

STATE OF MICHIGAN
IN THE SUPREME COURT

JENNIFER BUHL,

Plaintiff-Appellant,

V

CITY OF OAK PARK,

Defendants-Appellees.

Michigan Supreme Court

Docket No. _____

Court of Appeals

Docket No. 340359

Lower Court (Oakland Circuit)

Case No. 2017-157097-NI

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Plaintiff-Appellant Jennifer Buhl's
Application for Leave to Appeal

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Introduction and Statement of Grounds for Application

Does the January 2017 amendment to MCL § 691.1402a(5) apply prospectively or retroactively? In two decisions issued within four months of each other, the Court of Appeals gave two opposing answers to this question. Consistent with the long-standing presumption that legislative amendments apply only prospectively, not retroactively, a unanimous panel of the Court of Appeals held in May 2019 that the January 2017 amendment to MCL § 691.1402a(5) does not apply retroactively because “there is no evidence that the Legislature intended the amendment to be retroactively applied.” *Schilling v. City of Lincoln Park*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2019 (Docket No. 342448), 2019 WL 2146298, at *5 (App. 41a).

A few months later, the Court of Appeals reached exactly the opposite conclusion in a split opinion in this case. In Ms. Buhl’s appeal, the majority held in a published opinion that *Schilling* was wrong and that the amendment to MCL § 691.1402a(5) applies retroactively, due to what the majority opinion termed “[t]he *Brewer* restoration rule.” (App. 13a, 18a n9). According to the majority, this “restoration rule” comes from this Court’s decision in *Brewer v AD Transp Exp, Inc*, 486 Mich 50; 782 NW2d 475 (2010), and provides that a statutory amendment is retroactive if it (1) “overrule[s] a prior judicial decision” interpreting the statute; and (2) “return[s] the state of the law to the pre-decision status quo.” (App. 16a).

But this Court in *Brewer* held exactly the opposite. *Brewer* specifically reiterated the time-honored principle that, “[e]ven if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law.” *Brewer*, 486 Mich at 55–56 (quoting *Hurd v Ford Motor Co*, 423 Mich 531, 533; 377 NW2d 300 (1985)). The actual holding of *Brewer*—which rejected retroactive application of the statute before it—is the opposite of what the majority concluded here.

There is no support for the Court of Appeals' so-called "restoration rule." In fact, this new rule contravenes well-established law in several ways. First, this Court's precedent—both before and after *Brewer*—holds that statutory amendments that substantively change the law are limited to prospective application, even if the amendment is directed at invalidating one of this Court's decisions and/or "restoring" prior law. *See, e.g., Johnson v Pastoriza*, 491 Mich 417, 430; 818 NW2d 279 (2012); *Hurd*, 423 Mich at 533.

Second, there is no support in *Brewer* for the "restoration rule." *Brewer* held that the statute before it applied only prospectively, not retroactively. The language in *Brewer* upon which the majority relied for the so-called "restoration rule" is a single paragraph in which this Court explained one of several reasons for *declining* to apply a statutory amendment retroactively. Thus, the majority created the "*Brewer* restoration rule" out of language from this Court that held the opposite of the rule that the majority has advanced here.

Third, the so-called "restoration rule" improperly inverts the well-established presumption for prospective application of a legislative amendment. Under the Court of Appeals' analysis, a statutory amendment is retroactive even if it does not explicitly say that it is retroactive, as long as the Legislature was responding to this Court's jurisprudence. But this Court has never adopted that principle. Instead, this Court has always employed a presumption of anti-retroactivity, even where "the Legislature acts to invalidate a prior decision of this Court." *Johnson*, 491 Mich at 430.

Fifth, no court before has ever relied upon *Brewer* for anything like the majority's new-found "restoration rule." That is because such a rule does not exist. It is also because such a rule is entirely unworkable. Even the majority opinion in this case does not clearly articulate the circumstances under which the Legislature "restores" a prior state of affairs, and the inquiry is

only going to get more difficult, particularly when statutes are amended multiple times over the years.

