Because I started hurting and I couldn't go to work. So  
9 she wanted an excuse for those days.  
10 Q. And then you -- is it your testimony you wanted to  
11 return to work --  
12 A. Yes.  
13 Q. -- after that week?  
14 A. Yes.  
15 Q. And they wanted something from the doctor saying you  
16 could return to work?  
17 A. That I was clear to work.  
18 Q. Did you try to get that type of --  
19 A. I showed her my limitations and she said that's not an  
20 excuse.  
21 Q. Just so I'm clear, were you trying to evidence why you  
22 were off that week or were you trying to evidence for  
23 them why you were able to return to work?  
24 A. I wanted to return to work. And she wouldn't allow it  
25 because I guess the paperwork. I don't know. She said

Page 15

1 a check, it wasn't no --  
2 Q. And as we sit here today you're not currently on the  
3 schedule?  
4 A. No.  
5 Q. And that's because you said you were --  
6 A. Because I never brung (sic) them a doctor's excuse.  
7 Q. So you said you were hurting. That was your testimony,  
8 I think?  
9 A. Yes.  
10 Q. And so you did not provide them with a --  
11 A. Well, I gave them the information.  
12 MR. WOJNO: Let him ask the question first.  
13 THE WITNESS: Oh, okay.  
14 BY MR. KUKLA:  
15 Q. What you referred to as a doctor's excuse -- I guess we  
16 call it a disability certificate or slip, you never  
17 provided that to Sentech?  
18 A. They wouldn't accept it. I don't know why they wouldn't  
19 accept it.  
20 Q. Do you remember what you tried to give them?  
21 A. My prescription and the limitations.  
22 Q. Is that a prescription for medication?  
23 A. Yes. It had the date on it that I missed. The day that  
24 I missed it had the date on it. And I was showing them  
25 that that's proof that I went to the doctor. She wanted

Page 17

1 it's their company policy.  
2 Q. Who is that person you were dealing with at Sentech? Do  
3 you know her name?  
4 A. Her name is Simone.  
5 Q. Do you know the last name?  
6 A. No.  
7 Q. And your understanding is she's with Sentech, not New  
8 Center Stamping?  
9 A. She works for Sentech.  
10 Q. And what doctor -- you said you provided restrictions?  
11 A. Michigan Head & Spine.  
12 Q. Was that Dr. Marshall?  
13 A. Yes.  
14 Q. John Marshall?  
15 A. Yes.  
16 Q. So do you recall the last day you worked at New Center  
17 Stamping?  
18 A. March -- I think it was in between the 10th and the  
19 12th, somewhere in there.  
20 Q. So you hadn't worked at all in April?  
21 A. No. They wouldn't let me.  
22 Q. You didn't work anywhere else either, correct, in April?  
23 A. Well, I applied for jobs.  
24 Q. But you hadn't actually been hired and gone to work?  
25 A. No.

5 (Pages 14 to 17)



Keith Smith  
5/4/2016

Page 18

1 Q. You weren't paid for doing any work?  
2 A. No.  
3 Q. Do you remember where you applied for work?  
4 A. Giant Janitorial and Dollar Tree.  
5 Q. Did you have any interviews with any of those people?  
6 A. Giant called me but they never got back with me.  
7 Q. Before working for Sentech beginning in September of  
8 2015, did you work anywhere where did you work  
9 immediately before Sentech?  
10 A. I wasn't able to work.  
11 Q. What was the last job you had before Sentech?  
12 A. Just before I got hurt I was working as a car port at a  
13 car lot -- a used car lot, Wright Brothers. I think  
14 that's the name of it.  
15 Q. Where is that located? What city?  
16 A. Detroit.  
17 Q. What did your job duties entail?  
18 A. Car port, like pulling the cars out for advertisement,  
19 just sit and watch the lot so nobody would vandalize the  
20 vehicles.  
21 Q. And how long were you at Wright Brothers?  
22 A. About six months.  
23 Q. Do you remember a name of a boss or supervisor there?  
24 A. Yeah, Richard. Richard Wright -- Richard Wright.  
25 MR. BERGER: That makes sense.

Page 19

1 BY MR. KUKLA:  
2 Q. Were you paid hourly as a car port?  
3 A. They paid me cash, \$25 a day.  
4 Q. How many days a week did you work approximately?  
5 A. Five but they would tip me little small things tips but  
6 it wasn't big.  
7 Q. Taking a step back, when you were at Sentech,  
8 specifically New Center Stamping, what physical  
9 demands -- what did you have to do physically? You said  
10 you were a press operator.  
11 A. Just pressing buttons to make the machine go down.  
12 Q. And you were able to do that without -- you were able to  
13 do that -- you were able to do that job?  
14 A. At first until they changed my position. And then  
15 that's when I started hurting again because they tried  
16 to get me to do other things.  
17 Q. What are these other things they're trying to get you to  
18 do?  
19 A. Lifting. I told them I only could lift five pounds, so  
20 they gave me small one pound, put in the machine, push  
21 the machine.  
22 Q. And at some point they wanted you to lift heavier  
23 things?  
24 A. Well, yes -- no. After so many of them -- after so  
25 many, you get to hurting. You do 500, 600 day.

Page 20

1 Q. But you were able to do that job from September to  
2 March, correct?  
3 A. It wasn't same job.  
4 Q. Well, that's what I'm trying to find out.  
5 A. I worked in the same building during that time but  
6 different departments.  
7 Q. So you weren't always a press operator?  
8 A. There's a press in every department but some parts you  
9 have to physically labor.  
10 Q. So initially you weren't doing as much physical labor?  
11 A. Not in the beginning.  
12 Q. And eventually they switched you?  
13 A. Yes.  
14 Q. And then you had more physical labor?  
15 A. Then I started physical labor there.  
16 Q. And that physical labor was lifting more?  
17 A. Yes more lifting, yes.  
18 Q. So at the time -- oh, so in October of 2014, you were  
19 working as a car port with Wright Brothers?  
20 A. Yes.  
21 Q. And then after the incident on October 12th, 2014, you  
22 didn't return to work anywhere until September of 2015?  
23 A. Well, I tried to go back to Wright Brothers.  
24 Q. Do you remember how quickly you tried to go back? Was  
25 it the next week?

Page 21

1 A. It was November.  
2 Q. So November of 2014?  
3 A. Yes.  
4 Q. And were you able to do that job?  
5 A. No. I actually made mistakes and they fired me.  
6 Q. What mistakes did you make?  
7 A. I got -- dropped a windshield trying to help them carry  
8 a windshield. I dropped it and broke it. And he fired  
9 me because my arms just let it go. I don't know, just  
10 let it go.  
11 Q. Was that normal as a car port, you would be lifting  
12 things and carrying stuff?  
13 A. I guess the guy had another shop there and he brung  
14 stuff in and he wanted me to clear the vehicle and I was  
15 trying to help him and I dropped the glass.  
16 Q. And then they fired you?  
17 A. I couldn't pay for it so he fired me.  
18 Q. So they wanted you to pay for the broken glass?  
19 A. Yes, there was no money.  
20 Q. So then they fired you?  
21 A. Yes.  
22 Q. Do you remember when you were fired from Wright  
23 Brothers?  
24 A. November.  
25 Q. And did you work anywhere in December of 2014?

6 (Pages 18 to 21)

Keith Smith  
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Page 22

1 A. No.  
2 Q. What about January, 2015?  
3 A. No.  
4 Q. February, 2015?  
5 A. No.  
6 Q. March?  
7 A. No.  
8 Q. April?  
9 A. No.  
10 Q. May?  
11 A. No.  
12 Q. June, July, August?  
13 A. No.  
14 Q. You returned -- so you started in September with  
15 Sentech?  
16 A. Yes. Well, that's when they cleared me. I couldn't  
17 work until then.  
18 Q. Did you ever work at Comerica Park?  
19 A. That was volunteer.  
20 Q. Volunteer. Okay. When did you do that?  
21 A. In April of 2015.  
22 Q. What specifically did you do at Comerica Park?  
23 A. Cashier.  
24 MR. BERGER: What did you say?  
25 THE WITNESS: Cashier.

Page 24

1 A. Just ring them out.  
2 Q. -- you weren't compensated at all?  
3 A. Tips, tips.  
4 Q. Who would tip you?  
5 A. The customers.  
6 Q. Okay. When you say concessions, there was -- sometimes  
7 there would be someone going through the stands with pop  
8 or water --  
9 A. No way.  
10 Q. So you -- so you were sitting behind -- you're standing  
11 behind a cash register?  
12 A. Yes.  
13 Q. And customers would tip you?  
14 A. They would just leave tips. I was a beer porter. So I  
15 poured beer and they leave the change, I put it in the  
16 cup and we split it as a group.  
17 Q. Did you volunteer anywhere else that summer?  
18 A. No. That's the first time I ever volunteered anywhere.  
19 Q. So your time at Comerica Park as a cashier, you didn't  
20 do any type of work, either volunteer or for money,  
21 between the time you were terminated at Wright Brothers  
22 and when you started at Sentech?  
23 A. No. Just Comerica.  
24 Q. Do you have any idea how much money you made at  
25 Comerica?

Page 23

1 BY MR. KUKLA:  
2 Q. And you weren't compensated financially for that?  
3 A. We worked for tips.  
4 Q. So they weren't paying you a wage?  
5 A. No. It was volunteer. It was like a charitable group,  
6 One Touch Transition, they was trying to help me get  
7 back into the work force.  
8 Q. As best you can, what is One Touch Transition?  
9 A. A nonprofit corporation that helps people get out of bad  
10 situations.  
11 Q. So were they trying to find you a job? Is that your  
12 understanding?  
13 A. They were trying to make sure that I was physically able  
14 to work before they could find me a job.  
15 Q. So did they assign you to Comerica Park?  
16 A. Yes.  
17 Q. As best as you know is that what happened?  
18 A. Yes. They send me to Comerica Park, yes.  
19 Q. How long did you work at Comerica Park?  
20 A. April -- I think I worked the whole Tiger season. I  
21 didn't work every game though. It was like maybe three  
22 games, every time they had a home stand, we worked three  
23 games, four games.  
24 Q. You said you were cashier. So if a customer was coming  
25 up to the concession --

Page 25

1 A. Maybe \$20 a game.  
2 Q. Were you able physically to do the job as a cashier at  
3 Comerica Park?  
4 A. It wasn't a lot of moving, so yes.  
5 Q. Did you have to lift anything --  
6 A. No.  
7 Q. -- when you were at Comerica Park?  
8 A. No. Just the money or the cups of beer.  
9 Q. I saw in your discovery responses had -- you had  
10 mentioned a business called -- was it Sweet Water?  
11 A. Sweet Water, yeah.  
12 Q. Sweet Water Express?  
13 A. I haven't started there yet.  
14 Q. Are you scheduled to start there?  
15 A. Yes.  
16 Q. When are you scheduled to start there?  
17 A. They haven't called me back yet, so I don't know.  
18 Q. Is that a job you just applied for?  
19 A. Yes, I just recently applied for it. It's a manager's  
20 position at a restaurant?  
21 Q. A manager's position?  
22 A. Yes.  
23 Q. So Sweet Water is like a restaurant?  
24 A. Yeah, like an express restaurant on the east side.  
25 Q. Is it your understanding they have hired you?

7 (Pages 22 to 25)

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5/4/2016

Page 26

1 A. That's what they telling me but I haven't worked.  
2 Q. When were you -- and how did they communicate that you  
3 were hired there?  
4 A. A phone call.  
5 Q. So did you interview with someone there?  
6 A. Yes.  
7 Q. Do you remember the name of the person you interviewed?  
8 A. Jason.  
9 Q. At that point Jason called you back and offered you a  
10 job?  
11 A. Yes.  
12 Q. And you accepted that job?  
13 A. Yes.  
14 Q. But they never have given you a start date?  
15 A. I went in one day for training.  
16 Q. Do you remember what day that was?  
17 A. Last Wednesday.  
18 Q. And since then you haven't heard back in terms of when  
19 your shift --  
20 A. He said they working on the schedule so --  
21 Q. How much are you -- would you be paid at that position?  
22 A. I start off at \$8.75.  
23 Q. Do you have an understanding as to what your job duties  
24 or responsibilities would be?  
25 A. Basically cashier and counting inventory.

Page 27

1 Q. Prior to October 12, 2014, had you been involved in any  
2 accidents before that date?  
3 A. No.  
4 Q. No car accidents?  
5 A. No.  
6 Q. No slip and falls, nothing like that?  
7 A. No.  
8 Q. As of October, 2014, did you have a primary care doctor?  
9 A. I had applied for health care, yes.  
10 Q. Let me take a step back. Did you have health insurance  
11 in October, 2014?  
12 A. Not immediately. But I had applied.  
13 Q. Who did you apply with?  
14 A. With Molina Health Care. That's a Medicaid.  
15 Q. Was there a doctor you would typically see for a regular  
16 checkup or if you had a cold?  
17 MR. WOJNO: You're talking about the accident?  
18 MR. KUKLA: Yes.  
19 MR. WOJNO: He wants to know before the  
20 accident who you would go to.  
21 THE WITNESS: Well, Dr. Darwish.  
22 BY MR. KUKLA:  
23 Q. And you have seen Dr. Darwish since the accident?  
24 A. Yes.  
25 Q. And it's your recollection that you saw Dr. Darwish

Page 28

1 before the accident as well?  
2 A. No. I didn't have no reason to go see him.  
3 Q. That's all I'm going to find out -- sometimes you might  
4 have a family doctor you would go to, for example, if  
5 you want to get a yearly physical, if you had a cold or  
6 flu.  
7 A. They prescribed me high blood pressure medicine.  
8 Q. Who prescribed you high blood pressure medicine?  
9 A. Medicaid doctor, Dr. Darwish.  
10 Q. Other than Dr. Darwish, do you remember treating with  
11 any other doctors before the incident?  
12 A. No.  
13 Q. I saw in your Answers to Interrogatories that you had a  
14 tumor removed at Henry Ford Hospital.  
15 A. It wasn't Henry Ford. It was Beaumont. That was 2004.  
16 Q. Do you remember who the doctor was that you were  
17 treating with at the time?  
18 A. No, I cannot remember.  
19 Q. Was that something that you just went in? Do you know  
20 how you were diagnosed with that condition?  
21 A. No. It was like you could see it back then. It was  
22 a -- like a -- something coming out of my neck.  
23 Q. What side of your neck?  
24 A. Right here, up in here (indicating).  
25 Q. The right side of you neck?

Page 29

1 A. Yeah. Like a ball or something all growing out of my  
2 neck.  
3 Q. So in your -- you're describing a ball that was growing  
4 out of the left side -- I'm sorry, the right side of  
5 your neck; is that right?  
6 A. Yes.  
7 Q. Was it painful for you?  
8 A. No.  
9 Q. And then you went and had that removed?  
10 A. Yes. He said it came right out.  
11 Q. Any other surgeries other than that procedure before?  
12 A. No, no.  
13 Q. Were there any clinics you would go to just for, again,  
14 routine checkups or anything like that?  
15 A. No.  
16 Q. Other than that visit to Beaumont, have you been  
17 hospitalized? And I know you said that was in 2004 your  
18 recollection was.  
19 A. I think it was '04.  
20 Q. And in the five years before October of 2014, so from  
21 2009 to 2014, had you been hospitalized for any reason?  
22 A. No.  
23 Q. Did you suffer from any major illnesses?  
24 A. No.  
25 Q. Cancer? Diabetes?

8 (Pages 26 to 29)

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Page 30

1 A. No.  
2 Q. You did say you were on high blood pressure medication.  
3 A. Yes.  
4 Q. And that was before this incident, correct?  
5 A. Yes.  
6 Q. To your recollection, had you ever had an MRI of your  
7 neck or back before?  
8 A. Before?  
9 Q. Before the incident.  
10 A. No.  
11 Q. Ever have any X-rays of your neck or back that you're  
12 aware of before the incident?  
13 A. No.  
14 Q. Other than the -- were you on high blood pressure  
15 medication in October of 2014?  
16 A. Yes.  
17 Q. Any other medication you were taking --  
18 A. No.  
19 Q. -- at that time?  
20 A. No.  
21 Q. Before October 12th, 2014, were you a member of a gym or  
22 health club, anything like that?  
23 A. No, never.  
24 Q. Can you describe for me what types of hobbies or  
25 activities you engaged in or participated in before this

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1 incident happened?  
2 A. Hobbies like?  
3 Q. Did you exercise at all?  
4 A. Rode my bike everyday.  
5 Q. Any other type of exercise?  
6 A. No.  
7 Q. Can you describe for me, sir, what injuries you're  
8 claiming you sustained as a result of the incident on  
9 October 12th, 2014?  
10 A. Yes. I have a bulging disc, two bulging discs on my  
11 right side of my neck. I have a ruptured disc on my  
12 left side of my neck. I have a pinched nerve in my left  
13 shoulder and a hyperextended hip on my left side.  
14 Q. Let me make sure I got these all down. So your  
15 testimony is you have two bulging discs on the right  
16 side of your neck?  
17 A. Yes.  
18 Q. And you have a ruptured disc on the left side of your  
19 neck?  
20 A. Yes.  
21 Q. And you have a pinched nerve, your testimony is, in your  
22 left shoulder?  
23 A. Yes.  
24 Q. And a hyperextended hip on your left side?  
25 A. Yes.

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1 MR. WOJNO: For the record, he's going to rely  
2 upon what's set forth in his medical records for the  
3 extent of his injuries, just so you know.  
4 BY MR. KUKLA:  
5 Q. Are you claiming any type of head injury as a result of  
6 this incident?  
7 A. I have headaches all the time.  
8 Q. How frequently do you have a headache?  
9 A. At least five times a week.  
10 Q. Are you claiming a back injury as a result of this  
11 incident?  
12 A. Well, it's not -- if my hip didn't hurt, my back  
13 probably wouldn't hurt. But the way my hip is, it makes  
14 my back hurt.  
15 Q. Any complaints claiming injuries to your ankles or your  
16 knees?  
17 A. My foot. My left foot, it falls asleep a lot.  
18 Q. And you're associating that with the accident?  
19 A. It's got to be. It wasn't there before.  
20 Q. Did you ever -- did you ever experience neck pain before  
21 the date of the accident?  
22 A. No.  
23 Q. What about shoulder pain?  
24 A. No. That's my left side is my strong side. I'm a  
25 left-hander so all --

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1 Q. What about hip? Did you have any complaints of pain in  
2 your left hip before?  
3 A. No.  
4 Q. Let me ask you a couple questions now, Mr. Smith, about  
5 -- I'll ask you some more questions in a minute about  
6 the injuries that you're claiming but let's talk about  
7 the incident itself.  
8 A. Um-hmm.  
9 Q. My understanding is it occurred on October 12, 2014,  
10 correct?  
11 A. Yes.  
12 Q. And you were -- was this -- what time of the day was it?  
13 A. It was evening, at night.  
14 Q. I believe in your Answers to Interrogatories you said  
15 around 9:00 and 9:30 p.m.?  
16 A. Yes.  
17 Q. Does that sound about right?  
18 A. Yes.  
19 Q. And my understanding is October 12, 2014, was a Sunday.  
20 Is that your recollection?  
21 A. Yes. Sunday evening, yes.  
22 Q. And you were -- why don't you tell me first what  
23 happened. Describe the incident for me.  
24 A. What do you mean? Where do you want me to start?  
25 Q. Sure. My understanding -- my understanding is you claim

9 (Pages 30 to 33)

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1 you were riding your bike, this two wheeled bicycle,  
2 correct?  
3 A. Yes.  
4 Q. Were you by yourself or was somebody riding with you?  
5 A. I was alone.  
6 Q. Nobody walking with you or anything like that?  
7 A. No.  
8 Q. Where were you coming from?  
9 A. A friend's house.  
10 Q. And what is your friend's name?  
11 A. A lady named "P".  
12 MR. BERGER: Can you spell that?  
13 THE WITNESS: I'm not sure of her name. I  
14 wasn't really familiar with her. I just recently met  
15 her.  
16 BY MR. KUKLA:  
17 Q. You just knew her as "P"?  
18 A. As "P" that's what I was introduced to her.  
19 Q. Just -- you're saying you're referring to just the  
20 letter "P"?  
21 A. Yes. I think that's it. That's how I know her.  
22 Q. So were you at her residence?  
23 A. Yes.  
24 Q. And do you recall where that residence was?  
25 A. It's on Wayburn Street.

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1 and Eight Mile to Allard.  
2 Q. Just so I'm clear geographically, State Fair runs  
3 east/west, correct?  
4 A. Yes.  
5 Q. So Eight Mile is north. Seven Mile is south.  
6 A. Yes.  
7 Q. And you were -- so you left your home. You took State  
8 Fair. You rode your bike from your home --  
9 A. Um-hmm.  
10 Q. -- on State Fair. How did you get to Eight Mile?  
11 A. I take State Fair to Kelly and Kelly to Eastland. I  
12 actually went across Eastland parking lot to her house.  
13 Eastland is on Eight Mile Road.  
14 Q. And then from there you went to your sister's house?  
15 A. Yeah. And from my sister's --  
16 Q. And how did you -- what time did you leave your house to  
17 get to your sister's house; do you recall?  
18 A. It was football time. The Lions was playing so I went  
19 over there to watch football.  
20 MR. BERGER: One o'clock game that day?  
21 THE WITNESS: Yes.  
22 BY MR. KUKLA:  
23 Q. I won't ask you how they did but I think '14 was a  
24 pretty good season for them.  
25 A. They lost.

