

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMES J. LONG and DIANE LONG,

Plaintiffs-Appellees,

v

CITY OF PORT HURON and SEMCO ENERGY  
GAS COMPANY,

Defendants,

and

PAMAR ENTERPRISE, INC.,

Defendant-Appellant.

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UNPUBLISHED  
February 22, 2011

No. 294468  
St. Clair Circuit Court  
LC No. 06-001576-NI

Before: SAAD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In this premises liability action, defendant Pamar Enterprise, Inc., appeals by right from a judgment in favor of plaintiffs and from a subsequent order denying its motion to amend the judgment or in the alternative for a new trial. We reverse the judgment against defendant Pamar.

I. BASIC FACTS & PROCEDURE

On January 4, 2006, plaintiff James Long was jogging through the intersection of Riverside and Garfield in the city of Port Huron when he tripped on an uncovered gas valve near the curb and fell to the ground, sustaining injuries to his right knee and left elbow.

Plaintiffs<sup>1</sup> filed suit against Pamar, the city of Port Huron, and SEMCO Energy Gas Company, alleging that while Pamar was working on a sewer separation project at the

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<sup>1</sup> Diane Long asserted a claim for loss of consortium.

intersection in the fall of 2005, it negligently removed the valve cover and failed to replace the cover prior to stopping work for the winter. The trial court found in favor of plaintiffs in the amount of \$120,000, but also found that James Long was 40 percent comparatively negligent. The court awarded plaintiffs \$72,000, of which \$5,000 was allotted to Diane Long's claim. The court found that the city of Port Huron was liable for 50 percent of the amount owed to plaintiffs, or \$36,000, and that SEMCO and Pamar were liable for 25 percent of the amount owed to plaintiffs, or \$18,000 each. Plaintiffs moved for taxable costs, interest and attorney fees. The trial court granted the motion and ultimately entered a judgment in favor of plaintiffs and against Pamar in the total amount of \$32,862.41.<sup>2</sup>

Pamar moved for amendment of the judgment pursuant to MCR 2.517(B), or in the alternative for a new trial pursuant to MCR 2.611(A)(1)(e). Pamar argued that plaintiffs offered no proof that Pamar removed the valve cover, that it owed no duty to James Long because the condition was open and obvious, and that it lacked possession and control of the property. The trial court denied the motion.

## II. MOTION TO AMEND THE JUDGMENT/NEW TRIAL

Pamar argues that the trial court erred in denying its motion to amend the judgment or grant a new trial because it did not owe James Long any duty since it was not in possession or control of the premises when James Long was injured. We agree.

The denial of a motion to amend judgment is reviewed for an abuse of discretion. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 381-382; 775 NW2d 618 (2009). A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). The existence of a duty is a question of law subject to de novo review. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Under the principles of premises liability, the right to recover for a condition or defect of land requires that the defendant have legal possession and control of the premises." *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994). Possession and control are required because "[i]t is a general proposition that liability for an injury due to defective premises ordinarily *depends upon power to prevent the injury* and therefore rests primarily upon him who has control and possession." *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 662; 575 NW2d 745 (1998), quoting *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942) (emphasis in original).

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<sup>2</sup> SEMCO and the City of Port Huron have been dismissed pursuant to stipulations, and are not parties to this appeal.

In *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695; 644 NW2d 779 (2002), this Court reviewed the law of possession and control, and stated:

Our Supreme Court has defined a “possessor” of land as:

“(a) a person who is in occupation of the land with intent to control it or

“(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

“(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).” [*Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980), quoting 2 Restatement Torts, 2d, § 328 E, p 170.]

See also *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 569; 563 NW2d 241 (1997).

To determine whether [a] defendant was a possessor of [the premises], it is necessary to determine the meaning of the terms “possession” and “control” as used in the definition of “possessor.” Neither of these words has been previously defined by Michigan case law; accordingly, relevant dictionary definitions may be consulted in order to determine the plain meaning of these terms. *Oakland Co Bd of Co Rd Comm’rs v Michigan Property & Casualty Guaranty Ass’n*, 456 Mich 590, 604; 575 NW2d 751 (1998); *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 445 Mich 558, 568; 519 NW2d 864 (1994); *Hoover Corners, Inc v Conklin*, 230 Mich App 567, 572; 584 NW2d 385 (1998).

Black’s Law Dictionary (7th ed) defines “possession,” in this context, as “[t]he right under which one may exercise control over something to the *exclusion of all others*” (emphasis added). . . . *Random House Dictionary* (1995), p 297, defines “control” as “exercise[ing] restraint or direction over; dominate, regulate, or command.” Similarly, Black’s Law Dictionary defines “control” as “the power to . . . manage, direct, or oversee.” . . .

In *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998), the Supreme Court stated that “possession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the *actual exercise of dominion and control over the property*.” (Emphasis added.) [*Derbabian*, 249 Mich App at 702-704 (footnotes omitted).]

Clearly, Pamar had possession and control of the intersection of Riverside and Garfield while it was on site and working on the sewer separation project given that Pamar managed and oversaw the project. *Derbabian*, 249 Mich App at 704. Moreover, the evidence supported the trial court’s finding that the valve cover disappeared while Pamar had possession and control of the property. However, Pamar left the site for the winter, completely ceasing work on November 23, 2005. It did not return to the job site and begin working again until March or April 2006. During that time, Pamar placed no traffic barriers and construction equipment at the site. It did

not manage or direct the site, and could not exclude anyone from it. Therefore, when James Long was injured on January 4, 2006, Pamar no longer possessed or controlled the intersection. See *id.* at 702. Instead, the street was under the jurisdiction of the city of Port Huron. We conclude that the city had possession and control of the intersection at the time that James Long was injured, notwithstanding the evidence that the valve cover was removed while Pamar had possession and control of the premises. Because Pamar did not have possession and control of the intersection at the time James Long was injured, Pamar owed no duty to James Long and cannot be held liable under a theory of premises liability. *Kubczak*, 456 Mich at 662.

Given our resolution of the issue of Pamar's possession and control of the premises at the time James Long was injured, we need not address the applicability of the open and obvious doctrine.

Reversed and remanded for entry of judgment in favor of defendant Pamar. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Kirsten Frank Kelly  
/s/ Pat M. Donofrio