If this published opinion is not addressed by this Court, the newly announced “restoration rule” will upend Michigan’s retroactivity jurisprudence. It has already split the Court of Appeals in this case and created a conflict with a prior decision on the same issue. Over the course of only a few months, 4 out of 6 appellate judges rejected the adoption of a “restoration rule.” The minority interpretation, however, is now binding authority on the lower courts. This Court should grant leave to appeal in order to address this significant, far-reaching question.

Statement Identifying Judgment

Jennifer Buhl seeks leave to appeal the Court of Appeals' published opinion of August 29, 2019, in Court of Appeals Docket No. 340359. (App. 3a). That opinion affirmed the Oakland County Circuit Court's September 6, 2017, order granting Defendant City of Oak Park's Renewed Motion to Dismiss and dismissing Ms. Buhl's claims with prejudice. (App. 1a).

Statement of Questions Presented

- I. The Court of Appeals’ majority opinion determined that the January 2017 amendment to MCL § 691.1402a applies retroactively based upon what the majority identified as the “*Brewer* restoration rule.” According to the majority opinion, this rule provides that a statutory amendment is retroactive if it (1) “overrule[s] a prior judicial decision” interpreting the statute; and (2) “return[s] the state of the law to the pre-decision status quo.” This “rule,” however, appears nowhere in *Brewer*, was not relied upon in *Brewer*, has never been relied upon by any other court, and is fundamentally incompatible with this Court’s retroactivity jurisprudence, which holds that an amendment that enacts a “substantive change” in the law is limited to prospective application, even if it is intended to invalidate a prior decision of this Court.

Did the Court of Appeals err in creating and then applying a “*Brewer* restoration rule” that was not adopted in *Brewer* and that contradicts this Court’s retroactivity jurisprudence?

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: No.

The trial court answered: N/a.

The Court of Appeals answered: No.

- II. In *Schilling v City of Lincoln Park*, a unanimous panel of the Court of Appeals held that the January 2017 amendment to MCL § 691.1402a does not apply retroactively because the statutory language does not contain any indication that the statute should apply retroactively and because applying it retroactively would affect the parties’ substantive rights. Only a few months later, the majority of the panel in this case held that the 2017 amendment does apply retroactively, reasoning that ordinary retroactivity principles are surmounted by the new “*Brewer* restoration rule,” and that the amendment—despite giving municipalities an additional affirmative defense that completely defeats an injured person’s claim—did not “substantively change” the law.

Did the Court of Appeals err in concluding that the January 2017 amendment to MCL § 691.1402a applies retroactively?

Plaintiff-Appellant answers: Yes.

Defendants-Appellees answers: No.

The trial court answered: No.

The Court of Appeals answered: No.

Statement of Facts and Proceedings

A. Ms. Buhl trips on a defective sidewalk and injures her ankle.

On May 4, 2016 at approximately 4:30 p.m., Jennifer Buhl’s husband pulled his car up to the curb in front of Trend Express, a party store in Oak Park, Michigan, to allow his wife to exit the car. (App. 3a). It was raining as Ms. Buhl stepped from the car and made her way toward the store. (*Id.*).

As she approached the store, Ms. Buhl saw a raised crack in the sidewalk and attempted to step over it. (*Id.*). She did not see that the concrete was uneven on the other side of the crack, however. When she stepped over the crack, she stepped off the unseen drop-off and fell. Her left foot “flipped over and it kind of twisted,” ultimately fracturing her left ankle (*Id.*).

B. After Ms. Buhl’s claim against the City accrued, the Michigan Legislature changes the law, amending MCL 691.1402a to allow municipalities to assert the “open and obvious” defense in defective sidewalk cases.

The City of Oak Park (the “City”) has a statutory obligation to maintain its sidewalks in reasonable repair. *See* MCL § 691.1402a(1). Since at least 1995, our courts have held that a municipal corporation could not assert an open and obvious defense to a defective sidewalk claim under MCL § 691.1402a. *See Walker v City of Flint*, 213 Mich App 18, 23; 539 NW2d 535 (1995). This was because liability under that statute involves the violation of a statutory duty and is therefore not susceptible to common-law defenses. *See Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) (“[T]he open and obvious doctrine is inapplicable to a claim that a municipality has violated its duty to maintain . . . a sidewalk on a highway.”).