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1 Q. Do you remember an actual address?  
2 A. No.  
3 Q. Do you remember what part of -- what the main crossroads  
4 between -- for Wayburn -- for her house, I mean?  
5 A. Where she lived?  
6 Q. Yes.  
7 A. Devonshire and Harper, I think. Those two main streets.  
8 Q. And how had you gotten to her home?  
9 A. I rode my bike.  
10 Q. So you rode your bike from your home on State Fair?  
11 A. Actually I was leaving my sister's house to go to her  
12 house. I had left my house to go to my sister's house.  
13 Q. Where does your sister live?  
14 A. She stays in Harper Woods.  
15 Q. Do you remember the name of the street?  
16 A. Lodewyck.  
17 Q. So you had left your home. You were living on State  
18 Fair at that point, correct?  
19 A. Yes.  
20 Q. And you had left your home on State Fair and you rode  
21 your bike to your sister's home?  
22 A. Yes.  
23 Q. And what path -- how did you get there? What path did  
24 you take?  
25 A. I go State Fair going towards Kelly Road to Eight Mile

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1 Q. They lost?  
2 A. Unfortunately.  
3 Q. So you left -- so you stayed at your sister's until the  
4 game is over?  
5 A. Until four o'clock when the game is over.  
6 Q. How long did it take to bike from your home to your  
7 sister's home?  
8 A. Maybe 15 minutes.  
9 Q. What is your sister's name?  
10 A. Lakeitha.  
11 Q. And the last name?  
12 A. Smith.  
13 Q. Does anyone else -- was anyone else at the home when you  
14 were there?  
15 A. Her son.  
16 Q. What is her son's name?  
17 A. Trey.  
18 Q. Same last name?  
19 A. Brown.  
20 Q. Thank you. So after you left your sister's, where did  
21 you go from there?  
22 A. To "P's" house.  
23 Q. How did you get back -- how did you get to "P's" house  
24 on Wayburn?  
25 A. Go back the -- the opposite way from her house, through

10 (Pages 34 to 37)

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1 Kelly, Eastland; instead of going home, I went down  
2 Kelly straight to Houston Whittier.  
3 Q. From Houston Whittier to?  
4 A. From Houston Whittier to Wayburn.  
5 Q. How long were you at "P's" house?  
6 A. Well, actually I was supposed to go over there and gave  
7 her an estimate on painting her basement and ended up  
8 staying, watching the football game.  
9 Q. Were you doing any type of -- was that something you did  
10 painting --  
11 A. I did like handiwork --  
12 Q. -- like painting, handiwork?  
13 A. Yeah.  
14 MR. WOJNO: Only one person can talk at a  
15 time. She only has two hands, not four.  
16 THE WITNESS: Oh, I'm sorry.  
17 BY MR. KUKLA:  
18 Q. So that was something you did prior to October of 2014,  
19 handyman, painting, that type of work?  
20 A. Yes.  
21 Q. How often did you do that type of work?  
22 A. Whenever I got a call.  
23 Q. Have you done any of that type of work since October of  
24 2014? Haven't painted any homes or interiors?  
25 A. I tried to paint the house I live in now but it took

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1 A. The gas station.  
2 Q. Where was the gas station located?  
3 A. Seven Mile and Hayes.  
4 Q. Did you buy anything?  
5 A. They didn't have the pop I wanted so I kept going.  
6 Q. So you were riding your bike on Hayes going north?  
7 A. Right.  
8 Q. With the intent that you would get to State Fair and  
9 then make a right?  
10 A. Yes.  
11 Q. Do you recall which side of the of Hayes you were on,  
12 west side or east side?  
13 A. East side. I lived on the east side, so east side.  
14 Q. And do you recall the -- well, tell me what happened  
15 then. I mean describe for me the incident.  
16 A. Well, once I got to --  
17 Q. You were biking on Hayes, heading north?  
18 A. Um-hmm.  
19 Q. Did something happen?  
20 A. Yes.  
21 Q. Describe that for me.  
22 A. I crossed one street. Once I crossed the street, I was  
23 riding and then I lost control, just fell.  
24 Q. Okay. What -- do you remember what the closest --  
25 you're on Hayes, correct?

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1 forever so I just stopped.  
2 Q. Why did it take forever?  
3 A. Like I say, my left arm, it comes and goes. It does  
4 what it wants.  
5 Q. After -- so after -- do you recall about approximately  
6 what time in the evening it was or the afternoon it was  
7 when you left "P's" house?  
8 A. Maybe 8:30, close to nine.  
9 Q. And then you were heading home?  
10 A. Yes.  
11 Q. Which route did you take back home?  
12 A. I tried to find safe routes because it was dark. So I  
13 take Wayburn to Outer Drive and Outer Drive to Hayes and  
14 Hayes straight home.  
15 Q. When you got to -- now Hayes -- Hayes runs north/south,  
16 correct?  
17 A. Yes.  
18 Q. So were you -- were you south of Seven Mile when you got  
19 to Hayes?  
20 A. When I got to Hayes, yes, yes. I was actually at --  
21 maybe two miles from Seven Mile.  
22 Q. South of Seven Mile.  
23 A. Yes.  
24 Q. Did you stop anywhere between "P's" house and the  
25 accident?

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1 A. Yes.  
2 Q. -- what the closest crosstreet was to where the accident  
3 happened?  
4 A. Liberal.  
5 Q. Liberal Street?  
6 A. I had just crossed Liberal.  
7 Q. And you're not -- and you're not yet -- are you familiar  
8 with a street name Tacoma?  
9 A. Yes.  
10 Q. You had not yet got to Tacoma?  
11 A. That's a block before State Fair.  
12 Q. There would be State Fair, Tacoma. Do you know what the  
13 next one is --  
14 A. I'm not sure.  
15 Q. -- if you remember?  
16 A. I'm not sure.  
17 Q. And then Liberal?  
18 A. Yes.  
19 Q. So you were north of liberal?  
20 A. South of Liberal. I was coming south of liberal. Well,  
21 when I fell I was north of Liberal.  
22 Q. That's what I'm saying.  
23 A. Yes.  
24 Q. So you had gone from Seven Mile and you were heading  
25 north toward State Fair?

11 (Pages 38 to 41)

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- 1 A. Yes.
- 2 Q. And you crossed Liberal. What were the -- what was the
- 3 lighting conditions like when you were riding?
- 4 A. Terrible.
- 5 Q. Describe for me what you mean, terrible.
- 6 A. Just dark, dark.
- 7 Q. It was nighttime obviously.
- 8 A. Yes.
- 9 Q. Were there public lighting on?
- 10 A. No.
- 11 Q. No street lights?
- 12 A. No. That's why I was on the sidewalk.
- 13 Q. You're saying that -- but do you know if there are
- 14 street lights --
- 15 A. Now, yes.
- 16 Q. -- along Hayes?
- 17 A. Yes.
- 18 Q. You're saying they weren't there in October of 2014?
- 19 A. The way the sidewalk is, it's far away from the street
- 20 because the grass is wide. So they more -- the lights
- 21 more covered the street than the sidewalk.
- 22 Q. What type of bike were you riding?
- 23 A. Mountain bike, regular mountain bike.
- 24 Q. Is it equipped with reflectors?
- 25 A. Yes.

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- 1 Q. Is there any other type of lighting on it, such as like
- 2 a battery powered light that you could turn off, a
- 3 headlight?
- 4 A. No.
- 5 Q. And you said you were riding on the sidewalk.
- 6 A. Yes.
- 7 Q. Was there a reason you weren't riding in the street?
- 8 A. Get killed. It gets too dark to be in the street. I
- 9 rather be on the sidewalk because I -- I didn't want to
- 10 get hit by a car. Hayes is a pretty busy street.
- 11 Q. Did you see traffic going up and down as you were
- 12 riding --
- 13 A. Yes.
- 14 Q. -- before the accident?
- 15 A. Yes.
- 16 Q. Did you see anybody walking on the sidewalk?
- 17 A. There was a guy on the other side of the street.
- 18 Q. But not on the side you were on?
- 19 A. Not my side, no.
- 20 Q. As you turned -- so you were at Seven and Hayes?
- 21 A. Um-hmm.
- 22 Q. Before this happened at the gas station?
- 23 A. Yes.
- 24 Q. And then you turned, you started proceeding north on
- 25 Hayes?

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- 1 A. Yes.
- 2 Q. Before the incident, did you observe any -- any cones,
- 3 orange cones, any caution tape, any safety signs,
- 4 anything --
- 5 A. Not in that vicinity.
- 6 Q. -- at all? Had you seen any when were you riding?
- 7 A. No, not that night.
- 8 Q. Not that night?
- 9 A. No.
- 10 Q. So nothing between Seven Mile and Liberal, for example?
- 11 A. No.
- 12 Q. And how were you -- you testified in your words, I think
- 13 it was described as terrible, the lighting?
- 14 A. Just dark.
- 15 Q. How were you able to ride? You were able to see
- 16 somewhat, correct?
- 17 A. I'm pretty familiar with the area, so yes.
- 18 Q. When you say you're familiar with the area, had you rode
- 19 your bike on Hayes heading in that direction on Hayes
- 20 before?
- 21 A. Yes.
- 22 Q. How frequently would you ride your bike on the sidewalk?
- 23 A. I didn't take Hayes a lot but I would take the street --
- 24 what is the name of that street? A side street. What
- 25 was the name of that street? It was the street

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- 1 before -- two streets, I lived in between. Crusade,
- 2 that's the name of it.
- 3 Q. Explain for me how the incident happened. I mean did
- 4 you fall off the bike? What are you claiming happened?
- 5 A. When I got to the area, I fell -- my front wheel just
- 6 declined. And I panicked and I tried to catch myself
- 7 and fell.
- 8 Q. Do you know what caused the front wheel to decline?
- 9 A. Something missing -- missing sidewalk.
- 10 Q. When did you first realize that there was a missing
- 11 sidewalk?
- 12 A. When I fell.
- 13 Q. You didn't observe the missing sidewalk before?
- 14 A. It was too dark to see.
- 15 Q. Where were you -- what direction were you looking when
- 16 you were riding your bike at the moment you fell?
- 17 A. I was looking straight ahead.
- 18 Q. Were you looking at the ground?
- 19 A. No.
- 20 Q. Had you been looking at the ground, would you have been
- 21 able to see the missing sidewalk?
- 22 A. Probably not.
- 23 Q. How did you realize there was a missing sidewalk?
- 24 A. I fell.
- 25 Q. How did you see it? You were able to see it after you

12 (Pages 42 to 45)



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1 fell?  
2 A. Yeah. Once I got up, yes.  
3 Q. So once you stood up, you could see the missing  
4 sidewalk?  
5 A. Yes.  
6 Q. Presumably you were standing up and looking down?  
7 A. Yes.  
8 Q. Any reason why you didn't see it before you fell?  
9 A. It was dark.  
10 Q. But you were able to see it after you fell?  
11 A. Once I fell into it, yes.  
12 Q. So it was visible after you fell?  
13 A. Once I fell, I had no choice but to see it.  
14 Q. And you looked down and saw it?  
15 A. Yes.  
16 Q. Did you try to stop the bike at all?  
17 A. It was actually too late because it just declined  
18 (indicating). It just declined (indicating).  
19 MR. WOJNO: For the record, he's indicating  
20 his hands going in a downward motion. He keeps showing  
21 how his body went when he says declined.  
22 BY MR. KUKLA:  
23 Q. And I want to try and clarify just so I understand, sir.  
24 I'm just asking -- I don't know if it's even  
25 clarification. At some point did you try your hand

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1 left with my leg.  
2 Q. And how did you land? What side?  
3 A. I landed on my back and my head.  
4 Q. Did you fall on the pavement or on the grass?  
5 A. On the grass.  
6 Q. And to your knowledge did anyone witness this?  
7 A. There was a guy walking by that helped me go home.  
8 Q. And how far -- sorry. How did you -- so at some point  
9 after you're laying on your back -- you fell on your --  
10 you're laying on your back; is that correct?  
11 A. I felt on my back, yes.  
12 Q. At some point you get up, correct.  
13 A. Yes.  
14 Q. Were you able to get up on your own?  
15 A. I stumbled.  
16 Q. Did someone help you get up or did you get up on your  
17 own?  
18 A. I stood up real fast. I stumbled. And that's when  
19 somebody was standing there to catch me. He was like,  
20 whoa, are you okay.  
21 Q. Do you know where that person had been or where he was  
22 before?  
23 A. He was across the street.  
24 Q. Was he in a car? Was he walking?  
25 A. Walking.

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1 brakes?  
2 A. Yes.  
3 Q. Did you try to brake the vehicle -- the bicycle at any  
4 point?  
5 A. It was too late. Once I -- it was too late.  
6 Q. So is the answer no, you did not try to brake?  
7 A. No.  
8 Q. What stopped the bike then?  
9 A. The wheel turned.  
10 Q. And is it your testimony that you fell off the bike?  
11 A. Yes.  
12 Q. Do you have any idea how fast you were riding? How many  
13 miles per hour you were going?  
14 A. No. I'm not sure.  
15 Q. Were you biking at like a leisurely pace or in a hurry?  
16 A. Just rolling along.  
17 Q. Can you describe for me how you fell?  
18 A. It was so fast. Let me see. It declined, the wheel  
19 turned, I went to put my leg down to catch myself.  
20 Q. What leg?  
21 A. My left leg. And once it hit the ground, it jammed and  
22 catapulted me to the left.  
23 Q. Your left leg jammed?  
24 A. It jammed into the dirt and catapulted me some kind of  
25 way after the bike had twisted. I catapulted to the

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1 Q. Do you know his name?  
2 A. Darryl.  
3 Q. Did you ever ask Darryl if he saw what happened?  
4 A. Well, what he told me was I was there and then I wasn't.  
5 Q. Meaning you were there and then you weren't?  
6 A. Yeah. He looked over and saw me and he looked again and  
7 he didn't see me.  
8 Q. And then how did you get -- did you go home after  
9 falling?  
10 A. Yes.  
11 Q. How did you get home?  
12 A. He helped me walk my bike home.  
13 Q. Did you seek any type of medical attention that evening?  
14 A. No. That evening, no. I fell right to sleep.  
15 Q. Were you in any type of pain when you left --  
16 A. Yes.  
17 Q. -- left the accident scene?  
18 A. But I thought shock. I be all right.  
19 Q. What was hurting specifically?  
20 A. My head and my leg.  
21 Q. Your left leg?  
22 A. Yes.  
23 Q. Was your neck hurting at all?  
24 A. At the time I had a headache so I wasn't sure if it was  
25 my neck or just my head.

13 (Pages 46 to 49)



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1 Q. Was your shoulder hurting?  
2 A. Yes.  
3 Q. My understanding of your testimony is you didn't land on  
4 your left shoulder?  
5 A. I landed on my left side. When I flipped over, I landed  
6 hard on one side of my body.  
7 Q. I just want to be clear. Is it your testimony you  
8 landed on your left side or your back?  
9 A. My left side.  
10 Q. So not your back?  
11 A. I did a flip. So I just called it my back because I did  
12 a flip.  
13 Q. Flip meaning after you hit the ground?  
14 A. Yes. Once I flipped off my bike, I landed like sideways  
15 (indicating). Like I can't describe -- like sideways  
16 (indicating).  
17 MR. WOJNO: For the record, he's indicating to  
18 the left with his arms up.  
19 BY MR. KUKLA:  
20 Q. So this gentleman, Darryl, helps you walk the bike back  
21 home?  
22 A. Yes.  
23 Q. And you continued walking on Hayes to State Fair?  
24 A. Well, once he took me home --  
25 MR. WOJNO: No, he doesn't want to know where

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1 Darryl went. He wants to know where you went.  
2 THE WITNESS: I went in the house.  
3 BY MR. KUKLA:  
4 Q. But did you continue walking Hayes north?  
5 A. Yes.  
6 Q. As you're walking, did you observe any type of -- any  
7 orange cones, any barricades, any tape, anything like  
8 that around any portion of the sidewalk?  
9 A. At State Fair. Once I got to State Fair.  
10 Q. So what did you specifically observe at State Fair?  
11 A. Well, they had put barricades on the sidewalk on the  
12 opposite side of the street.  
13 Q. On the opposite side?  
14 A. Yes.  
15 Q. Had you seen those barricades before?  
16 A. No. Well, they were there that day I left, that's why I  
17 went the opposite way. But I didn't go down Hayes. You  
18 could see them from my house. You could look out the  
19 door.  
20 Q. My understanding is you took some pictures the next  
21 morning; is that correct?  
22 A. Yes.  
23 Q. Did you go by yourself to take the photographs?  
24 A. Yes.  
25 MR. KUKLA: Can we mark this one?

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1 SMITH EXHIBIT 1  
2 WAS MARKED BY THE REPORTER  
3 FOR IDENTIFICATION  
4 BY MR. KUKLA:  
5 Q. Mr. Smith, I've been handed what has been marked as  
6 Exhibit 1. Is that a photograph that you took?  
7 MR. WOJNO: There's two in the picture.  
8 BY MR. KUKLA:  
9 Q. First, let's start with the one that depicts, looks like  
10 a sidewalk?  
11 A. Yes.  
12 Q. That's a photograph you took?  
13 A. Yes.  
14 Q. Is that the area where you fell?  
15 A. Yes.  
16 Q. Do you know if that -- is that -- if you're looking at  
17 the picture, is it facing north or is it facing south?  
18 A. It's facing north.  
19 Q. So you would have been coming up -- as you're heading  
20 north, you would have been looking at that picture that  
21 way (indicating)? I mean looking straight ahead,  
22 correct?  
23 A. Yeah.  
24 Q. Did you also take a picture of this -- there's a  
25 reference to Parsons Brinckerhoff?

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1 A. Yes.  
2 Q. What is that a picture of?  
3 A. It was some construction that were out there the day  
4 after.  
5 Q. And the day after would have been Monday, the 13th?  
6 A. No. They didn't show up Monday. They showed up  
7 Tuesday. They weren't there on Monday.  
8 Q. The picture of the -- that depicts the grass and the  
9 sidewalk, and you testified that's where you fell, when  
10 did you take that picture?  
11 A. On Monday.  
12 Q. Monday, the 13th of October?  
13 A. Yes.  
14 Q. The next morning?  
15 A. The next morning, yes.  
16 Q. When did you take the picture of Parsons Brinckerhoff?  
17 A. A couple days after that.  
18 Q. And was that just a vehicle you saw in the area?  
19 A. They were sitting on the corner of State Fair and Hayes.  
20 There was a few trucks out there that day.  
21 MR. KUKLA: Mark this one too.  
22 SMITH EXHIBIT 2  
23 WAS MARKED BY THE REPORTER  
24 FOR IDENTIFICATION  
25 BY MR. KUKLA:

14 (Pages 50 to 53)

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1 Q. Mr. Smith, you've now been handed what is marked as  
2 Deposition Exhibit 2, which depicts two photographs.  
3 Have you seen these photographs before?  
4 A. Yes.  
5 Q. Did you take these photographs?  
6 A. Yes.  
7 Q. Were they taken at the same time on October 13?  
8 A. Yes.  
9 Q. The picture on the left, is that -- do you know what  
10 that is a picture of?  
11 A. A picture of a bus stop on the opposite side of the  
12 street.  
13 Q. Opposite side of where you fell?  
14 A. Yes.  
15 Q. Directly opposite or further?  
16 A. Like catty corner. Like a little further but it's like  
17 catty corner.  
18 Q. And that's Hayes?  
19 MR. WOJNO: Can we go off the record?  
20 (An off the record discussion was held)  
21 BY MR. KUKLA:  
22 Q. Mr. Smith, looking at what's been marked as Exhibit --  
23 photograph A on Exhibit 2 --  
24 A. Um-hmm.  
25 Q. -- there's two orange cones or does that appear to be

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1 MR. WOJNO: Before or after?  
2 MR. KUKLA: Before.  
3 THE WITNESS: Before that day?  
4 BY MR. KUKLA:  
5 Q. Yes.  
6 A. I saw them but they wasn't on my street. They were  
7 further down.  
8 Q. On Hayes though or --  
9 A. Yes.  
10 Q. Okay.  
11 MR. KUKLA: Mark this one.  
12 SMITH EXHIBIT 3  
13 WAS MARKED BY THE REPORTER  
14 FOR IDENTIFICATION  
15 BY MR. KUKLA:  
16 Q. Mr. Smith, you've been handed what's marked as Exhibit  
17 3. Did you take that photograph?  
18 A. Yes.  
19 Q. Was that taken on October 13, 2014?  
20 A. Yes.  
21 Q. Can you describe for us what is that a photograph of?  
22 A. Where I landed at.  
23 Q. So you landed on the --  
24 A. Dirt.  
25 Q. -- the left side of the picture, there's grass and dirt?

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1 two orange cones in that picture?  
2 MR. WOJNO: Orange barrels.  
3 MR. KUKLA: Orange barrels. Sorry.  
4 THE WITNESS: Yes.  
5 BY MR. KUKLA:  
6 Q. That's not the area where you claim you fell, correct?  
7 A. No.  
8 Q. It's on the opposite side of Hayes?  
9 A. Yes.  
10 Q. Then the photograph that's depicted here, Exhibit B --  
11 or sorry, photograph B, what is that a picture of?  
12 A. A picture of the cones on State Fair and Hayes.  
13 MR. WOJNO: You mean the barrels.  
14 THE WITNESS: The barrels, yes.  
15 BY MR. KUKLA:  
16 Q. And you testified that you had seen those barrels before  
17 this incident, correct?  
18 A. Yes.  
19 Q. And the yellow tape, there's yellow tape as well?  
20 A. Yes.  
21 Q. Having lived on State Fair you frequented Hayes  
22 regularly; is that fair to say?  
23 A. When I had to.  
24 Q. Had you seen people or construction crews working on  
25 Hayes on the sidewalk?

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1 A. Yes.  
2 MR. KUKLA: Exhibit 4.  
3 SMITH EXHIBIT 4  
4 WAS MARKED BY THE REPORTER  
5 FOR IDENTIFICATION.  
6 BY MR. KUKLA:  
7 Q. Mr. Smith, I've handed you what's marked as Exhibit 4.  
8 There's two photographs in that picture which we've  
9 marked as A and B. Can you describe for us what  
10 photograph A is?  
11 A. This is a picture of the street where I crossed.  
12 Q. What was the reason for taking that photograph?  
13 A. Trying to remember where I fell.  
14 Q. And your testimony was you fell on Hayes, north of  
15 Liberal Street?  
16 A. Yes.  
17 Q. What is picture B a photograph of?  
18 A. Showing where they dug the sidewalk up, dug the bus stop  
19 up.  
20 Q. Is that the area where you fell?  
21 A. Yes.  
22 Q. Your testimony is you landed in that grass and dirt  
23 area --  
24 A. Yes.  
25 Q. -- that's depicted in photograph B?

15 (Pages 54 to 57)

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1 A. Yes.  
2 Q. And then there's a pole there with a bus stop sign?  
3 A. Um-hmm.  
4 Q. Do you see that there appears to be some type of yellow  
5 paint on the pole?  
6 A. Um-hmm.  
7 MR. WOJNO: For the record, that's there two  
8 year prior to.  
9 MR. KUKLA: Was it?  
10 MR. WOJNO: The yellow tape. We discussed it  
11 and viewed it in imagery two years prior to the date of  
12 loss.  
13 BY MR. KUKLA:  
14 Q. When you were riding your bike that night did you  
15 observe that yellow tape on the pole?  
16 A. No.  
17 MR. KUKLA: Mark this one too.  
18 SMITH EXHIBIT 5  
19 WAS MARKED BY THE REPORTER  
20 FOR IDENTIFICATION  
21 BY MR. KUKLA:  
22 Q. Sir, you've been handed what's marked as Deposition  
23 Exhibit 5, which has two photographs marked A and B.  
24 Did you take those photographs?  
25 A. Yes.

