

Who's in Control? The Clear Line Between Ordinary Negligence and Premises Liability

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In *Farrar v Misch*, unpublished decision of the Michigan Court of Appeals, 2024, Plaintiff's decedent, Nicole Kenworthy, allegedly drowned in a swamp on Defendant's property. Kenworthy had been invited to a piece of property allegedly owned by Defendant and Defendant's father. After some time, Defendant requested that Kenworthy leave. Kenworthy then became upset. During this period, Defendant noticed that Kenworthy was standing in an unknown amount of water. Defendant told Kenworthy not to walk further into the woods due to a nearby swamp. Defendant also informed Kenworthy that he did not know who else was on the property. The next morning, Kenworthy was reported missing. Defendant gave police permission to search the property. Kenworthy's body was discovered and the cause of death was attributed to drowning in the swamp.

The trial court granted Defendant's motions (1) to dismiss the ordinary negligence claims because this was a premises liability case, and (2) to dismiss the premises liability claims because Defendant didn't have possession and control of the property. Plaintiff appealed, arguing that (1) Kenworthy shared a "special relationship" with Defendant which created a heightened duty of care, and (2) he had possession control of the premises.

In upholding the dismissal of the ordinary negligence claim, the Court opined that Plaintiff ignored the difference between a claim of ordinary negligence and a claim premised on a condition of the land. *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 335 Mich App 616, 625 (2021). Specifically, a claim where a special relationship exists creates a heightened duty of care in premises liability, not ordinary negligence. The Court stated that a claim for ordinary negligence must also allege negligent conduct separate from the condition of the land. An ordinary negligence claim is not viable where the claim concerns the creation of a dangerous condition. *Nathan v David Leader Mgt, Inc*, 342 Mich App 507, 513 (2022). The Court held that Plaintiff's claim concerned premises liability only, and the trial court's dismissal of the ordinary negligence claims was proper.

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Farrar v Misch contrasts the differences between ordinary negligence and premises liability claims.

Where a plaintiff's injuries resulted from a person's actions or inactions, a claim for ordinary negligence may be viable. However, where a plaintiff's injuries resulted from a dangerous condition on the land, an individual may be liable under a theory of premises liability if the individual possessed and exercised control over the land.

In regard to the premises liability claim, the Court held that possession over property does not depend on a possible right of possession, but on actual domain and control. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 661 (1998). A “possessor” is a person with the intent to control land that they currently occupy, previously occupied and no other person has occupied it since, or is to immediately occupy it. The Court also defined a possessor as someone who has the sole right to exercise control over something. *Derbabin v S&C Snowplowing, Inc*, 249 Mich App 695, 703 (2002). The Court determined that reasonable minds may differ in determining whether Defendant was a possessor of the land at issue. The Court reasoned that because Defendant stated he and his father both owned the property and that he consented to the search of the property, Defendant may be considered a possessor. The Court added that because Defendant told Kenworthy there was a nearby swamp and he was unsure of who else may have been on the property, a question of material fact existed as to whether he had sole control. As a result, the Court reversed the trial court’s dismissal of the premises liability claim.

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