But on January 3, 2017, nearly eight months after Ms. Buhl’s claim against the City accrued, the Michigan Legislature passed Public Act 419 of 2016. (App. 32a). Public Act 419 changed the law, amending MCL § 691.1402a to allow a municipal corporation to assert “any defense available under the common law with respect to a premises liability claim,

including, but not limited to, a defense that the condition was open and obvious.” MCL § 691.1402a(5). The amendment took effect the next day, on January 4, 2017. (App. 32a). The amendment contains no reference to retroactivity. (*Id.*).

C. Ms. Buhl sues the City.

Ms. Buhl sued the City on January 31, 2017 in Oakland County Circuit Court. Almost immediately, the City moved for summary disposition, arguing that the sidewalk’s defective condition was open and obvious. Because the prior version of MCL § 691.1402a allowed no open and obvious defense, the City could only raise that defense if the January 2017 amendment applied retroactively to Ms. Buhl’s incident. The trial court denied the City’s motion without prejudice, pending Ms. Buhl’s deposition.

On July 10, 2017, the City renewed its motion for summary disposition. The trial court heard that motion on August 23, 2017, and it granted the City’s motion on September 6, 2017. (App. 2a). At the hearing and in its order, the trial court held that: (1) the January 2017 amendment to MCL § 691.1402a applies retroactively to the date of Ms. Buhl’s incident; (2) as a result, the City can assert an open and obvious defense; and (3) the alleged defect was open and obvious as a matter of law. (App. 2a).

D. The Court of Appeals affirms the trial court’s decision, despite the prior decision in *Schilling*.

Ms. Buhl timely appealed the trial court’s order. On May 16, 2019, while Ms. Buhl’s appeal was pending, the Court of Appeals decided *Schilling*. There, the panel unanimously held that “the amended version of MCL 691.1402a(5) does not apply to this case because plaintiff’s cause of action accrued before the amendment took effect and there is no evidence that the Legislature intended the amendment to be retroactively applied.” *Schilling*, 2019 WL 2146298, at *5.

The Court of Appeals rendered its decision in Ms. Buhl’s appeal only a few months later. But instead of agreeing with the unanimous decision in *Schilling*, the majority opinion rejected *Schilling* on the basis of a new rule that the majority divined from *Brewer*. According to the majority, *Brewer* enshrined a two-prong “restoration rule” (App. 13a), under which a statutory amendment is retroactive if it (1) “overrule[s] a prior judicial decision” interpreting the statute; and (2) “return[s] the state of the law to the pre-decision status quo.” (App. 16a).

According to the majority, the January 2017 amendment returned the law to the status quo that existed before the judiciary ruled that MCL § 691.1402a does not allow a municipality to assert an open and obvious defense. The majority opinion held that the amendment “demonstrates what [the Legislature] intended the law to be all along” and that therefore “the new legislation does not enact a substantive change in the law.” (App. 17a). The majority opinion therefore decided that, under the rule that it fashioned from *Brewer*, the 2017 amendment to MCL § 691.1402a applies retroactively. (App. 3a).

Judge Letica dissented, observing that no statutory language suggests that the January 2017 amendment should be applied retroactively; that *Brewer* does not contain a “restoration rule;” and that the *Schilling* panel correctly ruled that the amendment applies prospectively, consistent with the presumption in favor of prospective application. (App. 22a).

E. Ms. Buhl timely files this application for leave to appeal.

The majority opinion’s holding in this case has already affected other cases involving the statute. *See, e.g., Drake v City Of Oak Park*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 10, 2019 (Docket No. 340975), 2019 WL 4282069, at *3 (reversing the trial court on the basis of *Buhl*) (App. 34a). And it will continue to affect future cases involving not only MCL § 691.1402a, but all other statutory amendments passed by the

Legislature. Because the Court of Appeals has created the “*Brewer* restoration rule” out of whole cloth and because its new rule contradicts this Court’s long-governing retroactivity jurisprudence, Ms. Buhl timely applies to this Court for leave to appeal.