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1 Q. And is photograph A, is that a picture of the area where  
2 you fell?  
3 A. Yes.  
4 Q. And so that is --  
5 MR. BERGER: It's looking south.  
6 MR. KUKLA: Looking south.  
7 MR. WOJNO: Correct. We're in agreement.  
8 BY MR. KUKLA:  
9 Q. And you fell in an area that would be to the right of  
10 photograph A?  
11 A. Yes.  
12 Q. And photograph B then depicts the area where you fell --  
13 A. Yes.  
14 Q. -- and has the bus stop sign with the pole and the  
15 yellow tape?  
16 A. Yes.  
17 MR. KUKLA: I think the last photograph I have  
18 for you is this one.  
19 SMITH EXHIBIT 6  
20 WAS MARKED BY THE REPORTER  
21 FOR IDENTIFICATION  
22 BY MR. KUKLA:  
23 Q. Mr. Smith, you've been handed a photograph or what's  
24 been marked as Deposition Exhibit 6, with photographs A  
25 and B. Can you describe -- did you take those two

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1 photographs?  
2 A. Yes.  
3 Q. What does photograph A depict?  
4 A. Well, actually I was trying to see if I could pick up  
5 the actual spot where I fell from these cones to down  
6 there to show that there's nothing down there.  
7 MR. BERGER: What direction are you looking in  
8 A there? Is that south?  
9 THE WITNESS: That's south, yes.  
10 MR. BERGER: Down Hayes there?  
11 THE WITNESS: Down Hayes, yes.  
12 BY MR. KUKLA:  
13 Q. Toward the area where you fell?  
14 A. Wait a minute. No, no, no, I'm sorry. This is the  
15 opposite picture. The opposite side of the street of  
16 Hayes and State Fair.  
17 Q. And then did you take a photograph -- the picture that's  
18 marked as B, what -- did you take that picture the same  
19 day or couple days later?  
20 A. A few days later. I took a picture of the trucks  
21 together.  
22 Q. And you saw that truck in the vicinity?  
23 A. Yeah. I just took pictures of everybody that was  
24 together.  
25 Q. Looking back again at Exhibit 1, photograph --

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1 MR. WOJNO: I don't think we separated them.  
2 Do you want me to do that?  
3 MR. KUKLA: Yeah, if you can.  
4 MR. WOJNO: For the record. I've marked  
5 photograph A as the Parsons Brinckerhoff signed truck  
6 and door and photograph B is the sidewalk in Exhibit 1.  
7 BY MR. KUKLA:  
8 Q. Sir, does looking at photograph B of Exhibit 1, does  
9 that accurately depict the condition of the sidewalk as  
10 you observed it after you fell on October 12th, 2014?  
11 A. Yes.  
12 Q. And this was mid October so I'm assuming even though  
13 it's Michigan, there was no snow or anything that  
14 evening?  
15 A. No. It was dry and clear.  
16 Q. You're not aware of anything else that would have  
17 obscured the condition as depicted in Exhibit 1-B?  
18 A. No.  
19 Q. And it's your testimony that there were no orange  
20 barrels around this area?  
21 A. No.  
22 Q. And there were no yellow caution tape around the area?  
23 A. No.  
24 MR. WOJNO: Your answer meaning no, means  
25 that's correct, that there was none?

16 (Pages 58 to 61)

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1 THE WITNESS: Right, that's correct.  
2 BY MR. KUKLA:  
3 Q. And it's your testimony -- did you observe any sidewalk  
4 closed signs while you were riding your bike north on  
5 Hayes?  
6 A. No.  
7 Q. And prior to the incident after you turned off of Seven  
8 Mile and went on to Hayes north, had you observed any  
9 barrels or caution tape or anything of that sort?  
10 A. No.  
11 Q. The next day though when you went back you observed them  
12 across the street though?  
13 A. Yes. Well, I observed the ones that was on my block.  
14 But Seven Mile and Hayes and in that area, no.  
15 Q. Do you recall when you had last been in that area Seven  
16 Mile and Hayes before October 12?  
17 A. No. Maybe Thursday. I'm not sure.  
18 Q. The Thursday before the 12th?  
19 A. No. It was Monday, Tuesday because I walked those two  
20 days.  
21 Q. And just so we're clear, Monday and Tuesday before --  
22 A. Yes.  
23 Q. -- the Sunday when you claim you fell?  
24 A. Yes. It was Monday and Tuesday before that.  
25 Q. Had you walked this same area?

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1 before October 12, 2014, was the previous Tuesday?  
2 A. Yes.  
3 Q. When you were walking the sidewalk -- when you were  
4 walking to work on that Monday and Tuesday, did you  
5 observe any people, construction crews or anybody  
6 working on the road or the sidewalk?  
7 A. They were more closer to Six Mile.  
8 Q. So further south?  
9 A. Yes.  
10 Q. Now you did seek medical attention on October 13,  
11 correct?  
12 A. Yes.  
13 Q. Let me ask you how did you -- when you went to take  
14 these photographs, how did you get there? Did you walk  
15 to the area?  
16 A. I limped around because I wanted to talk to somebody.  
17 Q. Was anybody -- did anyone go with you?  
18 A. No.  
19 Q. And you were able to walk that area?  
20 A. It wasn't easy but I did it.  
21 Q. Do you remember how much time you spent out there when  
22 you were taking these photographs?  
23 A. It wasn't long. Maybe ten minutes.  
24 Q. Did you talk to anybody when you were out there?  
25 A. No.

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1 A. I walked Hayes, yes.  
2 Q. Hayes from Seven Mile to --  
3 A. I walked to work that day, yes.  
4 Q. Which direction would you go when you're walking to  
5 work?  
6 A. Straight out Hayes to Houston Whittier.  
7 Q. Would you go -- which side of Hayes would you go on?  
8 The same side you were riding your bike or the other  
9 side?  
10 A. Same side I ride my bike.  
11 Q. Was it Monday or Tuesday?  
12 A. Monday and Tuesday. I walked to work those two days.  
13 Q. Did you observe --  
14 A. There was no construction and the sidewalk was fine.  
15 Q. So the sidewalk that's pictured -- the picture of the  
16 sidewalk -- the condition of the sidewalk that's  
17 depicted in Exhibit 1, photograph B, is not what you  
18 observed when you were walking to work --  
19 A. No.  
20 Q. -- Monday or Tuesday before the incident?  
21 A. No.  
22 Q. Do you know how long the sidewalk had been in this  
23 condition?  
24 A. No.  
25 Q. And the last time you would have been on that sidewalk

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1 Q. And again, you didn't observe any work crew that day?  
2 A. That day, no.  
3 Q. And then at some point you went -- you went to the ER on  
4 the 13th?  
5 A. Yes, St. John.  
6 Q. Is that St. John on Moross?  
7 A. Moross.  
8 Q. And you were seen in the ER?  
9 A. Yes.  
10 Q. And do you remember what they did for you when you were  
11 there?  
12 A. They took an X-ray of my neck and back and prescribed me  
13 some medication. And we did a few little tests on my  
14 arm and leg.  
15 Q. Was this pain medication they prescribed?  
16 A. Yes.  
17 Q. And you were not on the pain medication before the  
18 incident?  
19 A. No.  
20 Q. And then were you discharged home from the ER?  
21 A. Yes.  
22 Q. So you weren't admitted to the hospital?  
23 A. No.  
24 Q. Were you given any instructions to follow-up with --  
25 A. Yes.

17 (Pages 62 to 65)

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1 Q. Just so I complete the question, were you given any  
2 instructions to follow-up with a physician?  
3 A. Yes.  
4 Q. Who -- who did you -- did you follow-up with anyone?  
5 A. Yes.  
6 Q. Who did you follow-up with?  
7 A. The first week I followed with Dr. Darwish.  
8 Q. Is that a male or female?  
9 A. Male.  
10 Q. Did you also return to the ER on the 14th?  
11 A. On the 14th?  
12 Q. Yes, of October.  
13 A. I don't remember going back.  
14 Q. So you went -- your testimony -- your recollection --  
15 and we will get your medical records. But your  
16 recollection is you went on the 13th, correct?  
17 A. Yes.  
18 Q. And then you were discharged and they instructed you to  
19 follow-up?  
20 A. She told me to seek more help. That's what she told me.  
21 She said you're going to need some more medical  
22 attention.  
23 Q. Did they tell you what injury -- did they make a  
24 diagnosis?  
25 A. She said my neck was in bad shape.

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1 A. Yeah, Van Dyke Spinal because it wouldn't stop hurting.  
2 Q. What wouldn't stop hurting?  
3 A. My neck and my leg. It would not stop. So I had to go  
4 see somebody who would really help me.  
5 Q. Now Dr. Darwish you had treated with before the  
6 incident, correct?  
7 A. Yes.  
8 Q. Had you ever treated at Van Dyke Spinal before?  
9 A. No. Never heard of them.  
10 Q. How did you become aware of Van Dyke Spinal?  
11 A. I think it was my attorney. They recommended that  
12 place, I think, because I never heard of them.  
13 Q. And do you recall when you first went to Van Dyke  
14 Spinal? Does November, 2014, sound about right?  
15 A. It was like the end of November, all the way until  
16 January I was going to see them for physical therapy.  
17 Q. Were they also doing chiropractic services?  
18 A. They was trying to find out what was going on with me.  
19 So they the ones that sent me to MRI.  
20 Q. And then at some point you said you stopped treating  
21 with -- at Van Dyke Spinal?  
22 A. Once he got the information from the MRI, he sent me to  
23 Michigan Head & Spine.  
24 Q. Do you remember who the name of the doctor was at Van  
25 Dyke Spinal?

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1 Q. And this is the ER doctor?  
2 A. Yes.  
3 Q. Do you recall anything else she said?  
4 A. She told me to make sure I seek more medical attention.  
5 Q. Do you recall the name of the doctor?  
6 A. No.  
7 Q. And you followed up approximately, you said, about a  
8 week later with doctor --  
9 A. Dr. Darwish.  
10 MR. WOJNO: He said he saw Dr. Darwish that  
11 week not a week later.  
12 BY MR. KUKLA:  
13 Q. I'm sorry.  
14 A. Let me see, I went to the doctor on Monday. I went to  
15 Dr. Darwish on a -- I think on a Thursday or Friday  
16 because I was still hurting.  
17 Q. That same week?  
18 A. Yes.  
19 Q. What, if anything, did Dr. Darwish do for you?  
20 A. Nothing. He just told me it takes time to heal. So I  
21 went for another physician. I went for a second  
22 opinion.  
23 Q. Where did you go for a second opinion?  
24 A. Um, I probably went Van Dyke -- what was his name?  
25 Q. Is that Van Dyke Spinal?

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1 A. Um, he wasn't a doctor. He was a physical therapist.  
2 Oh, man. I can't remember his name.  
3 Q. Was there a Dr. Michael Meeron?  
4 A. Meeron, that's it, Meeron.  
5 Q. And is he with a chiropractor; do you know?  
6 A. Yes.  
7 Q. And you saw him at Van Dyke Spinal Rehabilitation  
8 Center?  
9 A. Yes.  
10 Q. How did you get to -- they're located in Warren,  
11 correct?  
12 A. Yes.  
13 Q. How did you get to their offices?  
14 A. Either I would catch the bus or get a ride.  
15 Q. And if the records say that you were discharged from Van  
16 Dyke Spinal on February 3rd, 2015, does that sound about  
17 right?  
18 A. Yes.  
19 Q. And then you also started treating at Michigan Head &  
20 Spine?  
21 A. Yes.  
22 Q. You testified you were referred there by --  
23 A. Dr. Meeron.  
24 Q. At Michigan Head & Spine you've seen Dr. John Marshall;  
25 is that right?

18 (Pages 66 to 69)

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- 1 A. Yes.
- 2 Q. Are you still seeing Dr. Marshall?
- 3 A. Yes.
- 4 Q. When was the last time you saw Dr. Marshall?
- 5 A. The 28th of April.
- 6 Q. Of 2016?
- 7 A. Yes.
- 8 Q. What type of treatment has Dr. Marshall or the other
- 9 professionals at Michigan Head & Spine provided to you?
- 10 A. I've gotten another MRI on my head. I also received a
- 11 epidural shot in my spine and medication and a lot of
- 12 physical therapy.
- 13 Q. The epidural shot, was that only one?
- 14 A. I was supposed to get three but when they gave me the
- 15 first one, it scared the hell out of me. He put me to
- 16 sleep and I woke up in that room and I was afraid to go
- 17 back for a while. I was afraid.
- 18 Q. So you've only had one epidural shot?
- 19 A. Yes.
- 20 Q. Are there plans to have any more?
- 21 A. Yes.
- 22 Q. Is there one currently scheduled?
- 23 A. Well, he told me whenever I'm ready, he would schedule
- 24 it.
- 25 Q. Are you also undergoing physical therapy?

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- 1 A. Not now.
- 2 Q. When did you --
- 3 A. They gave me a pamphlet to follow for neck exercises and
- 4 stuff.
- 5 Q. So stuff to do at home?
- 6 A. I do at home physical therapy, yes.
- 7 Q. Were you going somewhere for physical therapy at some
- 8 point?
- 9 A. Just the Van Dyke Spinal.
- 10 Q. So nowhere other than at Van Dyke Spinal?
- 11 A. That's the only place I went for physical therapy.
- 12 Q. And you stopped treating at Van Dyke Spine in February
- 13 of 2015?
- 14 A. Yes.
- 15 Q. So no physical therapy since then?
- 16 A. No.
- 17 Q. Have you had any surgeries?
- 18 A. No.
- 19 Q. Are there any surgeries scheduled?
- 20 A. He told me it was dangerous.
- 21 Q. Who told you?
- 22 A. Meeron. He said 70/30 chance that I would die under the
- 23 knife.
- 24 Q. Do you know what type of surgery he was talking about?
- 25 A. Neck, neck surgery.

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- 1 Q. Now he is a chiropractor to your understanding?
- 2 A. Yes.
- 3 Q. He wouldn't have been actually performing any surgery on
- 4 you?
- 5 A. No.
- 6 Q. Did he specify what type of neck surgery you might need?
- 7 A. No. He just said if I even thought of it, it would
- 8 probably kill me because of where my injuries are.
- 9 Q. Has Dr. Marshall ever indicated that you need surgery?
- 10 A. He said it's an option but it was up to me.
- 11 Q. How regularly -- I know you testified that you saw
- 12 Dr. Marshall last on April 28, 2016.
- 13 A. Yes.
- 14 Q. How regularly are you seeing him?
- 15 A. Well, I had the epidural in August. Well, no. No, I'm
- 16 sorry, in July and it lasted until March. So I was able
- 17 to physically do a lot more than what I am now.
- 18 Q. So the epidural relieved the pain?
- 19 A. Yes.
- 20 Q. Are you on any current pain medication?
- 21 A. Tramadol.
- 22 Q. And that's prescribed medication?
- 23 A. Yes.
- 24 Q. And is Dr. Marshall the one that's prescribed that?
- 25 A. Yes.

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- 1 Q. How frequently do you take that?
- 2 A. Every day four times a day.
- 3 Q. And where do you get your prescriptions filled?
- 4 A. CVS pharmacy, Conner and Gratiot.
- 5 Q. Any other medications you're currently taking?
- 6 A. Besides my blood pressure, they give me a Robaxin for
- 7 muscle relaxing.
- 8 Q. Do you have an appointment scheduled with Dr. Marshall
- 9 coming up or any future --
- 10 A. Well, he says I got to follow-up in August, to come see
- 11 him again in August. But he told me anywhere between
- 12 there, if I'm ready to have that second epidural, to
- 13 give him a call.
- 14 Q. Is your -- is your neck -- are you currently
- 15 experiencing pain in your neck?
- 16 A. Yes.
- 17 Q. Is it on the right side of your neck, the left side?
- 18 A. It's like just straight down the middle, just --
- 19 Q. On a scale of one to ten, with one being the least
- 20 amount of pain and ten being the most severe, where
- 21 would you rank the pain in your neck presently?
- 22 A. Nine.
- 23 Q. Is that consistent or does it fluctuate?
- 24 A. Well, my medication, if I take -- like if I take it, my
- 25 medication, in the morning then I take it in the

19 (Pages 70 to 73)



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1 afternoon I don't feel nothing until time to go to bed.  
2 And when it wears down, I take them just before I go to  
3 bed.  
4 Q. And then currently are you experiencing pain in your  
5 shoulder, left shoulder?  
6 A. Only when I use it.  
7 Q. What types of things cause pain in your left shoulder?  
8 A. Cooking, hand shakes. I drop a lot of stuff. If I  
9 write a lot, holding something too long, I drop it. So  
10 a whole lot of things my hand does on its own.  
11 I hate to talk about this but a week ago I had  
12 some new puppies for my baby and my hand dropped one and  
13 killed it. I dropped it. I picked it up to look at it  
14 and my hand just let go of it and it died.  
15 Q. This happened recently?  
16 A. Last week.  
17 Q. Have you been seen by a neurologist; do you know?  
18 A. The neurologist that I talked to out at Dr. Marshall, I  
19 think he was the one that said I needed the epidural.  
20 Q. And that's for your neck though?  
21 A. Yes.  
22 Q. Has anyone said you need surgery on your left shoulder?  
23 A. He said that was an option because it wasn't as bad as  
24 it looked. He said it may go away.  
25 Q. Your left shoulder, is it better now than it was after

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1 stopped the cane.  
2 Q. So presently you're able to walk without a cane?  
3 A. I walk with a limp, yes.  
4 Q. Do you wear any type of neck brace or back brace or  
5 anything like that?  
6 A. No. Well, I wore a back brace for a while but I stopped  
7 wearing it because somebody told me it doesn't do  
8 anything but tell you that you got a back problem. It  
9 doesn't help.  
10 Q. Has Dr. Marshall or any other physician given you any  
11 restrictions on what you're able to do?  
12 A. Yes.  
13 Q. What are those restrictions to your understanding?  
14 A. My limitations was do not lift anything over five  
15 pounds. I have to move my leg as much as I possibly can  
16 when I'm sitting. That's why I keep moving my leg back  
17 and forth.  
18 Q. That's your left leg?  
19 A. Yes. And I only can do certain sedative (sic) jobs. I  
20 guess that's a sit down job. I don't know but he said  
21 sedative jobs. And also he said no running but I can't  
22 run. No bike riding. I haven't rode my bike since.  
23 Q. So you have not rode your bike since --  
24 A. Since I fell.  
25 Q. -- since you fell?

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1 you fell?  
2 A. Yeah, it's gotten better.  
3 Q. What about your back? Is your back causing you pain?  
4 A. Only when my hip hurts.  
5 Q. And is your hip continuing to cause you pain?  
6 A. Yes, something going on with it. They can't figure out  
7 what's wrong. It's hyperextended.  
8 Q. Have you had any physical therapy for your hip?  
9 A. Yes.  
10 Q. Same place at Van Dyke?  
11 A. They trying to figure out what's going on because of the  
12 way my bone is sticking out of my hip but they didn't  
13 know what to do.  
14 Q. On a scale of one to ten, with one being the least  
15 amount of pain, ten being the most severe, where would  
16 you rate the pain on your hip?  
17 A. My -- my hip 16, 17, somewhere up in there.  
18 Q. So your testimony is severe pain?  
19 A. Constant. It never stops.  
20 Q. Does that go away when you take the pain medication?  
21 A. Not my hip.  
22 Q. Are you able to walk without assistance?  
23 A. Yes but I stumble a lot.  
24 Q. So you're not using a walker?  
25 A. I had a cane but it started getting in the way so I just

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1 A. I haven't been able to.  
2 Q. You haven't even tried?  
3 A. Yes, I tried.  
4 Q. You tried?  
5 A. And I failed. It was embarrassing. I wouldn't do it  
6 again.  
7 Q. When did you try and ride your bike?  
8 A. I was helping my son fix his bike, so I tried to get on  
9 it to see if I do it because I hadn't did it in a while.  
10 Q. So it was relatively recently?  
11 A. Yeah, maybe a month ago.  
12 Q. Do you have any restrictions on how long you can stand?  
13 A. 45 minutes to an hour.  
14 Q. Is that from Dr. Marshall?  
15 A. Yes.  
16 Q. What about restrictions on how long you can sit?  
17 A. Same thing. He said up and down 45 minutes unless I  
18 like move around. As long as I can move my leg. If I'm  
19 in a tight spot, I have to get up and stand but as long  
20 as I can move my leg around, it won't cramp up.  
21 Q. Have you ever applied for Social Security Disability?  
22 A. For this incident, yes.  
23 Q. What was the result of that; if you know?  
24 A. Because I was able to work, I was not.  
25 Q. Do you recall when you applied?

20 (Pages 74 to 77)

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1 A. August -- July, August of last year.  
2 Q. Do you know if that decision was appealed at all?  
3 A. I never tried. I was frustrated so I just never.  
4 MR. KUKLA: At this point, thank you, sir.  
5 I'll pass the witness, as I'm sure my co-counsel may  
6 have some questions for you as well.  
7 MR. WOJNO: I think you covered everything.  
8 MR. PADDISON: I've got a couple, just a real  
9 quick couple.  
10 EXAMINATION BY MR. PADDISON:  
11 Q. Mr. Smith, my name is Gregory Paddison. I represent the  
12 City of Detroit in this matter. I apologize in advance,  
13 I may bounce around. I have a couple real, real quick  
14 questions for you.  
15 Starting with this: You mentioned that you  
16 are taking high blood pressure medication?  
17 A. Yes.  
18 Q. What is the name of that medication?  
19 A. Lisinopril.  
20 Q. And were you taking that medication on the date of  
21 August 12, 2014 --  
22 A. Yes.  
23 Q. October 12, 2014?  
24 A. Yes.  
25 Q. Are you aware of any of the side effects of that

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1 doctor.  
2 Q. So the doctor said you needed corrective lenses when you  
3 were younger?  
4 A. Yes, just to read with though.  
5 Q. Okay. When was the last time you actually had your eyes  
6 examined?  
7 A. 2006 maybe.  
8 Q. Now on the portion of the street where you fell that's  
9 depicted in Exhibits 1 through 6?  
10 A. Um-hmm.  
11 Q. On that portion of Hayes, is there a bike path in the  
12 street?  
13 A. Now it is.  
14 Q. There is now.  
15 A. They put one in. They just put one in.  
16 Q. If I'm understanding you correctly, are you saying that  
17 there was not one as of October 12, 2014?  
18 A. No.  
19 Q. And I believe you had indicated that you were riding on  
20 the sidewalk as opposed to the streets because there was  
21 traffic in the streets?  
22 A. Yes.  
23 Q. And was it -- you said it was dark out at the location  
24 where this fall occurred?  
25 A. Yes.

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1 medication?  
2 A. Yes.  
3 Q. What are those side effects?  
4 A. Just sleepiness.  
5 Q. Anything else?  
6 A. That's the only thing it does to me.  
7 Q. When during the day do you take your Lisinopril?  
8 A. As soon as I get up in the morning.  
9 Q. Do you recall what time you woke up on the morning of  
10 October 12, 2014?  
11 A. Maybe 8:30, nine o'clock in the morning.  
12 Q. You said you watched the Lions game at your sister's  
13 house.  
14 A. Yes.  
15 Q. When you went to "P's" house and you watched more  
16 football there --  
17 A. Yes.  
18 Q. Are you like me, do you drink at all while you watch the  
19 football games.  
20 A. I've been sober for 15 years.  
21 Q. Congratulations, sir. Mr. Smith, I see you have glasses  
22 here today. Are those prescription lenses?  
23 A. Just readers.  
24 Q. Have you been prescribed corrective lenses?  
25 A. When I was young but I haven't been to a -- seen an eye

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1 Q. Did the cars in the streets have their headlights on?  
2 A. Yes.  
3 Q. Did that provide some light to you?  
4 A. No. It was actually going so fast.  
5 Q. Could you see more clearly the area of the street where  
6 the cars were passing or the sidewalk?  
7 A. Well, on the sidewalk I seen more sidewalk because I'm  
8 on the sidewalk.  
9 Q. Okay. So the lights from the cars that were on the  
10 street didn't illuminate the sidewalk at all?  
11 A. Well, the way the street is, no.  
12 Q. Now you indicated that after the fall another individual  
13 had come to get you. I believe you said his name was  
14 Darryl.  
15 A. Yes.  
16 Q. And am I correct in saying that Darryl came from the  
17 opposite side of Hayes?  
18 A. Yes.  
19 Q. And did you witness or observe Darryl prior to falling?  
20 A. Nope. I was looking straight ahead.  
21 Q. So you didn't see him at any point prior to the fall?  
22 A. No.  
23 Q. When Darryl came over, did you guys have any  
24 communications? Did you guys say anything to one  
25 another?

