RECEIVED by MSC 10/10/2019 4:16:52 PM

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

Christopher J. Schneider (P74457)
Stephen J. van Stempvoort (P79828)
MILLER JOHNSON
Attorneys for Plaintiff-Appellant
45 Ottawa Avenue, SW – Suite 1100
Grand Rapids, MI 49503
616.831.1700
schneiderc@millerjohnson.com
vanstempvoorts@millerjohnson.com

John J. Gillooly (P41948)
Megan K. Cavanagh (P61978)
GARAN LUCOW MILLER, P.C.
Attorneys for Appellee
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207
(313) 446-5501
jgillooly@garanlucow.com
mcavanagh@garanlucow.com

Matthew Edward Bedikian (P75312)
MICHIGAN ADVOCACY CENTER
Co-Counsel for Appellant
2000 Town Center, Suite 1900
Southfield, MI 48075
(248) 957-0456
matt@miadvocacycenter.com

Appellant's Appendix

RECEIVED by MSC 10/10/2019 4:16:52 PM

Table of Contents
Volume I of I

Appendix Page

Circuit Court's Order Granting City of Oak Park's Renewed Motion for Summary Disposition
Filed September 6, 2017 ..... 1a

Court of Appeals Published Opinion Affirming Circuit Court's Order
Filed August 29, 2019 ..... 3a

Court of Appeals Dissent from Published Opinion Affirming Circuit Court's Order (Letica, J., dissenting)
Filed August 29, 2019 ..... 22a

Public Act 419 of 2016
Effective January 4, 2017 ..... 32a

Drake v City Of Oak Park, unpublished opinion per curiam of the Court of Appeals, issued Sept. 10, 2019 (Docket No. 340975), 2019 WL 4282069 ..... 34a

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 Co., unpublished opinion per curiam of the Court of Appeals, issued Apr. 25, 2017 (Docket No. 330957), 2017 WL 1488969 ..... 37a

Schilling v. City of Lincoln Park, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2019 (Docket No. 342448), 2019 WL 2146298 ..... 41a

Sufi v City of Detroit, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2015 (Docket No. 312053), 2015 WL 668887 ..... 50a

RECEIVED by MSC 10/10/2019 4:16:52 PM

Received for Filing Oakland County Clerk 9/6/2017 11:06 AM

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

JENNIFER BUHL,

Plaintiff,

Case No 17-157097-NI
Judge Phyllis McMillen

v.

CITY OF OAK PARK,

Defendant.

Matthew Edward Bedikian (P75312)
MICHIGAN ADVOCACY CENTER, PLLC
Attorney for Plaintiff
2000 Town Center, Suite 1900
Southfield, MI 48075
248.957.0456
matt@miadvocacycenter.com

John J. Gillooly (P41948)
GARAN LUCOW MILLER, P.C.
Attorney for Defendant
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207
313.446.5501
jgillooly@garanlucow.com

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

At a session of said Court held in the Oakland County Circuit Court, City of Pontiac, County of Oakland,

State of Michigan on: 9/6/2017

PRESENT: HON. PHYLLIS C MCMILLEN
Circuit Court Judge

This matter having come before this Honorable Court on Defendant, City of Oak Park's Renewed Motion to Dismiss, briefs in support of and in opposition to said motion having been filed, oral argument having taken place on August 23, 2017, and this Court otherwise being fully advised in the instant premises;

IT IS HEREBY ORDERED that Public Act 419 applies retroactively to the date of the incident at issue for the reason stated on the record in open court;

RECEIVED by MSC 10/10/2019 4:16:52 PM

Received for Filing Oakland County Clerk 9/6/2017 11:06 AM

IT IS FURTHER ORDERED that pursuant to Public Act 419, Defendant may assert the defense that the condition at issue was open and obvious in this case for the reasons stated on the record in open court;

IT IS FURTHER ORDERED that Plaintiff's claims are dismissed because the alleged defect was open and obvious for the reasons stated on the record in open court.

For each of the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant City of Oak Park's Renewed Motion to Dismiss is hereby **granted** for the reasons stated on the record in open court.

This Order resolves the last pending claim and closes the captioned case.

IT IS SO ORDERED.

/s/Phyllis McMillen

CIRCUIT COURT JUDGE

WW

Approved as to Form Only:

/s/Matthew Edward Bedikian
Matthew Edward Bedikian (P75312)
MICHIGAN ADVOCACY CENTER, PLLC
Attorney for Plaintiff
2000 Town Center, Suite 1900
Southfield, MI 48075
248.957.0456
matt@miadvocacycenter.com

/s/John J. Gillooly
John J. Gillooly (P41948)
GARAN LUCOW MILLER, P.C.
Attorney for City of Oak Park
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207
313.446.5501
jgillooly@garanlucow.com

DETROIT-#1354432.docx

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 10/10/2019 4:16:52 PM

STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER BUHL,

Plaintiff-Appellant,

v

CITY OF OAK PARK,

Defendant-Appellee.

FOR PUBLICATION
August 29, 2019
9:00 a.m.

No. 340359
Oakland Circuit Court
LC No. 2017-157097-NI

Before: O'BRIEN, P.J., and TUKEL and LETICA, JJ.

TUKEL, J.