Argument

I. This Court reviews de novo the trial court’s summary disposition ruling.

This Court reviews de novo a trial court’s decision on a motion for summary disposition under MCR 2.116(C)(10). *See Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Additionally, the question whether a statutory amendment applies retroactively is a question of law, which is reviewed de novo. *Brewer*, 486 Mich at 53.

II. This Court has adopted a presumption that legislative amendments apply only prospectively, not retroactively.

The Legislature’s intent determines whether a statute applies prospectively or retroactively. *Johnson*, 491 Mich at 429. Because of the potential unfairness of applying a statute retroactively, “[s]tatutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application.” *Id.* “The Legislature’s expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself.” *Davis v State Employees’ Ret Bd*, 272 Mich App 151, 155–56; 725 NW2d 56 (2006).

To determine whether a law has retroactive effect, this Court “keep[s] four principles in mind.” *LaFontaine Saline, Inc v Chrysler Grp, LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014). They are:

First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to

transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

Id. at 38-39. These four principles are merely factors; meeting any one of them does not necessarily mean that the presumption against retroactivity has been overcome. *Id.*

III. The Court of Appeals created and then relied upon a *Brewer* “restoration rule” that does not exist and that inverts the presumption against retroactivity.

As recognized in *Schilling* and the dissent in this case, the applicable *LaFontaine* factors clearly provide that the January 2017 amendment to MCL § 691.1402a applies only prospectively, not retroactively. (App. 41a).

Rather than follow the well-established precedent mandated by this Court’s retroactivity jurisprudence, the Court of Appeals majority created a new rule—what it called the “*Brewer* restoration rule” (App. 13a)—to support its determination that the 2017 amendment applies retroactively. The majority opinion confirmed in footnote 9 that this “restoration rule” was the fundamental rationale for its decision to differ with *Schilling* on the question of retroactivity. (App. 18a n9). The problem with the Court of Appeals’ divination of this rule, however, is that the rule appears nowhere in *Brewer*, was not relied upon in *Brewer*, has never been relied upon by any other court, and is fundamentally incompatible with this Court’s retroactivity jurisprudence.

A. *Brewer* does not contain a “restoration rule.”

First, the portion of *Brewer* upon which the Court of Appeals relied is dicta and did not adopt any sort of “restoration rule.” In *Brewer*, this Court held that an amendment to the workers’ compensation statutes did *not* apply retroactively. 486 Mich at 58. The Court in *Brewer* gave at least four reasons for its determination that the Legislature did not intend for the amendment to apply retroactively, noting that: (1) there was no explicit language stating that the

amendment applied retroactively; (2) the Legislature adopted a specific effective date for the amendment instead of stating that it was intended to apply retroactively; (3) the statutory amendment did not reinstate the state of the law that existed prior to an intervening judicial decision; and (4) the amendment was not a “remedial” or “procedural” statute because it imposed new burdens and changed existing legal rights. *Id.* at 57-58.

In this case, the Court of Appeals zeroed in on the third of *Brewer*’s rationales. The Court of Appeals then turned *the negative implication* of this Court’s rationale into an absolute rule: “The obvious teaching of this aspect of *Brewer* is that if the legislation which overruled [the prior judicial decision] also had restored the pre-[decision] status quo, then the new enactment would have applied retroactively.” (App. 13a).

The majority opinion’s interpretation is demonstrably wrong. *Brewer* specifically held that these multiple factors counseled *against* retroactivity, not that the inverse of any one of them would have sufficed on its own to show retroactive intent. Additionally, to reach its contrary interpretation of *Brewer*, the majority opinion quotes the relevant paragraph from *Brewer*—but omits the last sentence of the paragraph. (App. 12a). The omitted sentence reveals that the third factor (which is the inverse of the so-called “restoration rule”) was not the sole basis for this Court’s opinion. Instead, the omitted sentence makes clear that this Court’s holding in *Brewer* relied on all four factors, *plus the statutory language*, which made no reference to retroactivity: “In light of these circumstances *and the text of the amendment*, we simply can discern no clearly manifested legislative intent to apply the amendment retroactively.” *Brewer*, 486 Mich at 57 (emphasis added).