21 (Pages 78 to 81)



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1 A. He asked me was I okay, what happened, how did you fall.  
2 I'm like looking around like.  
3 Q. Just curious, how do you know that Darryl came from the  
4 opposite side of the street?  
5 A. Because he wasn't on my side of the street or I would  
6 have saw him.  
7 Q. So he didn't tell you that he came from the opposite  
8 side of the street or you didn't see him cross the  
9 street?  
10 A. He just appeared. Hey, you're all right.  
11 Q. So at this point you're assuming that Darryl came from  
12 the opposite side of the street?  
13 A. Well, he told me I was across the street. I saw you and  
14 then I didn't see you.  
15 Q. Okay. So Darryl said that he actually saw you basically  
16 disappear?  
17 A. Yes.  
18 Q. So it's your understanding that Darryl could actually  
19 observe you from across the street?  
20 A. Yes.  
21 Q. At the time of the fall, were you wearing a helmet?  
22 A. No.  
23 Q. Do you recall what you were wearing at the time of the  
24 fall?  
25 A. Just a jacket and jeans.

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1 Q. Blue jeans?  
2 A. Yes.  
3 Q. Are they blue, blue jeans or black?  
4 A. Regular blue jeans.  
5 Q. And a jacket?  
6 A. Yes.  
7 Q. Do you recall what color the jacket was?  
8 A. Blue.  
9 Q. Light blue or dark blue?  
10 A. Light blue.  
11 Q. And you indicated that you actually fell into the grassy  
12 area on the side of the sidewalk, not actually on the  
13 sidewalk itself, is that correct?  
14 A. Yes.  
15 Q. Were there any scuff marks or dirt marks on your jeans  
16 or jacket?  
17 A. On my jeans and jacket.  
18 Q. Where were those dirt or scuff marks?  
19 A. On the back, on the one side, my left sleeve and my  
20 right here (indicating) , around the shoulder, left  
21 sleeve area.  
22 MR. PADDISON: So let the record reflect the  
23 witness is identifying his left shoulder, left trapezoid  
24 area.  
25 BY MR. PADDISON:

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1 Q. Is that correct?  
2 A. Yes.  
3 Q. Okay. Thank you. Now the photographs that were marked  
4 as Exhibits 1 through 6, you took those photographs?  
5 A. Yes.  
6 Q. And in those photographs there is pictures of vehicles  
7 identified AS Parsons Brinckerhoff and Rauhorn Electric.  
8 A. Yes.  
9 Q. What led you to take photographs of those two vehicles  
10 in particular?  
11 A. I was told by my attorney to take pictures. That's the  
12 only way we can help.  
13 Q. And when were those taken?  
14 A. They said did I know the name, they had asked me, of the  
15 people who --- and I said I could find out.  
16 Q. Were there any other work vehicles at the location when  
17 you went to take pictures on the date that those  
18 photographs were taken?  
19 A. On that day, yes. It was just the one that I took  
20 pictures of.  
21 Q. Okay. Now you said that the last time you traveled that  
22 portion of the sidewalk prior to the fall was a previous  
23 Monday or Tuesday?  
24 MR. WOJNO: Monday and Tuesday.  
25 THE WITNESS: Monday and Tuesday.

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1 BY MR. PADDISON:  
2 Q. Which would have been by my math, October 6 and 7th?  
3 A. Just a couple of days after my birthday.  
4 Q. And that portion of the sidewalk on Hayes was fine?  
5 A. Was fine.  
6 Q. And then one last question and I want to preface this  
7 I'm not asking for the substance of the communications  
8 or what was said, I'm simply asking for a time.  
9 A. Okay.  
10 Q. Do you recall the first time you sought the advice of an  
11 attorney relative to this fall?  
12 MR. WOJNO: I'm going to object to that and  
13 instruct him not to answer. It's not relevant and not  
14 material and is inadmissible.  
15 MR. PADDISON: You're right, but this is still  
16 a deposition. It's discovery. I am not asking for the  
17 substance of the communications which would be  
18 privileged. Times and dates are not privileged under  
19 attorney/client privilege.  
20 MR. WOJNO: Well, I'm instructing him not to  
21 answer when he first sought our advice.  
22 MR. PADDISON: Very well. No further  
23 questions.  
24 MR. BERGER: Good afternoon, Mr. Smith.  
25 THE WITNESS: Hi.

22 (Pages 82 to 85)

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1 MR. BERGER: My name is Jay Berger and I  
2 represent Parsons Brinckerhoff in this matter.  
3 EXAMINATION BY MR. BERGER:  
4 Q. In reviewing your medical records for today, I noticed a  
5 note from Spinal Rehab, I think that's the Van Dyke  
6 Spinal Rehab. The date of the note is November 10th of  
7 2014. And in that note under the heading Prior  
8 Musculoskeletal Problems, it noted a fall in  
9 approximately 2010. Do you remember suffering a fall in  
10 2010?  
11 A. 2010?  
12 Q. Correct.  
13 A. I was in Florida in 2010.  
14 Q. Do you remember reporting a fall to your doctors at  
15 Spinal Rehab that occurred in 2010?  
16 A. No. I was in Florida in 2010. So why would I -- no.  
17 Q. So you don't know why that note is in your medical  
18 records?  
19 A. No. If the -- it would be a mistake because I was in  
20 Florida.  
21 Q. What were you doing down in Florida in 2010?  
22 A. Helping my uncle. I got a disabled uncle that needed my  
23 assistance. So I went down and stayed with him for a  
24 couple of years.  
25 Q. What years were you down in Florida --

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1 Q. Sure. Painting the ceiling and walls.  
2 A. Yes with long sticks.  
3 Q. Have you been doing painting and these home renovation  
4 projects all your adult life?  
5 A. Just about.  
6 Q. Approximately how many -- let's start with home  
7 renovation. Approximately how many home renovation jobs  
8 do you do on the side a year prior to the accident?  
9 A. I don't have a truck. So maybe four -- three, four,  
10 five. It depends on who calls.  
11 Q. Do those jobs involve generally painting or what do they  
12 involve?  
13 A. Mostly painting. Maybe a little drywall hole or some  
14 mudding.  
15 Q. Have you ever worked for a professional painting  
16 company?  
17 A. No. I didn't have a paper saying I could -- that I  
18 could do it, so they wouldn't hire me.  
19 Q. I'm talking in the course of your whole life. Have you  
20 ever worked for a professional painting company?  
21 A. No.  
22 Q. Have you ever worked for any professional home  
23 renovation companies or companies that specialize in  
24 home renovations?  
25 A. They weren't professional. They were just home

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1 A. 2010 to 2012.  
2 Q. -- staying with your uncle?  
3 A. Yes.  
4 Q. What was his name?  
5 A. His name is Enrico Hall.  
6 Q. Can you spell that for the record, please?  
7 A. E R I C O H.  
8 Q. Hall is his last name?  
9 A. Yes, H A L L.  
10 Q. And what were you doing for your uncle down in Florida?  
11 A. Housekeeping.  
12 Q. Housekeeping?  
13 A. Yeah.  
14 Q. Does he suffer from some sort of medical condition?  
15 A. He is a double amputee.  
16 Q. Were you lifting him and things of that nature?  
17 A. No. He could basically do a lot on his own. He just  
18 needed help with housekeeping and cooking.  
19 Q. Were you working while you were down there other than  
20 taking care of your uncle?  
21 A. Not -- only just like home improvement jobs.  
22 Q. What type of home improvement jobs?  
23 A. Painting.  
24 Q. Painting. Did that painting involve overhead work?  
25 A. Overhead, what you mean, like lifting?

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1 improvement.  
2 Q. Home improvement companies?  
3 A. Well, wasn't a company, just word of mouth.  
4 Q. Just on your own, never employed by any company that did  
5 those type of services?  
6 A. No.  
7 Q. No?  
8 A. I didn't have the credentials to show them so they  
9 wouldn't hire me.  
10 Q. What credentials are you talking about?  
11 A. If you work for home improvement, they want to be able  
12 to insure you. So you had to prove that you were like  
13 able to do this job properly. So they wanting paperwork  
14 to show that maybe that you went to school for this,  
15 like a trades skill. And I never had that so they never  
16 hired me.  
17 Q. Did you file any tax returns in 2013?  
18 A. No.  
19 Q. Did you file any tax returns for 2014?  
20 A. 2014, no, I was still hurting. Well, in 2014, no. I  
21 got paid cash at that pork place.  
22 Q. So no tax returns were filed for 2014?  
23 A. No.  
24 Q. Any tax returns for 2015?  
25 A. Yes.

23 (Pages 86 to 89)

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1 Q. You did file a tax return for 2015?  
2 A. Yes.  
3 Q. Did you play sports when you were a kid?  
4 A. High school, yes.  
5 Q. What sport did you play? Football?  
6 A. Yes.  
7 Q. Football, four years of high school?  
8 A. I didn't play football for high school. I just played  
9 it like around the neighborhood, just picking up, pick  
10 the football up and run. That's all.  
11 Q. Pick-up football?  
12 A. And run. There wasn't no like organized. I tried for  
13 my high school and I didn't make it.  
14 Q. Tried out for Denby and didn't make it?  
15 A. Yes.  
16 Q. Did you play in the rec leagues at that point in time  
17 when you didn't make Denby?  
18 A. No.  
19 Q. Just pick-up with your friends?  
20 A. With my friends, yeah.  
21 Q. Okay. And any other sports other than football?  
22 A. Basketball but that's it.  
23 Q. Did you play basketball in any leagues while you were  
24 growing up --  
25 A. No.

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1 Q. -- recreation or otherwise?  
2 A. No.  
3 Q. Did you talk with any construction workers or anyone  
4 else on the date that you took the pictures of these  
5 trucks, Mr. Smith?  
6 A. No. I wanted to but I didn't see nobody to talk to.  
7 Q. Have you ever talked with anyone from Parsons  
8 Brinckerhoff?  
9 A. No.  
10 Q. Have you ever heard of the company Parsons Brinckerhoff?  
11 A. No.  
12 Q. You mentioned that -- I think you testified that the  
13 last time you had a driver's license was in 2008?  
14 A. Well, that's when they suspended me.  
15 Q. It was suspended?  
16 A. Yes.  
17 Q. For what reason was your license suspended?  
18 A. I failed to pay a ticket for driving -- for disregarding  
19 a red light, something like that. That's what the  
20 ticket said.  
21 Q. And since your license was suspended, you haven't moved  
22 to have it reinstated or anything like that?  
23 A. I couldn't afford to pay it so --  
24 Q. How do you spell Sentech; do you know?  
25 A. S E N T E C (sic).

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1 Q. S E N T E C?  
2 A. Yes.  
3 Q. Where is the Sentech office located?  
4 A. Inside the New Center Stamping building on East  
5 Milwaukee.  
6 Q. So the reason you stopped working for Wright Brothers --  
7 A. Yes.  
8 Q. -- is not because of your injuries, it's because you  
9 dropped the windshield and they fired you?  
10 A. Well, I was working pretty good until I got hurt. And  
11 then when I couldn't afford to pay for that windshield,  
12 that's when he told me I was fired. Other than that he  
13 wouldn't have fired me. I would have been working the  
14 desk.  
15 Q. There was nothing that prevented you from working for  
16 Wright and Brothers after your accident?  
17 A. I couldn't perform.  
18 Q. What type of heavy lifting --  
19 A. It wasn't lifting. It was just driving. My neck hurt  
20 too bad to look around.  
21 Q. You were moving the cars around?  
22 A. Yes.  
23 Q. Watching over the cars?  
24 A. Yes.  
25 Q. You thought that the injuries from your accident

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1 prevented you from doing that?  
2 A. My left arm wouldn't act right and my neck would hurt  
3 when I look around. And I was moving too slow a lot.  
4 Q. Did any doctors put you on any restrictions or  
5 limitations with respect to your job at Wright Brothers?  
6 A. No.  
7 Q. When I was reviewing your response to Interrogatories  
8 before the deposition today, Mr. Smith, I noticed that  
9 in one of the answers you mentioned that Mr. McGee, you  
10 stated he was riding his bicycle nearby and saw the  
11 fall. He assisted with getting me home. Was he on a  
12 bicycle as well?  
13 A. I thought he was on a bike. He was walking.  
14 Q. He was actually walking?  
15 A. Yes.  
16 Q. And after your fall, did you testify you walked your  
17 bicycle home then at that point in time?  
18 A. No. He helped me walk it home.  
19 Q. So he walked your bicycle home?  
20 A. Yes.  
21 Q. And you walked next to him?  
22 A. Yes.  
23 Q. And on your walk home you proceeded north up Hayes,  
24 correct?  
25 A. Yes.

24 (Pages 90 to 93)

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1 Q. Did you run into any other sections of the sidewalk that  
2 were missing at that time?  
3 A. Not on my side of the street.  
4 Q. Did you see any on the other side of the street?  
5 A. On the opposite side, yes.  
6 Q. You were able to observe some missing sidewalk sections  
7 on the opposite side?  
8 MR. WOJNO: That night or later?  
9 MR. BERGER: That night.  
10 THE WITNESS: That same night?  
11 MR. BERGER: Yes.  
12 THE WITNESS: Once I stopped at State Fair and  
13 Hayes, yes.  
14 BY MR. BERGER:  
15 Q. Prior to State Fair and Hayes, did you see any other  
16 sections of the sidewalk missing on Hayes?  
17 A. No.  
18 Q. Did anyone else observe your accident on October 12th  
19 other than Mr. McGee that you're aware of?  
20 A. I know the car stopped and asked if I was okay. And  
21 once -- once -- he said I got him. He straight. They  
22 took off. So I don't know who that was. They just  
23 stopped said are you all right. I heard -- I remember  
24 hearing a voice from a distance saying is he okay. He  
25 was like I got him and they just pulled off.

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1 A. Um-hmm.  
2 Q. I just want to talk to you about the photo that I have  
3 attached to that exhibit. And I apologize, it's not a  
4 color copy, Mr. Smith. Do you remember -- is that a  
5 photo you took? Well, obviously you didn't take it.  
6 Are you pictured in that photo?  
7 MR. WOJNO: Before he answers the question,  
8 I'm going to place an objection on the record, this is  
9 not an accurate, full, complete copy of the  
10 documentation sent to the City of Detroit, as indicated  
11 by counsel, but go ahead. Your question was that he  
12 didn't take the photograph. Do you remember who took  
13 the picture?  
14 MR. BERGER: I'll strike that.  
15 BY MR. BERGER:  
16 Q. Is that you in the photograph, Mr. Smith?  
17 A. Yes.  
18 Q. Who took that photograph?  
19 MR. WOJNO: My office took the photograph.  
20 BY MR. BERGER:  
21 Q. Do you recall when that photo was taken Mr. Smith?  
22 A. Maybe December. I know it was winter, cold and snowing.  
23 Q. And you have a hat on in that picture, correct?  
24 A. Yes.  
25 Q. Where are you standing in that picture? Where is that

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1 Q. Mr. McGee said I've got him?  
2 A. Yes.  
3 Q. So the car pulled off?  
4 A. Yes.  
5 Q. You didn't speak with anyone in that car?  
6 A. No.  
7 Q. Didn't get the name of that person --  
8 A. No.  
9 Q. -- the license plate anything like that?  
10 A. No.  
11 Q. Mr. Paddison asked if you had consumed any alcohol on  
12 the date of your accident. Had you used any drugs on  
13 that date recreational or otherwise?  
14 A. No.  
15 MR. BERGER: Can we get this marked deposition  
16 exhibit next in order, please.  
17 SMITH EXHIBIT 7  
18 WAS MARKED BY THE REPORTER  
19 FOR IDENTIFICATION  
20 BY MR. BERGER:  
21 Q. Mr. Smith, I've just marked a Deposition Exhibit 7 which  
22 is a letter that your attorney sent out to the City of  
23 Detroit Law Department. I think it had additional  
24 photos other than the photo that I've attached there as  
25 your counsel has instructed us.

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1 location?  
2 A. I'm standing at the -- actually where they put the  
3 concrete in at.  
4 Q. So was that essentially the place where you believe you  
5 fell, Mr. Smith?  
6 A. That's where I fell, yes.  
7 Q. But now you're standing in the location where the  
8 concrete has now been placed in that hole?  
9 A. Yes.  
10 Q. And you believe that was in December of 2014?  
11 A. I'm not sure which day that was.  
12 MR. WOJNO: I can find out the date from my  
13 investigator and provide you with the date.  
14 BY MR. BERGER:  
15 Q. Who was with you at that time, Mr. Smith, at that  
16 picture?  
17 A. The attorney's office was with me. I met them there.  
18 Q. How many -- were there attorneys or --  
19 A. One guy.  
20 Q. One individual. Do you remember his name?  
21 A. I'm not sure. He told me his name. I'm not sure.  
22 Q. Were there any construction crews that you observed out  
23 on the day that you took that picture in December or  
24 whatever that was?  
25 MR. WOJNO: For the record, he indicated it

25 (Pages 94 to 97)

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1 wasn't taken by him. It was taken by my office.  
2 THE WITNESS: No.  
3 BY MR. BERGER:  
4 Q. On the date that that picture was taken.  
5 A. No.  
6 Q. You didn't observe any construction crews out there that  
7 day?  
8 A. No.  
9 Q. No construction trucks?  
10 A. No. It was raining and cold that day.  
11 Q. Okay. You talked about One Touch Transition, Mr. Smith.  
12 Can you tell me what they do?  
13 A. One Touch Transition is a nonprofit organization that  
14 helps people that's trying to get back into the work  
15 force, that had a bad situation come on they life and  
16 where they maybe lost a job and they houses. It's  
17 basically for women but because I knew who runs the  
18 place, they let me come in and volunteer to help.  
19 Q. When did you seek out One Touch Transition's help and  
20 services?  
21 A. When they -- well, they actually asked me did I want to  
22 go and get up and come because I couldn't work and I  
23 wanted to. So they told me we got someone that will  
24 help you to get going, where people can see you, you  
25 might run into somebody that will help you get a job if

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1 you come and help us for a while.  
2 Q. And what did you do for One Touch Transition?  
3 A. I worked at Comerica Park as a cashier.  
4 Q. Was that it?  
5 A. It was just -- yeah, volunteer. Or I know we supposed  
6 to went to Ford Field but we went to one game, that's  
7 it.  
8 Q. Other than Comerica Park and one game at Ford Field, did  
9 you do any other volunteer work for One Touch  
10 Transition?  
11 A. No.  
12 Q. And they helped you out of a bad situation. What was  
13 the bad situation you were trying to get help out of?  
14 A. Well, I wanted to work but I was hurting and nobody  
15 would hire me. But -- I just wanted to work. I just  
16 wanted to work.  
17 Q. You mentioned you were riding a mountain bike. Do you  
18 know what type of brand it was?  
19 A. No. I'm not sure. Orion or something like that.  
20 Q. Orion. How do you spell that?  
21 A. O R I O N, something like that.  
22 Q. O R I O N?  
23 A. Yeah.  
24 Q. You don't have a make or model or anything like that for  
25 it?

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1 A. No. I'm not sure.  
2 Q. Did you own a helmet, a bike riding helmet?  
3 A. No.  
4 Q. No. You went to St. John Hospital on the day following  
5 the accident, correct?  
6 A. Yes.  
7 Q. How did you get to St. John that day?  
8 A. My mother -- no. No, I'm sorry. My girlfriend dropped  
9 me off.  
10 Q. And your girlfriend's name is?  
11 A. Was Lavougis, L A V O U G I S, Childress.  
12 Q. Can you spell the last name?  
13 A. C H I L D R E S S.  
14 Q. Does she live with you, Mr. Smith?  
15 A. No.  
16 Q. Where does she reside?  
17 A. She stay on Wyoming. I don't know the actual number. I  
18 never really paid attention to that. That's something I  
19 should know.  
20 Q. On Wyoming in Detroit?  
21 A. Yes.  
22 Q. Were you dating Ms. Childress at the time of the  
23 accident?  
24 A. Yes.  
25 Q. Has she attended any other doctor appointments with you

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1 other than your appointment at St. John?  
2 A. Maybe once or twice.  
3 Q. I think you testified you've never been involved in any  
4 prior lawsuits, correct?  
5 A. No.  
6 Q. Have you ever made any workers' compensation claims  
7 either prior to or after the accident?  
8 A. No.  
9 Q. Have you ever sought any treatment for neck pain prior  
10 to the accident?  
11 A. No.  
12 Q. Have you ever sought any treatment for back pain prior  
13 to the accident?  
14 A. No. I know I strained my back at times but it wasn't no  
15 big physical situation.  
16 Q. When did you strain your back?  
17 A. I can't remember. It wasn't a big issue. It was just a  
18 minor strain because I dropped a ladder and I tried to  
19 catch it and it kind of strained but that's it. I  
20 wasn't hurt. I just strained my back, that's all.  
21 Q. What year do you think that strained back incident  
22 occurred?  
23 A. I think it was the same year, '14.  
24 Q. You were carrying a ladder at the time?  
25 A. No. It was falling and I tried to catch it and it

26 (Pages 98 to 101)

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1 pulled me.  
2 Q. What type of ladder was it?  
3 A. Aluminum ladder.  
4 Q. A stretch ladder, extendable?  
5 A. 20 feet.  
6 Q. Was that on a painting project that you were working on?  
7 A. I was holding the ladder for somebody.  
8 Q. Was it a painting project?  
9 A. Yes.  
10 Q. Where was that painting project occurring?  
11 A. At Richard's house.  
12 Q. I'm sorry, who's house?  
13 A. Richard.  
14 Q. Last name?  
15 A. Wright. Yeah, the guy I was working for.  
16 Q. Oh, at Wright Brothers?  
17 A. Yes.  
18 Q. Did you seek any medical attention for that injury?  
19 A. No. It just -- I went to get some prescription. That's  
20 it. And I didn't need it.  
21 Q. Which doctor did you go see?  
22 A. St. John.  
23 Q. Sorry?  
24 A. I went to St. John.  
25 Q. St. John Hospital?

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1 injuring your back on any other occasions prior to the  
2 accident?  
3 A. No.  
4 Q. How about with respect to your hip? Have you ever,  
5 prior to the accident, experienced any hip pain?  
6 A. No.  
7 Q. None?  
8 A. None.  
9 Q. Have you ever sought any medical treatment for hip pain?  
10 A. No.  
11 Q. Have you ever sought any treatment for left hand or arm  
12 pain?  
13 A. No.  
14 Q. You never had any injuries to your left arm or hand  
15 prior to the accident?  
16 A. No.  
17 Q. Not that you can recall?  
18 A. No.  
19 Q. Have you ever broken any bones?  
20 A. No.  
21 Q. Prior to the accident which is the subject of your  
22 Complaint, have you ever had any other MRIs done?  
23 A. No.  
24 Q. Other than the X-rays in July of 2014, had you ever had  
25 any other X-rays done of any part of your body that you

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1 A. Yes.  
2 Q. Do you remember the month in 2014 that that accident  
3 happened?  
4 A. Hmm, July.  
5 Q. Do you recall the doctor's name or anything like that at  
6 St. John Hospital?  
7 A. No because it wasn't that serious. No.  
8 Q. Do you remember what tests were performed at St. John  
9 Hospital?  
10 A. X-ray.  
11 Q. An X-ray. Were any MRIs done at that point in time?  
12 A. No.  
13 Q. Do you remember the results of those X-rays, results  
14 from any diagnostic tests or anything like that?  
15 A. All she said was a strain.  
16 Q. Strained back?  
17 A. Yeah.  
18 Q. What types of medicines were prescribed for you, if any?  
19 A. She gave me some Motrin.  
20 Q. Were you taking -- how long did you take that Motrin for  
21 after the accident?  
22 A. One week.  
23 Q. One week?  
24 A. Yes.  
25 Q. Other than this incident in July of 2014, do you recall

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1 can recall?  
2 A. Just for the tumor when they wanted to see what it was.  
3 Q. Have you ever been treated for any depression or  
4 anxiety?  
5 A. No. I know I've dealt with anxiety but that's because  
6 of my blood pressure.  
7 Q. Have you ever seen a psychologist or psychiatrist?  
8 A. When I start -- when I start detoxing from alcohol, yes.  
9 Q. And when was that Mr. Smith?  
10 A. 2001 maybe.  
11 Q. And who were you seeing, a psychologist or psychiatrist?  
12 A. It was a psychiatrist.  
13 Q. Do you recall the name of that doctor?  
14 A. No. It was -- I remember where the office is but I  
15 don't remember the doctor's name.  
16 Q. Where was that office located?  
17 A. Kelly, Kelly Road near Eight Mile.  
18 Q. Did you enroll in an alcohol treatment program to help  
19 you with that problem?  
20 A. When I was on probation, my probation officer made me go  
21 to AA. Around the time I got convicted of that felony,  
22 I was an alcoholic. My probation officer made me clean  
23 myself up.  
24 Q. Have you ever seen a chiropractor prior to your accident  
25 in 2014?

27 (Pages 102 to 105)



Keith Smith  
5/4/2016

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1 A. No.  
2 Q. Have you ever sought hospital treatment for any other  
3 injury prior to the incident in 2014, other than the  
4 tumor you described in your neck and the issue regarding  
5 the ladder in July of 2014?  
6 A. No.  
7 Q. Not that you can think of?  
8 A. No.  
9 Q. Nothing?  
10 A. Nothing. At St. John Hospital, no.  
11 Q. What current medications are you taking?  
12 A. Tramadol, 50 milligram Tramadol. I take four times a  
13 day, two pills, four times a day. And the Robaxin  
14 muscle relaxer I take once before bedtime.  
15 Q. Did you ever seek any medical treatment while you were  
16 working down in Florida for any issues?  
17 A. I went to the doctor for pneumonia. I think I got sick  
18 because of the hurricane that came through there made me  
19 real cold and I had no winter clothes and I got sick.  
20 Q. Do you remember where you sought treatment for that?  
21 A. No. I was very unfamiliar with down there so I don't  
22 remember the names of some of those places.  
23 Q. What city were you in down there?  
24 A. Seminole.  
25 Q. Seminole?

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1 Mr. Smith.  
2 MR. PADDISON: One real quick follow-up.  
3 MR. WOJNO: It's my turn. I've learned to be  
4 patient. I'll take my turn and then I'll pass him to  
5 you eventually. Okay?  
6 EXAMINATION BY MR. WOJNO:  
7 Q. Mr. Smith, you tried to return to work at Wright  
8 Brothers after you fell on the bicycle, correct?  
9 A. Yes.  
10 Q. And you injured your left arm when you fell in the  
11 missing cement off your bike?  
12 A. Yes.  
13 Q. When you dropped this windshield, were you trying to  
14 carry it with your left arm?  
15 A. Yes.  
16 Q. Did you dropping the windshield have anything to do with  
17 the injury to your left arm?  
18 A. No.  
19 Q. What I'm saying though, did you drop the windshield  
20 because of your injury?  
21 A. Because of my injury.  
22 Q. Okay. And then you were asked about after the Good  
23 Samaritan, Darryl, came to your aid, he helped you walk  
24 up north from Hayes Street to East State Fair and then  
25 you went home on East State Fair?

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1 A. Yes.  
2 Q. Do you remember your uncle's address?  
3 A. It was Paradise Towers on 110th Street, an apartment  
4 complex. I don't remember the numbers.  
5 Q. So you actually went to a hospital for your pneumonia?  
6 A. I don't know if it was pneumonia but I was sick as hell.  
7 Q. What type of sickness were you suffering from?  
8 A. Cold -- probably a cold because they got really chilly  
9 down there for three days.  
10 Q. Did you go to a hospital, doctor's office? Where did  
11 you go?  
12 A. A hospital emergency room.  
13 Q. Which hospital?  
14 MR. WOJNO: He just testified he doesn't  
15 remember the name.  
16 BY MR. BERGER:  
17 Q. You don't remember the name of it?  
18 A. No.  
19 Q. Other than that cold, did you seek any other hospital  
20 attention while you were down in Florida?  
21 A. No.  
22 Q. Did you see go any doctors while you were down in that  
23 area of Florida?  
24 A. No.  
25 MR. BERGER: That's all I've got for you,

Page 109

1 A. Yes.  
2 Q. And you testified earlier that Exhibit 2, photograph  
3 number B, shows some barrels on the corner -- the  
4 opposite corner of East State Fair and Hayes, correct?  
5 A. Yes.  
6 Q. And is that the area that you saw the barrels the night  
7 when you were going home? Did you see those barrels  
8 there?  
9 A. Yes.  
10 Q. And you could see that there because the barrels were  
11 there?  
12 A. Yes.  
13 Q. Do you remember seeing the neurologist, Dr. Diaz?  
14 A. Yes.  
15 Q. And he sent you for an additional MRI testing, correct?  
16 A. Yes.  
17 Q. And was one of the areas that he sent you for a MRI of  
18 your lower back?  
19 A. Was that a lumbar?  
20 Q. Correct.  
21 A. Yes.  
22 Q. Did you ever discuss the results of the MRI of your  
23 lumbar spine with Dr. Diaz?  
24 A. He told me was -- it looks like I was double jointed.  
25 Q. And then after that, you had an epidural injection to

28 (Pages 106 to 109)

Keith Smith  
5/4/2016

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1 your lumbar spine, was it?  
2 A. Yes.  
3 MR. WOJNO: I think that's all I have.  
4 MR. PADDISON: I apologize for interrupting.  
5 RE-EXAMINATION BY MR. PADDISON:  
6 Q. Mr. Smith, you testified that following the accident  
7 working with Wright Brothers you dropped a windshield.  
8 A. Yes.  
9 Q. And it broke and in July, prior to the accident, you  
10 tried to catch a ladder that had fallen that you were  
11 supposed to be watching?  
12 A. Yes.  
13 Q. I'm going to do this. I apologize. I'm trying to think  
14 of a better way to word this. Is butterfingers  
15 something you typically had a problem with or dropping  
16 things or is this more recent?  
17 A. My left hand was my great hand. My left hand was so  
18 accurate until then. Now I done drop things -- I done  
19 dropped so many glasses.  
20 Q. You mean then, you mean the bike accident?  
21 A. Yes.  
22 Q. But you did drop the ladder in July before the accident?  
23 A. I didn't drop it. The wind pushed it. I went to grab  
24 it so it wouldn't fall.  
25 MR. PADDISON: No further questions.


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1 BY MR. KUKLA:  
2 Q. B. Do you know what that pole is in that photograph; if  
3 you know?  
4 A. Street light pole.  
5 Q. So fair to say there is a street light pole in the  
6 direct area where you testified that you fell, correct?  
7 A. Yes. It wasn't on.  
8 Q. You're telling us it was not on?  
9 A. No.  
10 MR. KUKLA: Thank you.  
11 MR. WOJNO: We're all set. Thank you very  
12 much.  
13 MR. BERGER: Thank you, Mr. Smith.  
14 MR. WOJNO: I will take an E-tran and however  
15 you do it in the text format.  
16 MR. PADDISON: I'll hold off for now.  
17 MR. BERGER: Copy, E-tran.  
18 (The deposition was concluded at 4:30 p.m.)  
19  
20  
21  
22  
23  
24  
25

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1 MR. KUKLA: I got a couple.  
2 RE-EXAMINATION BY MR. KUKLA:  
3 Q. When you went on to take the photographs, the  
4 photographs that you took of the Parsons Brinckerhoff  
5 and also Rauhorn, did you speak to anybody from Rauhorn  
6 Electric?  
7 A. No.  
8 Q. Did you speak to anybody -- at any point have you spoken  
9 to anyone from Rauhorn?  
10 A. Uh-huh.  
11 MR. WOJNO: You got to say or no.  
12 THE WITNESS: No.  
13 BY MR. KUKLA:  
14 Q. Did you observe any signs or vehicles marked with Merlo  
15 Construction on them?  
16 A. No. I took pictures of what was out there.  
17 Q. So you never -- am I correct then you never spoke to  
18 anybody from Merlo Construction --  
19 A. No.  
20 Q. -- regarding any of the allegations you have in this  
21 Complaint?  
22 A. No.  
23 Q. And if you remember the area that we marked as Exhibit  
24 4?  
25 MR. WOJNO: Which photograph?

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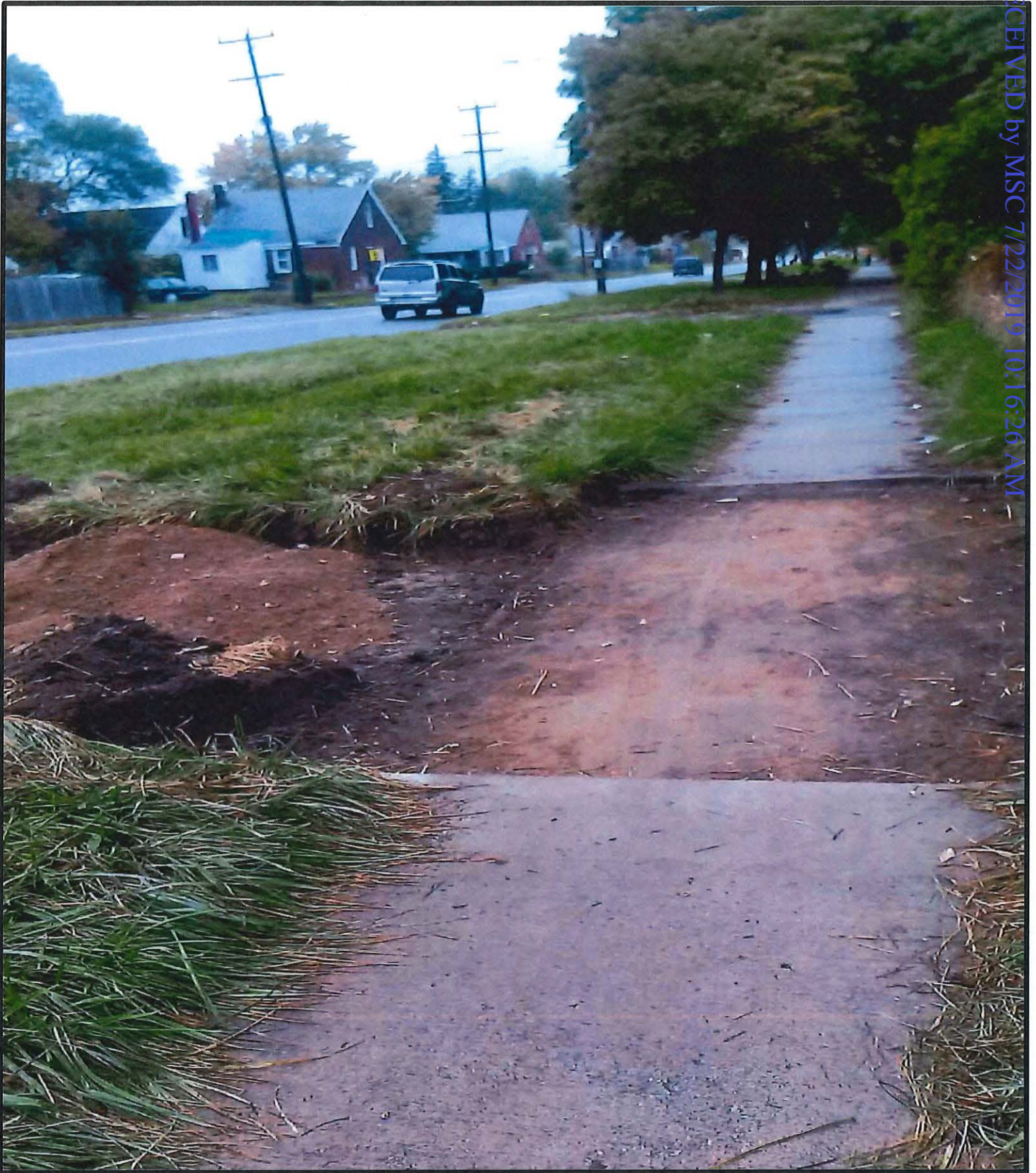
1 CERTIFICATE OF NOTARY  
2  
3 STATE OF MICHIGAN )  
4 ) SS  
5 COUNTY OF OAKLAND )  
6 I, Gay Ann Nosek-Nibling, Certified Shorthand  
7 Reporter, a Notary Public in and for the above county  
8 and state, do hereby certify that the above deposition  
9 was taken before me at the time and place hereinbefore  
10 set forth; that the witness was by me first duly sworn  
11 to testify to the truth, and nothing but the truth, that  
12 the foregoing questions asked and answers made by the  
13 witness were duly recorded by me stenographically and  
14 reduced to computer transcription; that this is a true,  
15 full and correct transcript of my stenographic notes so  
16 taken; and that I am not related to, nor of counsel to  
17 either party nor interested in the event of this cause.  
18  
19   
20 Gay Ann Nosek-Nibling CSR 2515  
21 Notary Public,  
22 Oakland County, Michigan  
23 My Commission expires: 02-11-19  
24  
25

29 (Pages 110 to 113)



**EXHIBIT 3:**

**PHOTOGRAPHS**









**EXHIBIT 4:**  
**INSPECTOR DAILY REPORTS**



Michigan Department of Transportation

## Inspector's Daily Report

10/17/2014 3:24 PM

FieldManager 6.1a

Contract: 82609-119576, Upgrade signals to box spans, pedestrian countdown,

IDR Date 10/9/2014	Day of Week Thursday	Seq. No. 1	Import Date 10/21/2014	Project Engineer John Stevenson - PB	Construction Engineer Roger Teale - MDOT
Inspector's Initials-Name AZ All Zwayen			Federal Project Number STP 1482(048)		Elec. Attachments None
Prime Contractor Rauhorn Electric, Inc.					
Entered By AZ, All Zwayen		Revised By		Revision Date	Revision No.
Temperatures Low: 49° F High: 60° F		Weather Cloudy Sunny			
<p>Comments</p> <p>Rauhorn was on site on October 9th at Houston/Whittier and Hayes and , Houston/Whittier and Chalmers.</p> <p>The Contractor started working at 7:30 AM on the NE corner of Houston/Whittier and Hayes, they starting to remove the forms and fill it up with sand and compacted.</p> <p>Then they moved to the NW corner to remove the forms and fill it up with sand and compacted.</p> <p>Then they moved to the SW corner to remove the forms and fill it up with sand and compacted.</p> <p>At 10:30 AM they moved to Houston/Whittier and Chalmers, they started working on the SE corner to remove the forms and fill it up with sand and compacted.</p> <p>____ VISTERS _____</p> <p>None</p> <p>____ POSTINGS _____</p> <p>None</p> <p>____ ATTACHMENTS _____</p> <p>None</p>					

## Contractors

Contractor's Name	Personnel	No.	Hrs.	Equipment	No.	Hrs.
Rauhorn Electric, Inc.						

## Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	Site 00	N/A	Yes	8.00	7.00			

Reviewed By: \_\_\_\_\_  
(Signature)\_\_\_\_\_  
(Date)



Michigan Department of Transportation

## Inspector's Daily Report

12/31/2014 11:17 AM

FieldManager 5.1a

Contract: 82609-119676, Upgrade signals to box spans, pedestrian countdown,

IDR Date 10/9/2014	Day of Week Thursday	Seq. No. 1	Import Date 12/31/2014	Project Engineer John Stevenson - PB	Construction Engineer Roger Teale - MDOT
Inspector's Initials-Name JRH Jason R Handley			Federal Project Number STP 1482(046)		Elec. Attachments None
Prime Contractor Rauhorn Electric, Inc.					
Entered By JRH, Jason R Handley		Revised By		Revision Date	Revision No.
Temperatures Low: 46° F High: 62° F		Weather overcast			
<b>Comments</b> ***This is a sequence 2 IDR to correct postings on sequence 1 IDR. Incorrectly paid for sidewalk removal by the square foot rather than by the square yard. This IDR is for correcting those errors*** For other information, please see sequence 1 IDR for contractor activity.					

## Contractors

Contractor's Name	Personnel	No.	Hrs.	Equipment	No.	Hrs.
Merlo Construction Co., Inc.						
Rauhorn Electric, Inc.						

## Item Postings

Item/Material Description	Item Code	Prop. Line	Project	Category	Quantity	Unit	Location	Brkdwn ID	Attn
Sidewalk, Conc, 4 inch	8030044	0170	119676A	0001	380.010	SF	Hayes: Outer Drive to Kilbourne	Hayes	
Contractor: Merlo Construction Co., Inc.									
Item Remarks: Agreed to by Brian G at merlo.									
Missed in comp sheets. When re totaled we owe Merlo 380.01 sf 4"									
Concrete, Grade Pt (Merlo)						1.43	Cyd		
Material Remarks: vi, Superior									
Curing Compound, White						1.80	Gal		
Material Remarks: vi and approve, right points									

Reviewed By: \_\_\_\_\_ (Signature) \_\_\_\_\_ (Date)



Michigan Department of Transportation

## Inspector's Daily Report

10/17/2014 3:24 PM

FieldManager 5.1a

Contract: 82609-119576, Upgrade signals to box spans, pedestrian countdown,

IDR Date 10/10/2014	Day of Week Friday	Seq. No. 1	Import Date 10/21/2014	Project Engineer John Stevenson - PB	Construction Engineer Roger Teale - MDOT
Inspector's Initials-Name AZ All Zwayen			Federal Project Number STP 1482(048)		Elec. Attachments None
Prime Contractor Rauhorn Electric, Inc.					
Entered By AZ, All Zwayen		Revised By		Revision Date	Revision No.
Temperatures Low: 40 ° F      High: 60 ° F		Weather Sunny			



Michigan Department of Transportation

## Inspector's Daily Report

10/17/2014 3:24 PM

Field Manager 5.1a

## Comments

Rauhorn was on site on October 10th with two crews; the first one at Houston/Whittier and Chalmers, the second crew was on 7 mile and Chalmers.

The First Crew Start to work at 7:30 AM on the NW corner of Houston/Whittier and Chalmers, the Started saw cut sidewalk and removed (4' x 4') for three locallon at NW, SW and NE corner, then they start to drill the 3' diameter hole (36 x 36 strain pole foundation hole for 11.5 feet) and inserted and formed the four steel bars for the pole. The contractor then inserted and leveled the form.

At 11:00 AM they moved to the NE corner to drill the 3' diameter hole (36 x 36 strain pole foundation hole for 11.5 feet) and inserted and formed the four steel bars for the pole. The contractor then inserted and leveled the form and covers it up.

The Other crew started working on Chalmers and 8 mile road at 7:30 AM, They started to drill the 3' diameter hole (36 x 36 strain pole foundation hole for 11.5 feet) and inserted and formed the four steel bars for the pole and installed the two (3 inches) and 1.5 inch conduit for encasement for 5 Feet for both Strain pole foundations on the NW and SW corner.

They finished the form and waited for the concrete truck to pour at 1 PM.

Superior concrete truck arrives at 1:45 PM; the testing begins shortly after by TTL and Somat. TTL air test shows a 6.3 % and Somat 5.6 %, and slump with a 2.75" for Somat and 2.75" for TTL the concrete temperature was 70 F for TTL and 70F for Somat.

The pour begin at 1:55 PM. Contractor pours and vibrates concrete at the steel pole foundations as the NW and SW corner.

They finished pouring at 2:14 PM.

The contractor finishes the concrete and covers each pur before leaving at 3:00 PM

See attached concrete ticket for mix design.

\_\_\_\_ VISTERS \_\_\_\_

Somat

TTL

\_\_\_\_ POSTINGS \_\_\_\_

2x steel fdn

5' of 2 3 inch conduit encased

6' of 1 1/2 inch conduit

Side walk removal

\_\_\_\_ ATTACHMENTS \_\_\_\_

Concrete mix design ticket

Somat test results

Quantily calculation sheet





Michigan Department of Transportation

## Inspector's Daily Report

10/17/2014 3:24 PM

FieldManager 5.1a

## Contractors

Contractor's Name	Personnel	No.	Hrs.	Equipment	No.	Hrs.
Rauhorn Electric, Inc.	Evereh Forman	1	8.00	Dumper	2	8.00
	Forman	1	8.00	Equipment truck +	2	8.00
	groundsman	1	8.00	trailer		
	Miguel Groundsman	1	8.00	Equipment Van+ trailer	2	8.00
	Miguel Operator	1	8.00	Excavator	2	8.00
	Operator	1	8.00			

## Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	Site 00	N/A	Yes	8.00	7.00			two crew

## Item Postings

Item/Material Description	Item Code	Prop. Line	Project	Category	Quantity	Unit	Location	Brkdwn ID	Attn
Conduit, Encased, 2, 3 Inch, Modified	8197001	0780	119576A	0001	5.000	Fl	NW and SW corner	062	
Contractor: Rauhorn Electric, Inc.									
Item Remarks: VI and Accepted									
Conduit, 3 inch					5.00	Lt			
Sidewalk, Rem	2040055	0040	119576A	0001	5.300	Syd	NE NW and SW corner	Chalmers	
Contractor: Merlo Construction Co., Inc.									
Item Remarks: VI and Accepted									
Sidewalk, Rem	2040055	0040	119576A	0001	2.230	Syd	SW	Chalmers	
Contractor: Rauhorn Electric, Inc.									
Item Remarks: VI and Accepted									
Strain Pole, Steel, Anchor Fdn	8200165	0940	119576A	0001	2.000	Ea	NW and SW corner	062	
Contractor: Rauhorn Electric, Inc.									
Item Remarks: VI and Accepted									
Anchor Bolts, 1 3/4 inch					8.00	Ea			
Concrete, Grade 82					8.02	Cyd			
Ground Rod					2.00	Ea			

Reviewed By: \_\_\_\_\_  
(Signature)\_\_\_\_\_  
(Date)



Michigan Department of Transportation

## Inspector's Daily Report

10/24/2014 1:05 PM

FieldManager 5.1a

Contract: 82609-119576, Upgrade signals to box spans, pedestrian countdown,

IDR Date 10/9/2014	Day of Week Thursday	Seq. No. 1	Import Date 10/27/2014	Project Engineer John Stevenson - PB	Construction Engineer Roger Teale - MDOT
Inspector's Initials-Name AEJ Andrew E Jenkin			Federal Project Number STP 1482(046)		Elec. Attachments None
Prime Contractor Rauhorn Electric, Inc.					
Entered By AEJ, Andrew E Jenkin		Revised By		Revision Date	Revision No.
Temperatures Low: 49 ° F High: 60 ° F		Weather mostly cloudy Sunny			
Comments Merlo on site pouring ADA ramps and bus pads this date. The work was performed on Hayes road. The contractor had traffic control in place and was utilizing flaggers as well.					
VISITORS none					
ATTACHMENTS 1174, testing report, concrete tickets, computation sheets					

## Contractors

Contractor's Name	Personnel	No.	Hrs.	Equipment	No.	Hrs.
Merlo Construction Co., Inc.	foreman	1	8.00	stake truck w trailer	1	8.00
	laborers	10	8.00	truck	2	8.00

## Item Postings

Item/Material Description	Item Code	Prop. Line	Project	Category	Quantity	Unit	Location	Brkdwn ID	Attn
Dr Structure Cover, Adj, Case 1, Modified	4037050	0000	119576A	0001	2.000	Ea	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Contractor: Merlo Construction Co., Inc.									
Item Remarks: NW quad Mayfield and NE quad Craft									
Curb and Gutter, Cono, Det C4	8020023	0140	119576A	0001	188.400	Ft	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Contractor: Merlo Construction Co., Inc.									
Concrete, Grade P1 (Merlo)					11.78	Cyd			
Material Remarks: VI and approved									
Steel Reinf, Epoxy Coated					247.91	Lbs			
Material Remarks: VI and approved									
Curb, Rem	2040021	0020	119576A	0001	188.400	Ft	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Contractor: Merlo Construction Co., Inc.									