Thus, the majority is wrong that it is “obvious” that the legislative amendment in *Brewer* would have applied retroactively as long as the amendment had restored the pre-decision

status quo. *Brewer* says no such thing. This Court has never held that the legislature’s “restoration” of a nebulous pre-existing status quo is on its own sufficient to overcome the presumption against retroactivity. There is no “restoration rule” in *Brewer*.

B. *Brewer* specifically stated that statutory amendments are presumptively prospective even if they overrule an existing judicial decision.

Second, not only does *Brewer* contain no such “restoration rule,” but also *Brewer* reiterates this Court’s long-held view that statutory amendments are presumptively prospective even if they overrule an existing judicial decision: “Even if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law.” *Brewer*, 486 Mich at 55–56 (quoting *Hurd*, 423 Mich at 533).

The January 2017 amendment to MCL § 691.1402a was obviously a “substantive change in the law.” *Id.* Before January 2017, a municipality could not assert an “open and obvious” defense. After the amendment, it could. The amendment allowed the City to assert a substantive and complete defense to Ms. Buhl’s claim that it otherwise did not have. That is a “substantive change” in the law. *Id.*

Thus, this Court in *Brewer* specifically held the opposite of what the Court of Appeals says that it did: substantive statutory amendments are prospective, not retroactive, even if they are directed at overruling a judicial decision.

C. There is no support for the Court of Appeals’ assertion that the January 2017 amendment did not effect a “substantive change” in the law.

The majority opinion attempts to evade *Brewer*’s plain language by claiming that the January 2017 amendment to MCL § 691.1402a did not actually effect a substantive change in the law. According to the majority opinion, the law did not truly change “[b]ecause the Legislature has told us that the *Jones* decision [under which a municipality could not assert a

common-law defense] never should have applied.” (App. 18a). There are at least two problems with this line of analysis.

1. A legislative amendment that gives a defendant a new affirmative defense is a “substantive change” in the law.

First, the majority opinion’s approach is a non sequitur. There is no support for the argument that a change in the law is not substantive, merely because the law was altered to conform to a previous interpretation of it. Even if the law is being substantively changed to revert back to a prior approach, it is still being substantively changed.

The cases that the majority opinion cites do not make the illogical argument that the majority opinion advances. The decision in *Lahti v Fosterling*, 357 Mich 578, 595; 99 NW2d 490 (1959), for example, determined that an amendment to the workers’ compensation statutes was retroactive because it was remedial, such that it fell within the “remedial” exception to the anti-retroactivity principle. *Lahti* did not hold that the amendment was not actually a substantive change in the law.

A legislative amendment that is aimed at overturning one of this Court’s decisions is a substantive change in the law. “[T]he Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively.” *Davis*, 272 Mich App at 156. Unless the legislative amendment is accompanied by statutory text that clearly indicates the Legislature’s intent for retroactive application, an amendment intended to overturn one of this Court’s substantive decisions will not apply retroactively. *Hurd*, 423 Mich at 533.

2. **Instead of presuming that an amendment is prospective, the majority opinion presumes that, when reverting the state of the law to the pre-existing status quo, the Legislature also intended to apply the change retroactively.**

Second, the majority opinion asserts that “the Legislature has told us that the *Jones* decision never should have applied.” (App. 18a). To extrapolate the Legislature’s intent that *Jones* “never should have been applied,” the majority imagines things that the Legislature did not say. For example, the majority imagines that “[i]n essence, the amendment states, ‘The *Jones* doctrine is overruled’” (App. 16a). The majority further imagines that “the remainder of the statute essentially states ‘And we never intended for the *Jones* doctrine to be the law, so we are reinstating the law as set forth in the 1964 Act’” (*Id.*).

But the Legislature did not say any of this. Rather, the Legislature was silent on retroactivity. The amendment merely stated that, effective January 4, 2017, the amendment is the law, meaning that *Jones* is no longer the law. That is a significant and dispositive difference. Where the statutory text is silent as to retroactivity, the presumption of anti-retroactivity mandates that the amendment be applied prospectively only.