Contract: 82609-119576

IDR: 10/9/2014, AEJ, 1

Page 1 of 2



Michigan Department of Transportation

# Inspector's Daily Report

10/24/2014 1:05 PM

FieldManager 5.1a

## Item Postings

Item/Material Description	Item Code	Prop. Line	Project	Category	Quantity	Unit	Location	Brkdwn ID	Altn
Detectable Warning Surface Contractor: Merlo Construction Co., Inc.	8030010	0150	119576A	0001	80.000	Ft	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Detectable Warning Surface Material Remarks: VI and approved						80.00	Ft		
Pavt, Rem Contractor: Merlo Construction Co., Inc.	2040050	0030	119576A	0001	31.070	Syd	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Sidewalk Ramp, Conc, 6 Inch Contractor: Merlo Construction Co., Inc.	8030038	0160	119576A	0001	908.520	Sft	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Concrete, Grade P1 (Merlo) Material Remarks: VI and approved						18.81	Cyd		
Sidewalk, Conc, 4 Inch Contractor: Merlo Construction Co., Inc.	8030044	0170	119576A	0001	1,000.540	Sft	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Concrete, Grade P1 (Merlo) Material Remarks: VI and approved						12.31	Cyd		
Sidewalk, Conc, 6 Inch Contractor: Merlo Construction Co., Inc.	8030046	0180	119576A	0001	87.260	Sft	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	
Concrete, Grade P1 (Merlo) Material Remarks: VI and approved						1.81	Cyd		
Sidewalk, Rem Contractor: Merlo Construction Co., Inc.	2040055	0040	119576A	0001	211.560	Syd	Sta 0+00 to Sta 0+00 see comp sheet for locations	Hayes	

Reviewed By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

**EXHIBIT 5:**

**DEPOSITION TRANSCRIPT OF MR. BOUDREAUX,  
DEFENDANT'S EMPLOYEE**

Brian Boudreaux  
July 14, 2016

<p style="text-align: center;">Page 1</p> <p>STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE KEITH SMITH, Plaintiff, vs. Case No. 15-001269 NO HON. SHEILA ANN GIBSON CITY OF DETROIT, a Municipal Corporation, PARSONS BRINCKERHOFF MICHIGAN, INC., a Michigan Corporation, RAUHORN ELECTRIC, INC., a Michigan Corporation, MERLO CONSTRUCTION CO., INC. A Michigan Corporation, Defendants, and CITY OF DETROIT, a Municipal Corporation, Cross-Plaintiff, vs. PARSONS BRINCKERHOFF MICHIGAN, INC., a Michigan Corporation, and MERLO CONSTRUCTION CO., INC., a Michigan Corporation, Cross-Defendants,</p>	<p style="text-align: center;">Page 3</p> <p>1 APPEARANCES 2 3 JORDAN ACKER, ESQ. 4 GOODMAN ACKER 5 17000 West Ten Mile, Second Floor 6 Southfield, Michigan 48075 7 Appearing on behalf of the Plaintiff. 8 9 GREGORY B. PADDISON, ESQ. 10 CITY OF DETROIT LAW DEPARTMENT 11 2 Woodward Avenue Suite 500 12 Detroit, Michigan 48226 13 Appearing on behalf of the Defendant/Cross-Plaintiff. 14 15 PATRICK KUKLA, ESQ. 16 MERRY, FARNEN &amp; RYAN 17 300 Maple Park Boulevard, Suite 301 18 St. Clair Shores, Michigan 48081 19 Appearing on behalf of the Defendants/Cross-Defendants. 20 21 CLARK HILL 22 JAY M. BERGER, ESQ. 23 500 Woodward Avenue, Suite 3500 24 Detroit, Michigan 48226 25 Appearing on behalf of the Defendant/Cross-Defendant.</p>
<p style="text-align: center;">Page 2</p> <p>1 2 The Deposition of BRIAN BOUDREAUX, 3 Taken at 300 Maple Park Boulevard, Suite 301, 4 St. Clair Shores, Michigan, 5 Commencing at 3:15 p.m., 6 Thursday, July 14, 2016, 7 Before Lisa M. Fix, CSR-3121. 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: center;">Page 4</p> <p>1 TABLE OF CONTENTS 2 3 WITNESS PAGE 4 BRIAN BOUDREAUX 5 6 EXAMINATION BY MR. ACKER: 6 7 EXAMINATION BY MR. BERGER: 27 8 EXAMINATION BY MR. PADDISON: 29 9 10 EXHIBITS 11 12 EXHIBIT PAGE 13 (No Exhibits Marked) 14 15 16 17 18 19 20 21 22 23 24 25</p>

1 (Pages 1 to 4)

Carroll Court Reporting and Video  
586-468-2411

Brian Boudreaux  
July 14, 2016

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<p>1 2 St. Clair Shores, Michigan 3 Thursday, July 14, 2016 4 3:15 p.m.</p> <p>5 6 BRIAN BOUDREAU, 7 was thereupon called as a witness herein, and after 8 having first been duly sworn to testify to the truth, 9 the whole truth and nothing but the truth, was 10 examined and testified as follows: 11 MR. ACKER: Let the record reflect this is 12 the deposition of Brian Boudreaux, for all purposes 13 under the Court Rules, and may be used for all 14 purposes under the Court Rules. 15 Mr. Boudreaux, my name is Jordan Acker, I 16 represent the plaintiff in this matter. Is this your 17 first time giving a deposition? 18 THE WITNESS: No. 19 MR. ACKER: Okay. So because you've done 20 this before, and I'm sure the attorney's gone through 21 some of the ground rules, I'll just go through them 22 again real quickly for you. 23 First, let me finish my questions, or any 24 of the other attorneys that are speaking here, let 25 them finish their questions before answering, it makes</p>	<p>1 Q. Okay. Where did you work before Merlo? 2 A. Edward R. White Contracting. 3 Q. And what was your job title over there? 4 A. Laborer/foreman. 5 Q. Okay. 6 A. Yep. 7 Q. So you started out doing labor and then -- 8 A. Uh-huh. 9 Q. -- became the foreman over there? 10 A. Yes. 11 Q. And then you moved into the new -- this foreman job at 12 Merlo; is that right? 13 A. Yes. 14 Q. Okay. So you're talking about 2011 you started at 15 Merlo? 16 A. Yes. 17 Q. Okay. Have you gotten any promotions since you got 18 there? 19 A. No. 20 Q. Okay. So same job. What are your job 21 responsibilities? 22 A. To manage crews, schedule -- 23 Q. Okay. 24 A. -- organize, completion of jobs, 25 Q. Okay.</p>
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<p>1 things a lot easier. 2 Second, of course, is give me a verbal 3 response for anything, no nodding or shaking your 4 head, uh-huh, uh-huh, just yes and no, sir, fair? 5 Finally, if you don't understand a 6 question, I'm happy to rephrase it or reword it. I 7 know that lawyers can sometimes ask questions that 8 don't make any sense, but if you answer my question 9 I'm just going to assume that you understood it, fair? 10 THE WITNESS: Yes. 11 MR. ACKER: Okay. Great. Then let's get 12 started. 13 EXAMINATION 14 BY MR. ACKER: 15 Q. So you say your name is Brian Boudreaux, correct? 16 A. Yes. 17 Q. And you're an employee of Merlo? 18 A. Yes. 19 Q. Okay. How long have you worked there for? 20 A. Five years. 21 Q. Okay. And are you the foreman? 22 A. Yes. 23 Q. Okay. Have you been the foreman the entire time you 24 were there? 25 A. Yes.</p>	<p>1 A. That's it. 2 Q. So it's your job to be out there on the sites actually 3 physically overseeing the people who are doing them -- 4 A. Yes. 5 Q. -- or are you actively involved in the construction 6 process, as well? 7 A. Both. 8 Q. Okay. 9 A. Mostly overseeing. 10 Q. Okay. And you said you manage crews. Approximately 11 how many people are in your crew -- 12 A. Um, 13 Q. -- on a particular job? 14 A. Eighteen. 15 Q. Okay. And how many crews do you oversee, just one -- 16 A. (Witness Nodding.) 17 Q. -- at any one time? 18 A. Yes. 19 Q. Okay. And who's your direct supervisor? 20 A. Brian Gustin. 21 Q. Okay. And how long has Brian Gustin been your 22 supervisor, since you started? 23 A. Yes. 24 Q. Okay. And so you said the four things you do are 25 manage crews, schedule, organize and complete jobs; is</p>

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<p style="text-align: right;">Page 9</p> <p>1 that right?</p> <p>2 A. Yes.</p> <p>3 Q. Are you responsible for any paperwork?</p> <p>4 A. Yeah.</p> <p>5 Q. Okay. What kind of paperwork are you responsible for?</p> <p>6 A. Just, um, hours and quantities.</p> <p>7 Q. Okay. So when you say hours, that's of the people in</p> <p>8 your crew that are working a job; is that right?</p> <p>9 A. Yes.</p> <p>10 Q. Okay.</p> <p>11 A. And then the scheduling.</p> <p>12 Q. And the scheduling of those particular people?</p> <p>13 A. (Witness Nodding.)</p> <p>14 Q. And when you say quantities, what kind of items are</p> <p>15 you talking about? What items are you talking about?</p> <p>16 A. Quantities would be like what we would get paid for.</p> <p>17 Let's say we pour X. amount of sidewalk, I would</p> <p>18 measure it up, go over it with the inspector, agree,</p> <p>19 goes down the food chain.</p> <p>20 Q. Okay. So let's start when you remove a piece of</p> <p>21 sidewalk, okay? Are you keeping notes of that, as</p> <p>22 well?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And you're keeping track of how much you're</p> <p>25 removing?</p>	<p style="text-align: right;">Page 11</p> <p>1 like that, would that be something that you would keep</p> <p>2 paperwork for?</p> <p>3 A. No.</p> <p>4 Q. Okay. Who would keep the paperwork on something like</p> <p>5 that? Would there be -- let's start there. Would</p> <p>6 there be paperwork on something like that?</p> <p>7 A. No.</p> <p>8 Q. Okay. So at no point are you required to log how many</p> <p>9 construction barrels you put up?</p> <p>10 A. I'm not sure.</p> <p>11 Q. You're not sure if you'd have to keep the paperwork on</p> <p>12 that?</p> <p>13 A. Usually at the beginning of the job you get X. amount</p> <p>14 of barrels, and at the end of the job the X. amount of</p> <p>15 barrels would be there to be picked up.</p> <p>16 Q. Okay. So when you go to the job with X. amount of</p> <p>17 barrels, do you have a number of how many barrels you</p> <p>18 have?</p> <p>19 A. Yes.</p> <p>20 Q. And you put that in paperwork?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. What paperwork would you put that in?</p> <p>23 A. I don't put it in, it's all through contracts.</p> <p>24 Q. Okay. Who would put that in, if you know?</p> <p>25 A. I don't know.</p>
<p style="text-align: right;">Page 10</p> <p>1 A. Yes.</p> <p>2 Q. And how many hours it takes?</p> <p>3 A. Yes. Not each particular spot, no.</p> <p>4 Q. But for the whole crew?</p> <p>5 A. Yep.</p> <p>6 Q. Okay.</p> <p>7 A. Yes.</p> <p>8 Q. Now, when you have these particular jobs, there's a</p> <p>9 bunch of smaller sites; is that right?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. So are you moving from small site to small site</p> <p>12 while a job is going on?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And if there's issues at a particular site</p> <p>15 you're going directly to that one?</p> <p>16 A. Yes.</p> <p>17 Q. Someone will call you and say hey, Brian, we have an</p> <p>18 issue over here --</p> <p>19 A. Correct.</p> <p>20 Q. -- is that fair?</p> <p>21 Okay. So you're responsible for how much</p> <p>22 concrete, how much sidewalk you're putting in, and</p> <p>23 what you're removing; is that right?</p> <p>24 A. Yes.</p> <p>25 Q. What about any warning or caution tape or anything</p>	<p style="text-align: right;">Page 12</p> <p>1 Q. Okay. Would it be someone at Merlo?</p> <p>2 A. No.</p> <p>3 Q. Okay. Do you know what company would be responsible</p> <p>4 for that paperwork?</p> <p>5 A. No.</p> <p>6 Q. But someone would be?</p> <p>7 A. Yes.</p> <p>8 Q. If something was stolen, would you have to tell</p> <p>9 someone about it?</p> <p>10 MR. KUKLA: Object as to the form.</p> <p>11 MR. ACKER: Okay. I'll rephrase.</p> <p>12 BY MR. ACKER:</p> <p>13 Q. If you had a construction barrel stolen, would you</p> <p>14 have to report it to someone?</p> <p>15 A. No.</p> <p>16 Q. Okay. So if you had multiple construction barrels</p> <p>17 reported, would you -- or stolen, would you have to</p> <p>18 report it to someone?</p> <p>19 A. No.</p> <p>20 Q. So what I'm getting at is what's the threshold for you</p> <p>21 to have to report that your construction tape or</p> <p>22 anything was stolen? If every barrel you had on a job</p> <p>23 site was stolen, would you have to report that?</p> <p>24 A. Oh, yeah, we'd get more.</p> <p>25 Q. You'd get more?</p>

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<p style="text-align: right;">Page 13</p> <p>1 A. Uh-huh. 2 Q. How would you get more? 3 A. We'd call. 4 Q. And who would you call? 5 A. Probably the inspector, I would have to -- 6 Q. The inspector -- 7 A. We would have to make a note and then we'd call the -- 8 Q. Okay. Now, do you know the name of -- has it been the 9 same inspector the whole time? Is it a Merlo 10 employee? 11 A. No. 12 Q. Okay. Do you know who the inspector works for? Is it 13 usually the contractor? 14 A. No, usually you would call the prime contractor. 15 Q. Okay. So I want to refer -- do you know why we're 16 here today? 17 A. Yeah. 18 Q. Okay. So we're here talking about a small sub job 19 that you did, I'm sorry to use -- I know that's not 20 the right term, at Hayes and Liberal; is that right? 21 A. Yes. 22 Q. Okay. And that was part of a bigger job that you did 23 back in 2014; is that fair? 24 A. Yes. 25 Q. Okay. If I told you it happened in October of 2014,</p>	<p style="text-align: right;">Page 15</p> <p>1 Q. Okay. Do you have to report those being stolen? 2 A. No. 3 Q. Okay. Are those provided by another company, if you 4 know? 5 A. Yes. 6 Q. And what company are those provided by? 7 A. Just any signage company. 8 Q. Okay. Do you know for this October 2014 Hayes and 9 Liberal job who provided those? 10 A. No. 11 Q. Okay. Do you remember doing this Hayes and Liberal 12 job? 13 Can I just call it Liberal -- 14 A. Yeah. 15 Q. -- we'll know what we're talking about? Okay. 16 A. I remember the job -- 17 Q. Okay. 18 A. -- you know, and the locations, but I don't remember 19 minute by minute, no. 20 Q. Okay. I'm going to show you just a few exhibits just 21 to jog your memory, if that's all right, and I'm not 22 going to get these all confused -- 23 A. Okay. 24 Q. -- to make this easier. 25 So does this look like the area that you</p>
<p style="text-align: right;">Page 14</p> <p>1 do you have any reason to disagree with that? 2 A. No. 3 Q. Okay. So do you remember who the prime contractor was 4 on that job? 5 A. Rauhorn Electric. 6 Q. Okay. So would you then, if something got stolen you 7 would report -- if you would had reported it, you 8 would report it to the inspector of Rauhorn Electric; 9 is that fair? 10 A. It depends on what it is. 11 Q. What do you mean by that? 12 A. Well, if my backhoe got stolen I wouldn't call Rauhorn 13 Electric. 14 Q. Okay. If all your construction barrels got stolen 15 would you call Rauhorn Electric? 16 A. Most likely. 17 Q. Okay. But you're not sure? 18 A. Yeah, it's never been -- never had all the barrels 19 stolen. 20 Q. Okay. You ever have a situation where construction -- 21 or where warning signs or tape was stolen? 22 A. Yes, they rip off -- they rip it off a lot. Usually 23 more sidewalk closed signs will be stolen. 24 Q. Like the small signs that they put over? 25 A. Yes.</p>	<p style="text-align: right;">Page 16</p> <p>1 did this job at? 2 A. Yes. 3 Q. Okay. So can you just show me, just -- is this Hayes 4 right here in the foreground of this picture? 5 A. Yes. 6 Q. Okay. And then Liberal would be where in this 7 photograph, over here? 8 A. Yeah, over there. 9 Q. Okay. On the right side? 10 A. Uh-huh. 11 Q. Okay. And you went to this job, this particular site; 12 is that right? 13 A. Yes. 14 Q. Do you remember being at this particular location? 15 A. No. 16 Q. Okay. Do you remember if there was any streetlighting 17 there? Were you ever there at night? 18 A. No. 19 Q. Okay. So you wouldn't know if there was any working 20 streetlighting there, fair? 21 A. Correct. 22 Q. Okay. Do you remember anything unique or unusual 23 about this particular location? 24 A. No. 25 Q. Okay. Do you remember what dates you did the job at</p>

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<p style="text-align: right;">Page 17</p> <p>1 Hayes and Liberal?</p> <p>2 A. No.</p> <p>3 Q. Okay. Let me refresh your memory a little bit. I'm</p> <p>4 going to show you what's Exhibit 3, and again, it's in</p> <p>5 reverse order. I'll give this back to you.</p> <p>6 So based on what you see here, it looks</p> <p>7 like the concrete went in on -- on or before the 15th;</p> <p>8 is that right?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. When you do a job like this, are you filing the</p> <p>11 paperwork the same day that you do the job?</p> <p>12 MR. KUKLA: Object as to form and</p> <p>13 foundation. What paperwork? You're talking about</p> <p>14 paper he prepared?</p> <p>15 BY MR. ACKER:</p> <p>16 Q. Yeah, any of your paperwork. When you do a job, are</p> <p>17 you filing paperwork the same day that it's done?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Is that all the time?</p> <p>20 A. Yes.</p> <p>21 Q. Okay.</p> <p>22 A. But it's not laid out quadrant by quadrant, no.</p> <p>23 Q. Okay. So this is not paperwork that you did,</p> <p>24 obviously?</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 19</p> <p>1 A. Correct.</p> <p>2 Q. -- is that right?</p> <p>3 And the foreman would be you, right?</p> <p>4 A. Yes.</p> <p>5 Q. Who's the saw cutter, if you remember?</p> <p>6 A. I don't remember.</p> <p>7 Q. Okay. You don't know if it's somebody that's still</p> <p>8 working at Merle?</p> <p>9 A. No.</p> <p>10 Q. Okay. And according to this paperwork, you put in</p> <p>11 four feet -- or you removed the concrete that was</p> <p>12 there, I'm just going to pull it up for you so we're</p> <p>13 not wasting time.</p> <p>14 I'm going to show you this again. You've</p> <p>15 seen this type of document before, right?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. So this is filed October 9th, and it appears</p> <p>18 here that what happened at the Liberal work site?</p> <p>19 A. Yes.</p> <p>20 Q. No, I'm asking you, what did you do here?</p> <p>21 A. Removed the concrete.</p> <p>22 Q. Okay. The existing concrete?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. So when you're done removing existing concrete,</p> <p>25 do you take photographs of any kind of the site?</p>
<p style="text-align: right;">Page 18</p> <p>1 Q. This was done by your supervisor?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. What kind of paperwork are you -- are you</p> <p>4 filling out something that looks similar to this?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. Would it look -- again, this is from your</p> <p>7 supervisor, right?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. Now, according to your supervisor's paperwork,</p> <p>10 the job was done on or before October 9th -- or excuse</p> <p>11 me, was started on or before October 9th and completed</p> <p>12 by October 15th.</p> <p>13 A. Correct.</p> <p>14 Q. Any reason to disagree with that?</p> <p>15 A. No.</p> <p>16 Q. Okay. Do you remember exactly what date you did --</p> <p>17 you installed the concrete at Liberal and Hayes?</p> <p>18 A. No.</p> <p>19 Q. Okay. So I want to just ask you a couple questions</p> <p>20 about this. Do you see the paperwork that your boss</p> <p>21 fills out?</p> <p>22 A. No.</p> <p>23 Q. Okay. You have no reason to disagree, I'm showing you</p> <p>24 this paperwork again, that there was a foreman and a</p> <p>25 saw cutter out there --</p>	<p style="text-align: right;">Page 20</p> <p>1 A. Not usually.</p> <p>2 Q. Okay.</p> <p>3 A. Sometimes, but --</p> <p>4 Q. When would you -- when would you take photographs?</p> <p>5 A. I really don't.</p> <p>6 Q. Okay. And would you say then that you left some sort</p> <p>7 of caution tape or anything up there that day, or do</p> <p>8 you not know?</p> <p>9 A. No, I left caution tape.</p> <p>10 Q. And where is that -- do you have any documentation</p> <p>11 showing that that occurred?</p> <p>12 A. No.</p> <p>13 Q. Okay. No, you're not required to make any</p> <p>14 documentation that you left --</p> <p>15 A. No.</p> <p>16 Q. -- anything up there?</p> <p>17 Okay. Now, I'm just going to refer</p> <p>18 again -- actually this is -- we did this again. Oh,</p> <p>19 this is Exhibit 1.</p> <p>20 Okay. So do you see this here? I'm</p> <p>21 showing you --</p> <p>22 A. Yes.</p> <p>23 Q. -- Exhibit 1, the first photograph. Is this the way</p> <p>24 that you would remove a concrete slab?</p> <p>25 A. Yes.</p>

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<p style="text-align: right;">Page 21</p> <p>1 Q. Okay. And now not referring to any of the caution 2 tape, do you have any reason to believe that this is 3 an accurate photograph of that particular site? 4 A. Yes, but not after I left. 5 Q. Okay. So you'd say this photograph was taken at least 6 a day after you left; is that fair? 7 A. Yes. Depending on what day, yeah. 8 Q. Okay. So when you left, what condition did you leave 9 it in? 10 A. Well, we would have left it with caution tape, barrels 11 and sidewalk closed signs. 12 Q. Okay. So show me where -- where would you generally 13 leave these? Or where did you leave these in this 14 particular location? 15 A. Usually you would caution tape from here to here, from 16 there, there to there, and then all the way around, 17 and one barrel there and one barrel there with a 18 sidewalk closed sign at the intersection. 19 MR. PADDJSON: Counsel, for the record 20 please clarify what he's representing. 21 BY MR. ACKER: 22 Q. Yeah, it's okay if you draw on this one. Why don't we 23 just do that. So why don't you show me where -- and 24 you know this, this is where you left it on this 25 particular job?</p>	<p style="text-align: right;">Page 23</p> <p>1 Q. Okay. 2 A. But I mean usually the protocol is caution tape to the 3 barrels. 4 Q. If a pennant site isn't available? 5 A. Or we put concrete pins in place. 6 Q. Okay. Did you put concrete pins in place here? 7 A. Yeah. 8 Q. And where were those on this photograph? 9 A. I don't know. They're usually right here -- 10 Q. Okay. 11 A. -- in the grass. 12 Q. Okay. Are those easy to get out? 13 A. Yeah, I mean -- well, it depends. 14 Q. What does it depend on? I'm not trying to trick you, 15 I'm just here to get information. 16 A. I mean you would have to yank them out. 17 Q. Okay. But someone could do it by hand -- 18 A. Yes. 19 Q. -- without any special equipment? 20 A. It's just like moving a barrel. 21 Q. Okay. And I just want to show you one other 22 photograph, if you don't mind. This is Exhibit 2. We 23 looked at this again, right? 24 A. Okay. 25 Q. Okay. Do you see in this picture a permanent pole</p>
<p style="text-align: right;">Page 22</p> <p>1 A. You would leave a barrel right here -- 2 Q. Okay. 3 A. -- a barrel there, and then you would caution tape the 4 whole thing right around in a circle. 5 Q. You can draw -- you can write on it, that's fine. 6 A. Usually you caution tape the whole thing right here in 7 a circle, and your sidewalk closed signs would be at 8 the quadrants, the intersections saying sidewalk 9 closed. 10 Q. Do you know if there are any permanent poles or 11 permanent posts around there? 12 A. No. 13 Q. There was nothing permanent around there, is that 14 your -- 15 A. I don't recall. 16 Q. Okay. In a situation where there was something 17 permanent, like a light -- you know, like a big light 18 post or a streetlight, or something like that, would 19 you use the streetlight or that post to leave some 20 sort of caution tape? 21 A. Yes. 22 Q. Okay. You would all the time you would use it, is 23 that fair, if it was available to you at a particular 24 job site? 25 A. If it was available.</p>	<p style="text-align: right;">Page 24</p> <p>1 right there? 2 A. Yes. 3 Q. You never used this, did you? 4 A. I don't recall. 5 Q. Okay. But it's possible that you did, you just don't 6 remember? 7 A. Don't recall. 8 Q. Okay. And you never -- you never notate that, would 9 you? 10 A. No. 11 Q. Okay. You don't have to let anybody else know about 12 that? 13 A. No. 14 Q. It's totally your discretion, fair? Is that fair? 15 A. Yes. 16 Q. All right. So I just want to make sure. So you went 17 out there, you were also on the team that went out and 18 put the new concrete in, right? 19 A. Yes. 20 Q. When you returned to the site, do you remember if all 21 the barricades were stolen from this particular site? 22 A. I don't -- I don't remember. 23 Q. Okay. If all the concrete barricades or everything -- 24 if the barricades were all stolen, is that something 25 you would tell your supervisor about?</p>

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<p style="text-align: right;">Page 25</p> <p>1 A. I mean usually if they -- if we went to a site and the 2 barrels were missing we'd put new ones right away 3 right there, that's usually how it works. 4 Q. And would you notate that anywhere? Would you write 5 that down? 6 A. No, because it's a common occurrence down there. 7 Q. Okay. And when you say it's a common occurrence, it's 8 a common occurrence for some things to be stolen, or 9 for everything to be stolen? 10 A. Just to be misplaced. 11 Q. Okay. And what do you mean by misplaced? 12 A. They move them out of the way, they take the caution 13 tape down, they take the sidewalk closed signs away to 14 scrap, or whatever they do with them down there. 15 Q. Okay. So when you say misplaced, it could be placed 16 in the street, it could be placed somewhere else? 17 A. Correct. 18 Q. In this particular circumstance, do you believe that 19 everything was stolen and no trace of it was left? 20 A. No, I mean the barrel could be over here in this 21 picture, for all I know. 22 Q. Okay. But you don't have any memory of that? 23 A. No. 24 Q. Okay. Did you ever note any of that in this 25 particular report, if everything was stolen? <i>Y</i></p>	<p style="text-align: right;">Page 27</p> <p>1 I have. 2 3 EXAMINATION 4 BY MR. BERGER: 5 Q. Mr. Boudreaux, the protocol that you described for 6 placing the barricades and the caution tape, where do 7 you take that protocol from? Is that just a standard 8 protocol that Merlo has, or is there a written 9 specification or a drawing that indicates that? Where 10 did that come from? 11 A. It's just a standard operation that we follow. 12 Q. Okay. So there's no specification for this project on 13 how you place the barrels or the caution tape, or 14 anything like that? 15 A. No, usually it's -- no, I mean we would caution tape 16 it off. 17 Q. That's an internal policy -- 18 A. Yeah. 19 Q. -- and procedure to Merlo? 20 A. Yeah. 21 Q. This was a unit price project, right? 22 A. Right. 23 Q. You were getting paid based on your units, correct? 24 A. Correct. 25 Q. And I misspoke in the supervisor's dep and said time and material.</p>
<p style="text-align: right;">Page 26</p> <p>1 A. No. 2 Q. Okay. So you went back there to place it up a few 3 days later; is that right? I mean excuse me, to put 4 the new concrete in; is that right? 5 A. Yes. 6 Q. And it was just you and one other person? 7 A. When I placed the concrete? 8 Q. Yeah. 9 A. No. 10 Q. How many people would go out there and place the 11 concrete? 12 A. Five, six guys. 13 Q. Okay. I just have one other question for you about 14 this particular site. Do you see this fourth 15 photograph here? 16 A. Yes. 17 Q. Okay. Do you see the orange like fence around the 18 property there? 19 A. Yes. 20 Q. Is that something you or your crew would have put up? 21 A. No. 22 Q. Okay. Do you have that on your truck, or available to 23 put up if you wanted to? 24 A. No. 25 MR. ACKER: Okay. That's all the questions</p>	<p style="text-align: right;">Page 28</p> <p>1 So were you tracking any way the placement 2 of barricades and things like that, was that tracked 3 under a separate unit column for unit pricing, or no? 4 A. I'm not sure. 5 Q. Okay. Did you hold regular safety meetings with your 6 crews out there? 7 A. Yes. 8 Q. All right. Like a tool box lunch, or something like 9 that? 10 A. Tool box talk once a week. 11 Q. Once a week? 12 A. Yeah. 13 Q. Mornings? 14 A. Yes. 15 Q. Did you document those? 16 A. Yes. 17 Q. Did Rauhorn have anyone out on the project that they 18 specifically designated for safety? 19 A. Yes. Usually they do, I don't particularly remember 20 that project, but that would be the prime contractor, 21 they do. 22 Q. The prime contractor has a designated safety person, 23 correct? 24 A. Yes. 25 MR. BERGER: That's all I have for right</p>

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Brian Boudreaux  
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<p style="text-align: right;">Page 29</p> <p>1 now. Thanks.</p> <p>2 MR. PADDISON: Mr. Boudreaux, my name is</p> <p>3 Gary Paddison, I represent the City of Detroit in this</p> <p>4 action, a couple quick questions for you.</p> <p>5 EXAMINATION</p> <p>6 BY MR. PADDISON:</p> <p>7 Q. First and foremost, with respect to this project at</p> <p>8 Liberal and Hayes and the photographs depicted in</p> <p>9 Exhibit 1, during your time working on this project do</p> <p>10 you recall interacting with any employees or</p> <p>11 representatives of the City of Detroit?</p> <p>12 A. Just Parsons Brinckerhoff,</p> <p>13 Q. Okay. But any employees of like Detroit Public Works?</p> <p>14 A. No.</p> <p>15 Q. Were you required to report to any employees or</p> <p>16 representatives of the City of Detroit?</p> <p>17 A. No.</p> <p>18 Q. To the best of your knowledge, did any employees or</p> <p>19 representatives of the City of Detroit have the</p> <p>20 authority to dictate how you performed your tasks and</p> <p>21 your duties relative to the project?</p> <p>22 A. Not that I'm aware of.</p> <p>23 Q. Okay. The location that's depicted in Exhibit 1</p> <p>24 showing the portion of the sidewalk that had been</p> <p>25 removed, is it your understanding that Merlo and/or</p>	<p style="text-align: right;">Page 31</p> <p>1 CERTIFICATE</p> <p>2 STATE OF MICHIGAN</p> <p>3 COUNTY OF MACOMB</p> <p>4</p> <p>5 I, LISA M. FIX, C.S.R. 3121, a Notary</p> <p>6 Public in and for the above county and state, do</p> <p>7 hereby certify that the deposition was taken before me</p> <p>8 on the date hereinbefore stated, that the witness was</p> <p>9 by me first duly sworn to testify to the truth; that</p> <p>10 this is a true, full and complete transcript of my</p> <p>11 stenographic notes so take; and that I am not related,</p> <p>12 nor a counsel to either party, nor interested in the</p> <p>13 event of this cause.</p> <p>14</p> <p>15 </p> <p>16</p> <p>17 <i>Lisa M. Fix</i></p> <p>18 LISA M. FIX, CSR - 3121</p> <p>19 Notary Public, Macomb County</p> <p>20 My Commission Expires: 4-9-2019</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 30</p> <p>1 its employees removed that portion of the sidewalk?</p> <p>2 A. Yes.</p> <p>3 Q. And after removing that portion of sidewalk would it</p> <p>4 have been Merlo and/or its employees' responsibility</p> <p>5 to put up barricades and warning signs?</p> <p>6 A. Yes.</p> <p>7 MR. KUKLA: Objection to form.</p> <p>8 MR. PADDISON: Okay. That's it for me.</p> <p>9 MR. KUKLA: Nothing further.</p> <p>10 * * *</p> <p>11 (The deposition was concluded at 3:40 p.m.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	

8 (Pages 29 to 31)

Carroll Court Reporting and Video  
586-468-2411

**EXHIBIT 6:**

**TRANSCRIPT OF 1/30/17 TRIAL COURT HEARING OF  
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

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STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE  
CIVIL DIVISION

KEITH SMITH,  
Plaintiff,  
-vs- CASE NO: 15-001269-NO  
RAUHORN ELECTRIC INC, et al,  
Defendants

-----/

MOTION HEARING

Before the HONORABLE SHEILA ANN GIBSON, Circuit Judge,  
Detroit, Michigan - Thursday, January 12, 2017

APPEARANCES:

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WITNESSES:

None

EXHIBITS:

None

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Detroit, Michigan.

Thursday, January 12, 2017, 11:44 AM

THE COURT CLERK: 15-001269-NO, Keith Smith  
versus City of Detroit, et al.

MS. WARNER: Good morning, your Honor.  
Amanda Warner, on behalf of plaintiff, Keith Smith.

MR. KUKLA: Good morning, your Honor.  
Patrick Kukla, appearing on behalf of defendants, Rauhorn  
Electric and Merlo Construction Company.

THE COURT: Okay, now we've been around the  
block a couple of times --

MR. KUKLA: We have, your Honor.

THE COURT: -- in this case, and this is  
the summary -- your summary disposition.

MR. KUKLA: Defendant's motion for summary  
disposition, correct. At this point, we're the only  
defendants left in the case, your Honor.

THE COURT: Okay.

MR. KUKLA: There were -- as the Court is  
familiar, there were a number of different motions filed  
and some other defendants in the case. We're the only two  
remaining, at this point. This is our motion for summary  
disposition, based on essentially two arguments. One is  
that the alleged defect -- I know that your Honor, I know,  
is aware of the facts. The plaintiff was -- alleges that



1 he was injured when he was riding his bicycle on the  
2 sidewalk in the City of Detroit. There was a portion of  
3 the sidewalk where the concrete had been removed, as part  
4 of a sidewalk restoration or highway restoration project.

5 THE COURT: Mm-hmm.

6 MR. KUKLA: Plaintiff claims he fell off  
7 his bike and landed on the grass, sustained an injury. He  
8 was riding at night, didn't have his helmet on -- or  
9 have any helmet on and did not have any type of lamp or  
10 headlight on the bicycle. As he's riding, he falls,  
11 claims he's injured. The defendants in this case, the  
12 remaining defendants, Rauhorn and Merlo, the allegation is  
13 that they were the defendants who had been contracted to  
14 remove the concrete. Nonetheless, the plaintiff's  
15 position is that they caused the condition that led to his  
16 fall, which was this missing slab of sidewalk. Our  
17 position, your Honor, is that -- argument is twofold.  
18 One, that the alleged defect, this missing portion of  
19 sidewalk, was objectively open and obvious, which bars  
20 plaintiff's claim. In the alternative, if this is -- if  
21 the Court construes this or interprets the plaintiff's  
22 allegations to be one of ordinary negligence, instead of  
23 premises liability, plaintiff's claim still fails because  
24 Rauhorn had no involvement in removing the contract -- or  
25 concrete. They were the prime contractor. They

1 subcontracted all of the work out -- the concrete removal  
2 out to Merlo. So, there's no evidence -- plaintiff has  
3 come forward with no evidence that Rauhorn actually did  
4 any of the work that allegedly caused this missing  
5 sidewalk.

6 THE COURT: So, Rauhorn sur --  
7 subcontracted Merlo, correct?

8 MR. KUKLA: Correct.

9 THE COURT: Okay.

10 MR. KUKLA: There is no dispute that Merlo  
11 removed the concrete. That's not in dispute. Plaintiffs  
12 have -- are taking the deposition of two of the  
13 representatives of at Merlo, they testified that, you  
14 know, they were approximate, I think, it was October 9th;  
15 they went out there and removed the concrete, and I'll  
16 address that, why I don't believe there's negligence there  
17 in a minute. In terms of the open and obvious argument,  
18 it's our position and the case law, I believe, supports  
19 it, that, in order to construe what the plaintiff -- you  
20 have to look at the -- at the allegations in the complaint  
21 and, in this case, they're alleging essentially that we  
22 failed to correct a defect in the land, failed to warn the  
23 plaintiff and these allegations all sound in premises  
24 liability. So, our position is based on that, your Honor,  
25 based on allegations that they've made in the complaint,

1       this entry that the plaintiff is claiming, arose out of an  
2       alleged defect in the land. Nothing to do with how we  
3       removed the concrete or anything of that sort. He claims  
4       that there was a missing portion of sidewalk and he claims  
5       he didn't know about it and, therefore, he sustained an  
6       injury. So, our position is that, even though we're not  
7       the premises owner, the unpublished Court of Appeals  
8       opinion that I cited, *Jessee versus Walgreen's*, supports  
9       our position that if the plaintiff alleges premises  
10      liability, then the defendant, even if they're not the  
11      premises possessor, can still assert the open and obvious  
12      defense. So, our position, looking at a fair reading of  
13      their complaint, in its entirety, they're alleging  
14      premises liability, therefore, we can raise the open and  
15      obvious defense. As to whether the actual defect was open  
16      and obvious, I think the evidence, again, supports that.  
17      Plaintiff testified that, after he fell, he was -- from a  
18      standing position, he looked down. He could see that  
19      there were was a missing portion of sidewalk. He test --  
20      he took pictures the following day, which we've attached  
21      and I know plaintiff has attached to their brief. I  
22      submit that those photographs clearly indicate that this  
23      condition was objectively open and obvious. Michigan  
24      courts have consistently held that difference in height  
25      levels or uneven pavement is objectively open and obvious,

1 absent some of the unique circumstances. And, in this  
2 case, I would submit there are no other unique  
3 circumstances. Now, the plaintiff would say, well, I  
4 didn't see it. Well, I asked him, during his deposition,  
5 where was he looking and he testified he wasn't looking at  
6 the ground; he was looking straight ahead. Their other  
7 argument seems to be, well, it was dark outside. Well, as  
8 I'm sure your Honor knows, there's case law that says that  
9 the simple fact that it was dark doesn't, in and of  
10 itself, mean that the condition wasn't open and obvious.  
11 It's whether the condition was such that an objective  
12 person would observe on a casual observation. Here,  
13 again, plaintiff was able to see it and, furthermore, he  
14 had been riding his bike for quite some time. This wasn't  
15 like he just pulled out of his house and got on his bike.  
16 So, the idea that it was too dark, that he couldn't see  
17 anything, doesn't hold up because he had been riding the  
18 sidewalk, by his own testimony, for quite some distance.  
19 Secondly, he testified that, after he fell, he stood up,  
20 could see the missing sidewalk and, further, he testified  
21 that a good samaritan, who was walking apparently on the  
22 other side of the street, observed him fall and was able  
23 to come over and render aid. So, all of that, I believe,  
24 supports the fact that there's nothing unique about the  
25 darkness. It didn't prevent him from seeing this. What

1        was -- from seeing what was there to be seen, had he cared  
2        to look. And also, I think any argument that plaintiff  
3        makes that he wouldn't have been able to see it, had he  
4        looked down, is speculation, because he wasn't looking  
5        down. So, the idea that he couldn't see it because it was  
6        dark, there's simply no evidence of that. In their  
7        response, plaintiff argues that it's not premises  
8        liability; its ordinary negligence is what they're  
9        claiming, because they allege that Merlo caused this  
10       condition. However, I cited the Buhalis versus Trinity  
11       case, which essentially says that, even if that -- the  
12       fact that you're -- the plaintiff alleges that the  
13       defendant caused the condition that was a defect in the  
14       land doesn't transform the claim from one of ordinary  
15       negligence to premises liability. So, I give -- believe,  
16       in total, this is a premises liability claim. The  
17       condition was objectively open and obvious and the  
18       plaintiff's claim should be dismissed and the defendants  
19       are entitled to summary disposition. Alternatively, just  
20       very briefly, your Honor, I know the Court -- the Court's  
21       read the pleadings and the motions and responses, and I  
22       did file a reply brief. I don't know, your Honor, if you  
23       got a copy of that because --

24                THE COURT: I do. I haven't read it.

25                MR. KUKLA: -- that was after the case had

1           been reassigned.

2                   THE COURT: I just got that this morning.

3                   MR. KUKLA: Okay.

4                   THE COURT: I didn't have an opportunity.  
5           If you'd like to outline what you --

6                   MR. KUKLA: Sure. In the reply brief,  
7           essentially, your Honor, again I argue that Rauhorn --  
8           they've come forward with no evidence that Rauhorn  
9           actually caused this alleged defect, caused the condition,  
10          'cause Rauhorn didn't do anything, in terms of removing  
11          the concrete. So, I believe Rauhorn should be granted  
12          summary disposition. I addressed the open and obvious  
13          arguments that I just mentioned. I would -- in my reply  
14          brief, I did point out that the case law that the  
15          plaintiff cites, for the proposition that even if the  
16          allegation -- the alleged injury arose out of a condition  
17          of the land, that that somehow permits them to file an  
18          ordinary negligence claim. The case law that they've  
19          cited, I distinguish -- I attempted to distinguish, I  
20          think they are distinguishable, by the fact that in each  
21          of those cases, the allegation -- the -- the land had only  
22          a minor connection to the alleged claim. For them -- and  
23          the Hiner case was the one I specifically addressed, where  
24          the plaintiff was attempting to repair a cable box on the  
25          defendant's property. The defendant's dog started to

1 chase the plaintiff. While the plaintiff was attempting  
2 to avoid the dog, the plaintiff slipped and fell on some  
3 soft, muddy ground and the trial court had granted summary  
4 disposition, under the theory that the soft, muddy ground  
5 was objectively open and obvious. And when the Court of  
6 Appeals says, no, that's -- this is -- the primary  
7 complaint there was that the plaintiff -- defendant had  
8 failed to supervise their dog. Similarly, there was  
9 another case, where I forget the name but it's addressed  
10 in the reply brief, where a hotel owner, a young infant --  
11 a young child had drowned in the hotel pool. Well, there  
12 was no allegation that the pool itself was defective. The  
13 allegation was that the hotel had a duty to either provide  
14 a lifeguard or somehow supervise. There's no allegation  
15 like that in this case. His -- plaintiff strictly says he  
16 was injured, because he didn't appreciate that there was  
17 this missing sidewalk, so that the sidewalk wasn't even;  
18 it wasn't level. And then, lastly, I address the -- the  
19 argument that, even if this is ordinary negligence,  
20 there's no evidence -- plaintiff has not come forward with  
21 any evidence that Merlo breached any legal duty, separate  
22 and distinct from the contract. They were contracted by  
23 Rauhorn to remove the concrete. There's no allegation  
24 that Merlo did this in a negligent manner. The allegation  
25 seems to be that, after this concrete was removed, we had

1 a duty to somehow either warn or to go back and correct it  
2 or to provide some other barricade or something like that.

3 THE COURT: Okay, who was it that  
4 ultimately laid the sidewalk?

5 MR. KUKLA: Merlo, your Honor.

6 THE COURT: Merlo did.

7 MR. KUKLA: We came back approximately -- I  
8 believe that the testimony was October 9th it was removed.  
9 I believe, on or before October 15th, the concrete was  
10 repoured.

11 THE COURT: Mm-hmm.

12 MR. KUKLA: I believe the incident  
13 allegedly happened on October 12th. So, sometime in  
14 between that period, but our position is this isn't a case  
15 where they're saying that, while we were removing the  
16 concrete, we knocked down a fence and someone tripped over  
17 the fence or we damaged -- we cut down a tree and the tree  
18 fell on someone's car. We were hired to remove the  
19 concrete; we removed the concrete. We were hired to pour  
20 concrete back; we poured concrete back. There's no  
21 allegation -- we don't have a duty -- we don't have a  
22 common law duty to warn pede -- pedestrians or people on  
23 bicycles that the sidewalk had been removed. Similarly,  
24 the testimony was that we, in fact, put up barricades and  
25 that, somehow, either -- either people just knocked them



1 as a prank or stole 'em for scrap. I don't know what they  
2 would do with caution tape but the testimony was that the  
3 items were not -- that they were placed there. Plaintiff  
4 says, well, I didn't see it when I -- when I allegedly  
5 fell but there's no evidence to refute that, in fact,  
6 Merlo did, in fact, put some type of barricade up. But,  
7 even if they didn't, the testimony -- the Weakley case  
8 that I cited, where the court upheld a grant of open and  
9 obvious -- or dismissed a case based on open and obvious  
10 for a missing section of sidewalk, even in that case there  
11 were no barricades. The court found that that was  
12 objectively open and obvious. So, again, even if the  
13 Court were to construe this as ordinary negligence, I  
14 think there -- the evidence -- the record is lacking of  
15 any evidence of what Merlo did, other than simply perform  
16 its contract, which was to remove concrete. So, based on  
17 that, we would ask that summary disposition be granted,  
18 your Honor.

19 THE COURT: Okay. Let's do with Rauhorn  
20 first. What's your position, relative to Rauhorn?

21 MS. WARNER: Rauhorn is the principal and  
22 Merlo is the agent. Rauhorn was contracted by the city  
23 and MDOT to have this work done and they subcontracted  
24 with Merlo to actually do the work.

25 THE COURT: Okay, so --

1 MS. WARNER: Rauhorn is responsible for the  
2 actions of their agents and, if their agents are  
3 negligent, they're responsible for that negligence.  
4 Rauhorn also is involved because Merlo got the barrels and  
5 the alleged barrels, caution tape, signs, any warnings  
6 that they say they usually do when they remove concrete,  
7 from Rauhorn, although there is no evidence, no paperwork  
8 -- no witnesses testified that they actually did that. No  
9 evidence suggesting that they -- any of the barrels went  
10 missing and that there was any vandalism. There's no  
11 police reports filed and, actually, the contractor  
12 testified that none -- it's never happened to him, that  
13 all of the warnings were stolen in any one place, where  
14 they were performing work. So, Rauhorn is responsible for  
15 the negligence of its agent. Merlo is its agent.