Contrary to this anti-retroactivity presumption, the majority opinion’s “restoration rule” turns this Court’s well established anti-retroactivity presumption on its head. Instead of presuming that an amendment is prospective only, the majority’s new “restoration rule” presumes that, where legislation returns the state of the law to the status quo, then the legislature also intended to apply that amendment retroactively—unless there is specific indication otherwise. There is no support under this Court’s precedent for upending the anti-retroactivity presumption like this.

D. The majority’s “restoration rule” contradicts this Court’s precedent and is unworkable.

As indicated, the majority’s “restoration rule” contradicts the plain language of *Brewer*. By establishing a presumption of retroactivity in circumstances where an amendment re-asserts the pre-decision status quo, the majority’s rule also contradicts this Court’s long-held presumption that amendments are only prospective, unless shown to be otherwise. *See Johnson*, 491 Mich at 429.

The majority’s approach is also unworkable. A “restoration” test that seeks to divine legislative intent through legislative circumstances rather than hewing to the Legislature’s explicit language will quickly be mired in complicated and unrewarding analysis. How will a court be able to determine whether the *ex ante* status quo has been fully or faithfully restored through legislation? What if the prior status quo is both restored and amplified? What if it is almost wholly restored, or restored in a different manner, or through different verbiage? What if the prior status quo is restored through a statute or a statutory scheme that is different than the one that the judicial decision interpreted?

In Ms. Buhl’s case, the legislative amendment “restored” a status quo that existed more than twenty years before the amendment was enacted, but what if the legislative amendment is enacted to restore the status quo thirty, fifty, or a hundred years after the judicial decision in question? And what if the legislature flip-flopped on the issue, amending the statute first one way and then the other, such that it is unclear what the original status quo actually was?

The majority’s approach demands that our courts go down all of these paths and more—none of which is consistent with this Court’s precedent, and none of which is consistent with this Court’s repeated admonition that the best place to discern legislative intent is to look at

the language of the statute, not the circumstances surrounding the statute’s enactment. *See, e.g., Mich Dep’t of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008).

The Court of Appeals’ new rule is not the correct one, nor is it a wise one. It is, however, now enshrined in a published opinion that is binding on the Court of Appeals and all lower courts. To prevent the court’s erroneous ruling from warping this State’s retroactivity jurisprudence, this Court should grant leave to appeal.

IV. Under the *LaFontaine* factors, the 2017 amendment to MCL § 691.1402a is clearly not retroactive.

Once the Court of Appeals’ improper interpretation of *Brewer* is corrected, the *LaFontaine* factors plainly demonstrate that the 2017 amendment to MCL § 691.1402a is not retroactive. This is especially true given the requirement that “[t]he Legislature’s expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself.” *Davis*, 272 Mich App at 155–56.

A. Factor One: The statutory language favors prospective-only application.

The first factor—statutory language—is the most important, as the Legislature speaks most clearly through the language that it uses. “[T]he Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively.” *Davis*, 272 Mich App at 156. *See also Johnson*, 491 Mich at 431–32 (noting examples of other statutes that the Legislature explicitly made retroactive); *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (noting additional examples); *Moeller v Am Media, Inc*, 235 F Supp3d 868, 874–75 (ED Mich, 2017) (noting additional examples).

Thus, it is “most instructive” if “the Legislature included no express language regarding retroactivity,” because the absence of such language strongly indicates that the

Legislature, despite knowing how to make a statute retroactive, chose not to do so. *Davis*, 272 Mich App at 156.

Here, the January 2017 amendment does not contain any specific language indicating that it applies retroactively. (App. 32a). The amendment provides a specific, future effective date, January 4, 2017. (App. 32a). “[P]roviding a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.” *Johnson*, 491 Mich at 432 (quotation and citation omitted). Additionally, “[u]se of the phrase ‘immediate effect’ does not at all suggest that a public act applies retroactively.” *Id.* at 430. Instead, this phrase, too, supports prospective-only application. *Id.*

This first *LaFontaine* factor therefore overwhelmingly supports prospective-only application. *See Schilling*, 2019 WL 2146298, at *7. *See also Sufi v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2015 (Docket No. 312053), 2015 WL 668887, at *4 (holding that a prior amendment to MCL § 691.1402a did not apply retroactively when it gave additional defenses to municipal defendants and had no explicit language regarding retroactivity) (App. 50a). Indeed, even the majority agrees with this conclusion on the first factor. (App. 7a).