16 MR. KUKLA: Your Honor, I -- again, Merlo  
17 were was an independent contractor. They were not an  
18 employee of Rauhorn. I think Michigan case law is clear,  
19 that there is no -- there can't be -- there's no claim for  
20 negligent hiring of a subcontractor and the case law, I  
21 believe, supports the position that you're not liable for  
22 the actions of an independent contractor. So, unless they  
23 were doing something at your direction, perhaps, but  
24 there's no evidence here that Rauhorn instructed Merlo as  
25 to how to remove the concrete or anything of that sort.

1       So, again, I think Rauhorn should be dismissed, your  
2       Honor.

3               THE COURT: All right.

4               MS. WARNER: I'm not aware of any indemnity  
5       agreements either, but if they are present, they might  
6       have one, you know, with regard to how Merlo's supposed to  
7       conduct its work.

8               THE COURT: But the fact of the matter  
9       remains I -- I think it's undisputed that Merlo was an  
10      independent contractor and Merlo was the only one who  
11      effectively did the work and Merlo was responsible  
12      determining how it was done and the timeframe, and the  
13      specs that were involved. Therefore, taking the evidence  
14      in a light most favorable to the nonmoving party, the  
15      Court finds that Rauhorn has no legal basis, whatsoever,  
16      for any alleged negligence, on the part of Merlo, and the  
17      Court will dismiss, as to Rauhorn. Now, your arguments,  
18      as to Merlo?

19              MS. WARNER: Thank you, your Honor. First  
20      issue is the issue of ordinary negligence. Defendant  
21      Merlo was contracted by defendant Rauhorn and actively  
22      removed the sidewalk. We're not talking about a small  
23      area of sidewalk. We're talking about two very large  
24      slabs of sidewalk that were completely taken out. The  
25      height differential was significant but it was in the same

1 shape as the existing sidewalk. Defendant, Merlo, had no  
2 control or possession over the premises, when plaintiff  
3 fell. Merlo doesn't own it. They had no duty to, you  
4 know, pay rent for that or take care of that piece of  
5 land. So, that's why we're alleging ordinary negligence  
6 here, that the actual conduct of Merlo, in removing that  
7 area of the sidewalk, leaving it like that for five days,  
8 without any warnings, without any barricades, their actual  
9 conduct is the basis for liability. It's no different  
10 than hiring an electrician who performs work or any sort  
11 of service provider, on the land, and then they -- they do  
12 that work negligently or they leave it so somebody else is  
13 harmed and we sue those service providers on ordinary  
14 negligence, not premises liability, as they're not the  
15 home owner. They're not the land owner. They don't own  
16 the property, the land. Michigan law allows for both  
17 claims, premises and ordinary negligence, and defendants  
18 did not own, occupy or possess land --

19 THE COURT: But, what about this --

20 MS. WARNER: -- as it's stated in Laier v  
21 Kitchen.

22 THE COURT: Okay but what about the other  
23 case law that Mr. --

24 MS. WARNER: That's an unpublished case  
25 with a very short analysis of the situation. I don't

1 think it was and analyzed in the context of ownership and  
2 the facts are different too. We have a spill in a grocery  
3 store. Here, we have a huge construction project  
4 that's -- warnings are required and the sidewalk's  
5 required to be closed and I think this instance is  
6 different. The duty arises from the fact that they didn't  
7 put warnings out. I know that there was some suggestion  
8 that they always do. That was the testimony, but there  
9 was no testimony that they actually put the warnings out,  
10 the barrels out, the caution tape out, in this case.

11 THE COURT: Yeah, your arguments, even  
12 though you're -- you're stating a -- you're raising in  
13 terms of general negligence, it -- it appears that your  
14 arguments are still couched, in terms of -- even though  
15 you're not saying open and obvious and you're not saying  
16 premises, it sounds like your arguments are based in  
17 premises liability.

18 MS. WARNER: But also the fact that the  
19 defendant Merlo's conduct, they could remove the sidewalk,  
20 but they left it open for five days. They should have  
21 filled the sidewalk in, after they took it out. They  
22 should have placed barricades. Their -- it was their  
23 actual conduct that is the issue here, your Honor, which  
24 created the actual injury.

25 THE COURT: Mr. Kukla?

1 MR. KUKLA: Your Honor, again, if you look  
2 at, and I know the Court's read the briefs, in their  
3 complaint, they're essentially alleging, again, that Merlo  
4 failed to correct direct a dangerous condition on the  
5 land, failed to make the area safe, failed to warn the  
6 plaintiff. Those claims all the sound in premises  
7 liability and, in fact, plaintiff is claiming that he was  
8 injured as a result of an alleged defect in the land,  
9 which was this height differential between the missing  
10 section of the sidewalk. And, as I cited in the -- in the  
11 -- and I think the Jessee versus Walgreen case, while  
12 admittedly it was a spill of some liquid on the floor, not  
13 a sidewalk case, the analysis is the same, which is you  
14 look -- the Court looks to what the allegations are in the  
15 complaint, what's the gravamen of the claim, and,  
16 regardless of how they title it, if they're making an  
17 allegation of premises liability, then the defendant, even  
18 if not the premises possessor, can assert the open and  
19 obvious defense. In the published case of Buhalis versus  
20 Trinity Continuing Care Services, the Court there  
21 indicated that, even where the plaintiff alleges that the  
22 premises possessor created the condition, giving rise to  
23 the injury, that doesn't convert the case -- the claim  
24 from premises liability to ordinary negligence. So, even  
25 if plaintiff is arguing, well, he created this hazard,

1       which again I -- my position is Merlo just performed in  
2       accordance with their contract and if there is a dispute  
3       between Rauhorn and Merlo as to how they -- the contract  
4       was performed, that doesn't give rise to a claim -- I  
5       think -- the plaintiff claim against us for not complying  
6       with the contract. But even if they allege -- if their  
7       claim is well, you caused it, that doesn't convert a claim  
8       from -- from premises liability to ordinary negligence.

9               MS. WARNER: I would also say again that  
10       the claim or the issue that he keeps bringing up,  
11       regarding the contract, you can't just contract to do  
12       something and not take into consideration other aspects of  
13       safety. You can't contract to remove a sidewalk and then  
14       just place that liability on -- in the contract, well  
15       there was no -- nothing in the contract regarding safety  
16       over how long the sidewalk was supposed to be closed or  
17       when the cement was supposed to be refilled in.

18              THE COURT: Yeah, I understand that, but  
19       like I said, and I go back to what I said just a few  
20       minutes ago to you and the arguments that are being raised  
21       by Mr. Kukla, is that, you know, you're trying to make  
22       this general negligence but their -- the -- the claim  
23       sounds in general negligence -- I'm sorry, in premises  
24       liability. The complaint does the allegations. Even your  
25       arguments are sounding in premises liabilities --



1 liability, and there are published opinions that indicate  
2 that even though, and we'll look at Walgreen's and we can  
3 look at Buhalis, in terms of the fact that the defendant  
4 can raise the open and obvious defense here and, you know,  
5 if it walks like a duck, talks like a duck, quacks like a  
6 duck, it is a duck, and that's what's happening here. The  
7 claims are all sounding in premises liability. The  
8 arguments you raise are sounding in premises liability  
9 and, that being the case, if it's premises liability, we  
10 need to look at the language in the open -- open and  
11 obvious statute and the case law that follows that. In  
12 there -- this is a situation where the plaintiff --

13 MS. WARNER: Your Honor, I'm sorry. I  
14 don't mean to interrupt you. I didn't argue the open and  
15 obvious issue. I don't --

16 THE COURT: No, no, but I'm saying that it  
17 sounds -- you're not saying it, but your arguments are  
18 sounding. That's what I'm saying. I know you're --  
19 you're saying you have alleged, you know, and I understand  
20 you're saying it's general negligence, it's general  
21 negligence, it's general negligence, but as we know, the  
22 complaint, the claims and the arguments are all sounding  
23 in premises liability. I know what you're saying but  
24 everything that is delineated and outlined here, and like  
25 I said, think I said that early on, you're not saying

1 premises, but that's the way this whole case falls out  
2 and, you know, taking the evidence in the light most  
3 favorable to the nonmoving party, the Court finds that  
4 this is a case that does sound in premises liability and  
5 it is one, whereby the case should be dismissed. And,  
6 even looking at it in terms of a negligence claim, the  
7 Court doesn't find there's any substantial basis, taking  
8 the evidence in a light most favorable to the nonmoving  
9 party, as well, to allow the claim to proceed on a claim  
10 of general negligence, as well. So, the Court is going to  
11 grant the motion for summary disposition, as I indicated,  
12 primarily because this case does sound in premises  
13 liability. But, even if we take it one step further, the  
14 Court does not find that there is any negligence on the  
15 part of Merlo Construction, in its completing the work  
16 that was designated to it with the contract from  
17 Rauhorn -- Rauhorn Electric.

18 MS. WARNER: Your Honor, if I may, because  
19 you determined that it was a premises case and opened and  
20 obvious would apply, would you mind if I gave you  
21 additional arguments, regarding why open -- why this issue  
22 would not be --

23 THE COURT: Fine.

24 MS. WARNER: -- open and obvious?

25 THE COURT: Mm-hmm.

1 MS. WARNER: The -- an average person with  
2 ordinary intelligence is the standard that is the standard  
3 but it's also when you put -- when the average person is  
4 in the plaintiff's position and, in the plaintiff's  
5 position, he was on a bicycle and he was in the dark.  
6 Whether or not he had a lamp goes to comparative  
7 negligence, which is not considered in open and obvious.  
8 That's a different element. So, in the dark, on a  
9 bicycle, an average person in that position would not have  
10 discovered this missing sidewalk, upon casual inspection,  
11 and that's because the sidewalk that was removed was in  
12 the same shape as the existing sidewalk.

13 THE COURT: But, did you say there were  
14 two -- two slabs missing?

15 MS. WARNER: Two, as in not wide but going  
16 straight.

17 THE COURT: In front going -- on the  
18 sidewalk, there were two slabs. There -- I -- there are  
19 two --

20 MS. WARNER: Right.

21 THE COURT: -- there are two slabs. Slabs  
22 are probably three by -- three feet -- I'm estimating,  
23 probably approximately three by five?

24 MS. WARNER: There was a picture attached  
25 or included in the plaintiff's --

1 THE COURT: What exhibit?

2 MS. WARNER: -- response. It's actually on  
3 page 2. It's right in the brief.

4 THE COURT: It's in the brief? Right,  
5 yeah. Those slabs -- yeah, those are average slabs of  
6 sidewalk.

7 MS. WARNER: So, as he's going forward down  
8 the sidewalk, I noted defense counsel said that he  
9 testified that he wasn't looking down and I would say that  
10 that's accurate. We don't look down when we are riding a  
11 bicycle; we look straight ahead a few feet in front of us,  
12 as we're -- as we're riding. Just like when we're  
13 walking, when we're walking, we don't stare down at our  
14 feet; we're looking a couple of feet ahead of us.

15 THE COURT: Okay, and if you're looking a  
16 couple of feet ahead of you, and I -- even if -- even if  
17 -- we'll give you everything that you said, that it was  
18 dark. This, to me, is a situation where you have a  
19 different -- I know the word I'm thinking; I can't think  
20 of it right now, but there is a different -- a varying  
21 degree of radiation. Even if you can't see it, there's a  
22 darkness and then there's a lightness. You know, and even  
23 if you're looking ahead, if I'm looking at that black  
24 chair that's, what, ten -- 10 to 15 -- probably about ten  
25 feet away from me, I can see that there's a different hue

1           there. So, wouldn't -- you don't think a reasonable  
2           person, not when you're right up on it, but if he's riding  
3           up the sidewalk --

4                   MS. WARNER: Well, I think you're right  
5           about the hues but I think that there's that expectation  
6           like a different hue. So, it's wet. It has some dirt  
7           covering it. You don't expect the danger of a missing  
8           sidewalk, which is several inches different, and I think  
9           that's the issue here. When he was going forward, riding  
10          his bike, in the dark, he didn't realize that the sidewalk  
11          was missing and he was going to be falling forward, even  
12          though he was looking where he was going, riding his  
13          bicycle. I think anybody in that position could have  
14          happened to them and, upon casual inspection, in the dark,  
15          on a bicycle. The standard isn't an after-fact inspection  
16          while you're not on a bicycle.

17                   THE COURT: I agree.

18                   MR. KUKLA: In response, your Honor, again,  
19          I think the evidence supports that this was objectively  
20          open and obvious card that a person -- a reasonable  
21          person, upon casual observation, would see that -- what's  
22          depicted in that photograph. And also I would cite to --  
23          reference to the Jaworski versus Great Scott case, where  
24          the court held ordinary prudence generally requires one to  
25          see what just -- what is there to be seen and, in this

1 case, had he cared to observe that that was a visible; he  
2 saw it after he fell. There was nothing obstructing it.  
3 In my opinion, it screams out open and obvious.

4 MS. WARNER: And I think the thing was,  
5 when they are testifying that they said that there were  
6 barrels, that there were cones, there were warning signs,  
7 there's a reason for that, because the sidewalk is  
8 missing, and the fact that there -- the missing sidewalk  
9 could pose a danger.

10 THE COURT: Well --

11 MS. WARNER: At the very least, I think a  
12 question of fact remains.

13 THE COURT: No, I -- I -- I really don't,  
14 because the fact of the matter remains is that, I think  
15 it's -- I think it's -- if they're a reasonable person,  
16 especially when you're riding a bike and you're riding a  
17 bike at night, and we know that there are varying degrees  
18 of terrain, you have to be observant and, you know, I --  
19 and the thing is that I -- I -- I -- with this and the big  
20 -- if it was maybe a half a square or a chunk missing or  
21 something like that, but we've still got the issue of open  
22 and obvious, how big was the chunk. But, here, when  
23 you've got to complete squares missing, I -- you know, I'm  
24 still back at the point where, you know, a reasonable  
25 person should have been able to see that and that's the

1       problem here. This was -- you know, we still come full  
2       circle with -- with something that's open and obvious.  
3       When you even look at the general -- general negligence of  
4       a person, what a reasonable person would have seen and if  
5       you're -- if you're -- at night, you have to be  
6       perceptive, in terms of what's going on around you and the  
7       Court doesn't feel that this is a situation that was --  
8       that was not -- that did not create a negligent situation.  
9       A reasonable person would have observed it and it's  
10      unfortunate. You know, we have those situations all the  
11      time, where there are accidents but all accidents are not  
12      recoverable and, in this situation, the Court finds that  
13      this is a situation where there wasn't any negligence.  
14      Yes, they were contracted to remove the concrete. Yes,  
15      they removed the concrete. Were there barricades? No,  
16      but the fact of the matter remains is that a reasonable  
17      person, upon, not even inspection, in its travels, should  
18      have been able to -- to -- to see that there's nothing,  
19      you know, dark, light, whatever the difference may be.  
20      Because of the fact of the matter this isn't just one  
21      small patch; it's a huge -- it's two -- two squares of  
22      cement, which probably measured somewhere between  
23      approximately anywhere from 5 to 10 feet. So, it wasn't  
24      anything that a person should not have seen, riding a bike  
25      down the sidewalk. So, taking that as a light most



1 favorable to the nonmoving party, the Court is going to  
2 grant the motion for summary disposition, as to the -- as  
3 I indicated previously, to the open and obvious aspect of  
4 it, as well as the general negligence claim, as well.

5 MR. KUKLA: And that's ask to both  
6 defendants, correct, your Honor.

7 THE COURT: Yes. Yes.

8 MR. KUKLA: Rauhorn and Merlo?

9 THE COURT: Yes, but we -- I previously, in  
10 the first --

11 MR. KUKLA: Understood.

12 THE COURT: -- portion --

13 MR. KUKLA: Understood.

14 THE COURT: -- I disposed of Rauhorn --

15 MR. KUKLA: Understood.

16 THE COURT: -- because of its lack of  
17 having any hands on responsibility, relative to the  
18 claimant claim in the first instance, and that Merlo was  
19 the independent contractor who was responsible for all of  
20 the activities that took place, relative to the removal  
21 and replacement of the sidewalk. Thank you.

22 MS. WARNER: Thank you, your Honor.

23 MR. KUKLA: Thank you, your Honor.

24 THE COURT: And I'll look for the order to  
25 follow.

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MR. KUKLA: Okay.

THE COURT: Thank you so much.

MR. KUKLA: And we did have a another -- we  
had a motion to adjourn trial but that --

THE COURT: It moot.

MR. KUKLA: -- is moot at this point.

So --

THE COURT: All right.

MR. KUKLA: -- thank you, your Honor.

MS. WARNER: Consider it adjourned.

THE COURT: Thank you so much.

(At 12:16 PM proceedings concluded)

## 1 CERTIFICATE OF COURT REPORTER

2  
3  
4 STATE OF MICHIGAN }  
5 }SS  
6 COUNTY OF WAYNE }

7 I, Manuwella Jones, Official Court Reporter in the State  
8 of Michigan, County of Wayne, do hereby certify that this  
9 transcript, consisting of 28 pages, is a complete, true, and  
10 correct transcription of the proceedings in the matter of Keith  
11 Smith v Rauhorn Electric Inc, et al, on January 12, 2017, to  
12 the best of my ability, as this proceeding was recorded without  
13 the benefit of a live reporter.

14  
15  
16 June 25, 2017

17 \_\_\_\_\_  
18 Manuwella Jones, CSMR #5634  
19 Official Court Reporter  
20 2 Woodward, #770  
21 Detroit, Michigan 48226  
22 (313)224-0409  
23  
24  
25

**EXHIBIT 7:**  
**EXCERPTS FROM DEFENDANT'S BRIEF TO COURT ON APPEALS**

**COA DOCKET NO. 337708  
LOWER COURT NO. 15-001269-NO**

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**IN THE  
MICHIGAN COURT OF APPEALS**

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**KEITH SMITH,**

*Plaintiff/Appellant,*

**v.**

**MERLO CONSTRUCTION COMPANY, INC.,**

*Defendant/Appellee,*

**-and-**

**RAUHORN ELECTRIC, INC.,**

*Defendant.*

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**DEFENDANT-APPELLEE'S BRIEF ON APPEAL**

**\* \* \* ORAL ARGUMENT REQUESTED \* \* \***

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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

### 1.

DID THE TRIAL COURT PROPERLY FIND THAT THE OPEN AND OBVIOUS DEFENSE BARRED PLAINTIFF'S CLAIMS AGAINST MERLO?

Plaintiff-Appellant says "No."

Defendant-Appellee says "Yes."

### 2.

MAY THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO MERLO BE AFFIRMED ON THE ALTERNATIVE BASIS THAT MERLO OWED NO DUTY TO PLAINTIFF INASMUCH AS MERLO WAS NOT IN POSSESSION OR CONTROL OF THE PREMISES?

Plaintiff-Appellant says "No."

Defendant-Appellee says "Yes."

- B. Merlo was entitled to rely upon the open and obvious defense even though it was not an owner or possessor of the premises.

Merlo is entitled to rely upon the open and obvious defense notwithstanding the fact that it was neither the owner nor possessor of the premises upon which plaintiff fell. Consistent with the position embraced by the trial court, our Supreme Court has time and again expanded the open and obvious danger doctrine's application and has expressly stated that it should be applied to attack the duty element of any prima facie negligence case. *Riddle v. McLouth Steel Products Corp.*, 440 Mich. 85, 95-96; 485 N.W.2d 676 (1992).

This Court, under a factual scenario strikingly similar to that in this case, has ruled that a contractor engaged to repair a municipal sidewalk, was entitled to rely upon the open and obvious defense when a bicyclist was injured upon encountering the area under repair. In *Layer v. John C. & Son Constr. Co.*, 1997 WL 33354649 (Mich. Ct. App. Feb. 7, 1997) (*Exhibit F*), plaintiff sued a contractor, who had been hired to repair a municipal sidewalk, after she fell when her bicycle tire caught in a rut between the edge of the repaired sidewalk and a grassy berm. Upholding application of the open and obvious defense, this Court stated:

A premises liability case generally involves a claim against a possessor or owner of land for injuries caused by a dangerous condition on the land. \* \* \*

Indeed, plaintiff essentially has alleged that defendant's negligence in repairing the sidewalk created the rut, i.e., a



dangerous condition on the land. Although defendant is not a possessor or owner of land, in undertaking the repair work, defendant contractually agreed to meet the city's specifications and requirements. Accompanying defendant's contractual duty to conform to these requirements "is a common law duty to perform with ordinary care the thing agreed to be done." *Clark v. Dalman*, 379 Mich. 351, 260-261; 150 NW2d 755 (1967). The contract forms the basis from which the duty arises, and that duty encompasses within its scope those who foreseeably may be injured by the negligent performance of a contractual undertaking. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995). Thus, the "open and obvious danger" doctrine could apply to these facts.

(emphasis added; citation and footnotes omitted). As in *Layer*, Merlo contractually agreed with Rauhorn to meet the specifications and requirements imposed by MDOT in its contract with Rauhorn and, as a consequence, the open and obvious defense is available to Merlo. (*Exhibit G*, Rauhorn-Merlo Contract)

Fifteen years after the decision in *Layer*, this Court again agreed with the proposition that in a premises liability action, a defendant who was neither the owner nor possessor of the premises could nevertheless invoke the open and obvious defense. In *Jessee v. Walgreen Co.*, 2012 WL 5290311, at \*3 (Mich. Ct. App. Oct, 25, 2012), *leave to appeal denied*, 493 Mich. 954 (2013)<sup>4</sup> (*Exhibit H*) the plaintiff fell due to a large water puddle on the floor of a Walgreens that was caused by the defendant's floor cleaning machine. The plaintiff testified that she eventually saw the puddle once she

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<sup>4</sup> Pursuant to MCR 7.215(C), Merlo states that it cites this unpublished opinion due to a lack of a published opinion applying the open and obvious defense to a defendant who was neither the owner nor possessor of the premises upon which a plaintiff fell.

normally best able to prevent harm to others." *Derbabian v. S & C Snowplowing, Inc.*, 249 Mich. App. 695, 705; 644 N.W.2d 779 (2002) (internal quotation marks omitted). In *Derbabian*, the plaintiff slipped and fell in a grocery store parking lot. The owner of the store had hired a contractor to clear snow and ice from the parking lot. Plaintiff sued the snow removal contractor. The Court of Appeals held that the contractor "did not exercise the requisite dominion and control over the property" since "(1) nothing in the contract granted [the contractor] 'exclusive authority' over the parking lot, (2) [the contractor] did not have actual possession over the parking lot at the time of plaintiff's fall, and (3) [the store was] in the best position to avoid plaintiff's injury." *Id.* at 705-706.

Similarly, 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. Smith in fact agrees that Merlo was not in actual possession of the premises on the date of plaintiff's fall. To hold Merlo liable under the circumstances of this case would not further the purpose that underlies the legal rationale requiring "actual possession and control[.]" where Merlo simply did not have "the power to prevent the injury ... [.]" *Kubczak*, 456 Mich. at 661 (emphasis added). Accordingly, summary disposition for Merlo may be affirmed on the alternative basis that, in this premises liability action, Merlo was not in possession or control of the premises.