B. Factor Two is not applicable.

The second *LaFontaine* factor is not applicable in this case. (App. 7a). *See also Schilling*, 2019 WL 2146298, at *8.

C. Factor Three: Retroactive application would impair substantive rights.

The third *LaFontaine* factor restates the effect of a retroactive statute, noting that statutes cannot be applied retroactively to impair a party’s substantive rights. *Davis*, 272 Mich App at 158. In this case, the Court of Appeals ruled that retroactive application would be impermissible only if it affected a plaintiff’s “vested rights,” and that none of Ms. Buhl’s vested

rights are affected by the legislature's decision to give municipalities a new, complete affirmative defense against plaintiffs like Ms. Buhl. (App. 7a (ruling that only the abolition of an accrued cause of action "impairs a plaintiff's vested rights")). But that analysis is not accurate, for several reasons.

First, "the presumption against statutory retroactivity is not restricted to actions involving vested rights." *Davis*, 272 Mich App at 158. It also applies where a statute "creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past." *Id.* That is certainly the case here, where the January 2017 amendment to MCL § 691.1402a wrecks a new, fatal blow to Ms. Buhl's claim against the City by allowing the City to assert a complete defense that was unavailable to the City when Ms. Buhl's claim accrued.

Second, limiting the anti-retroactivity principle only to circumstances in which a plaintiff has "vested rights" is inconsistent with this Court's jurisprudence, particularly with respect to amended statutes of limitations.¹ According to the Court of Appeals, a retroactive statute would impair a plaintiff's vested rights "only if [the amendment] extinguishes [the plaintiff's cause of action] as a matter of law." (App. 8a). Thus, according to the majority opinion, the addition of an affirmative defense cannot possibly impair a plaintiff's vested rights, because it does not extinguish the plaintiff's cause of action as a matter of law. (App. 7a, 19a).

But this Court's jurisprudence in the context of amendments to statutes of limitations shows that this approach is incorrect. "[T]he running of the statute of limitations is an affirmative defense." *Dell v Citizens Ins Co of Am*, 312 Mich App 734, 752; 880 NW2d 280 (2015). Under the majority opinion's analysis, therefore, amended statutes of limitations should presumptively apply retroactively because they would not affect plaintiffs' "vested" rights. But

¹ "The question of determining what is a vested right has always been a source of much difficulty to all courts." *Lahti v Fosterling*, 357 Mich 578, 588; 99 NW2d 490 (1959).

“there exists a plethora of cases extending over 100 years of jurisprudence that provide that statutes of limitations enacted by the Legislature are to be applied prospectively absent a clear and unequivocal manifestation of a legislative preference for retroactive application.” *Davis*, 272 Mich App at 160–61. That is because “statutes of limitations, while generally coined as procedural, necessarily affect substantive rights where causes of action can be lost entirely because the action is time-barred.” *Id.*

In other words, an amendment that shortens or imposes a statute of limitations cannot be retroactive because it affects the plaintiff’s substantive rights—even though the statute of limitations is an affirmative defense and does not extinguish the plaintiff’s cause of action as a matter of law. That means that the majority opinion’s view of “factor three” is wrong. A statutory amendment can affect substantive rights by giving the defendant an affirmative defense. That, of course, is precisely what happened here.

Third, even if the retroactivity analysis must be calibrated to “vested rights,” a statute is retroactive where it either “takes away *or* impairs” those rights. *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571; 331 NW2d 456 (1982) (emphasis added). A cause of action becomes a “vested right” once it accrues. *Id.* at 573. Ms. Buhl therefore had a vested right in her cause of action against the City at the moment that she was injured, long before the 2017 amendment was enacted. Ms. Buhl’s vested right in that cause of action was at a minimum “impaired” when the 2017 amendment gave the City an additional—and potentially dispositive—affirmative defense that it did not possess when her cause of action accrued. Thus, even if a “vested right” must be impaired in order for a statute to fall within the anti-retroactivity presumption, that requirement is met here.

Finally, the Court of Appeals also analyzed for several pages of its opinion whether Ms. Buhl “relied” upon the pre-amendment version of MCL § 691.1402a. (App. 9a-12a). But the question that is relevant to retroactivity is the Legislature’s intent, not Ms. Buhl’s reliance on prior versions of the statute. A potential plaintiff’s reliance upon earlier versions of a statute has never been a relevant factor in Michigan’s retroactivity jurisprudence. *See Certified Questions*, 416 Mich at 571.

D. Factor Four: The January 2017 amendment affects Ms. Buhl’s substantive rights.

The fourth *LaFontaine* factor reflects an exception to the anti-retroactivity principle, providing that “statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested.” *Johnson*, 491 Mich at 432–33 (2012). For purposes of this exception, a statutory amendment cannot be deemed “remedial” merely because it remedies some perceived ill, because to do so would allow the exception to eat the rule:

[W]e have rejected the notion that a statute significantly affecting a party’s substantive rights should be applied retroactively merely because it can also be characterized in a sense as “remedial.” In that regard, we agree with Chief Justice Riley’s plurality opinion in *White v General Motors Corp*, 431 Mich 387, 397; 429 NW2d 576 (1988), that the term “remedial” in this context should only be employed to describe legislation that does not affect substantive rights. Otherwise, “[t]he mere fact that a statute is characterized as ‘remedial’ ... is of little value in statutory construction.”

Frank W Lynch, 463 Mich at 585. Thus, “[a]n amendment that affects substantive rights is not considered ‘remedial’ in this context” and may not be applied retroactively. *Brewer*, 486 Mich at 57. “Substantive rights are essential rights that affect the outcome of a lawsuit and can be protected or enforced by law.” *Macklis v Farm Bureau Gen Ins Co*, unpublished opinion per

curiam of the Court of Appeals, issued Apr. 25, 2017 (Docket No. 330957), 2017 WL 1488969, at *2 (App. 37a).

Here, the 2017 amendment allows municipalities to assert a substantive and complete defense that they could not assert previously. That is a substantive change in the law. For example, in *People v Kolanek*, 491 Mich 382, 405; 817 NW2d 528 (2012), this Court ruled that the addition of an affirmative defense under a statutory amendment was “a new substantive right available to some defendants” that could not apply retroactively absent any specific indication that the amendment should apply retroactively. *Id.* at 405. The same is true here.

The 2017 amendment also destroys or diminishes existing rights. For example, in *Macklis*, the court ruled that an amendment to the no-fault act which broadened an insurer’s affirmative defenses “necessaril[ly] diminishe[d] the rights of certain individuals otherwise eligible for no-fault benefits (*i.e.*, those who only used a vehicle but did not unlawfully take it),” and that the amendment therefore did not apply retroactively. 2017 WL 1488969, at *3. Here, before the 2017 amendment, people who were injured because of a vertical discontinuity defect of two inches or more in the sidewalk—like Ms. Buhl—could recover against the responsible municipal corporation, regardless of whether the defect was open and obvious. Just as the amendment in *Macklis* “necessaril[ly] diminishe[d]” the rights of plaintiffs by broadening the availability of an affirmative defense, so the 2017 amendment to MCL § 691.1402a diminished or destroyed the rights of certain individuals who otherwise could recover against municipalities (*i.e.*, those who were injured by an open and obvious sidewalk defect). As such, the 2017 amendment affects substantive rights and applies prospectively, not retroactively.

As *Schilling* properly recognized, all of the applicable *LaFontaine* factors favor prospective, not retroactive, application of the January 2017 amendment to MCL § 691.1402a. The Court of Appeals' decision to the contrary should be reversed.

Relief Sought

Jennifer Buhl requests that this Court grant her application for leave to appeal, reverse the opinion of the Court of Appeals, and remand the case to the trial court for further proceedings.

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