This case involves the question of whether a legislative act, 2016 PA 419, which makes the "open and obvious" doctrine applicable to suits against municipalities, applies retroactively—that is, whether it applies "to events antedating its enactment." *Frank W Lynch & Co v Flex Tech, Inc*, 463 Mich 578, 585; 624 NW2d 180 (2001), citing *Landgraf v USI Film Products*, 511 US 244, 283; 114 S Ct 1483; 128 L Ed 2d 229 (1994). The retroactivity question turns on whether the act impaired a "vested right," and our Supreme Court has long noted that "[t]he 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, 588-589; 99 NW2d 490 (1959). The trial court found that the statutory amendment applied retroactively and, applying the open and obvious doctrine, granted summary disposition to defendant. We hold that because no vested right of plaintiff was impaired by the Legislature's actions and because the Legislature's actions were remedial in nature, the resulting grant of summary disposition to defendant on the basis of the open and obvious doctrine was correct; we therefore affirm the trial court's judgment.

Plaintiff was injured on May 4, 2016, when she twisted her ankle on a sidewalk outside of a store called Trend Express in Oak Park, Michigan. The sidewalk was under defendant's exclusive jurisdiction. On the date of the injury, it was raining. Plaintiff's husband dropped her off in front of the building, and plaintiff walked toward the front door. Plaintiff noticed a crack in the sidewalk and attempted to step over it. However, plaintiff was looking at the store and failed to notice the uneven cement slabs on the far side of the crack from where she was walking. Plaintiff testified that she did not see the drop-off because she was not looking at the sidewalk

but admitted that she would have seen it if she had been watching where she was walking instead of looking at the store.

Plaintiff filed suit under the defective sidewalk exception to governmental immunity, MCL 691.1402a. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that the defect was open and obvious.[1] Plaintiff argued that it did not matter whether the defect was open and obvious because MCL 691.1402a(5), which permitted defendant to assert the open and obvious defense, was not enacted until *after* she was injured.[2] Plaintiff also argued that irrespective of the applicability of this statutory amendment, the condition was not open and obvious because the drop-off was not clearly visible from the direction from which plaintiff approached the store. The trial court held that the statutory amendment was retroactive because it affected only the availability of a possible defense, not plaintiff's ability to bring a claim. Further, the trial court held that the condition was open and obvious because plaintiff's photographs clearly showed that the corner of the concrete slab where plaintiff claimed to have tripped was raised.

I. RETROACTIVITY OF AMENDMENT TO MCL 691.1402a

On appeal, plaintiff first argues that the trial court erred when it determined that the amendment to MCL 691.1402a had retroactive effect. We disagree. This Court reviews de novo whether a statute applies retroactively. *Johnson v Pastoriza*, 491 Mich 417, 428-429; 818 NW2d 279 (2012).

A. STATUTORY BACKGROUND

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides immunity from tort liability to governmental agencies when they are engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). The GTLA waives immunity and allows suit against a governmental agency only if the suit falls within one of the statutory exceptions. *Moraccini*, 296

---

[1] Defendant also moved for summary disposition under MCR 2.116(C)(8) based on plaintiff's complaint not identifying the date of the accident. The trial court noted that even if it had agreed with defendant, it would have allowed plaintiff to amend her complaint to include the date. Thus, because the trial court found that summary disposition was warranted under MCR 2.116(C)(10), it declined to rule on the basis of MCR 2.116(C)(8), and that aspect of the motion is not pertinent for our purposes on appeal.

[2] The relevant timeline of events is thus:

- May 4, 2016: plaintiff's injury;
- January 3, 2017: enactment of amended statute;
- January 4, 2017: effective date of amended statute;
- January 31, 2017: plaintiff's complaint filed.

RECEIVED by MSC 10/10/2019 4:16:52 PM

Mich App at 392. MCL 691.1402a allows a plaintiff to sue a municipal corporation under some circumstances when the municipal corporation fails to maintain a sidewalk, and provides:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.
>
> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
>
> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
>
> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.
>
> (5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, 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.
>
> (6) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.

This current version of the statute was enacted on January 3, 2017, with the passage of 2016 PA 419, becoming effective on January 4, 2017. The only changes brought about by 2016 PA 419 were to add subsection (5) above, and, although not relevant for purposes of this case, to renumber the previous subsection (5) to subsection (6).

B. RETROACTIVITY DEFINED

The United States Supreme Court has noted that "courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. Each statement is framed as a generally applicable rule for interpreting statutes that do not specify their temporal reach." *Landgraf*, 511 US at 263-264 (citations omitted).

RECEIVED by MSC 10/10/2019 4:16:52 PM

> The first is the rule that "a court is to apply the law in effect at the time it renders its decision[.]" The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." [*Id.* at 264 (citations omitted).]

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law," *id.* at 269 (citations omitted), nor is it " 'made retroactive merely because it draws upon antecedent facts for its operation,' " *id.* at 269 n 24 (citations omitted). "[C]ourts should apply the law in effect at the time that they decide a case *unless* that law would have an impermissible retroactive effect as that concept is defined by the Supreme Court." *BellSouth Telecom, Inc v Southeast Tel, Inc*, 462 F3d 650, 657 (CA 6, 2006) (citation omitted).

"[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 US at 269-270. "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. "Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have 'sound instincts,' and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* (citation and brackets omitted).

There are four rules that a court must consider when determining whether a new statute applies retrospectively. *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 570; 331 NW2d 456 (1982):

> First, is there specific language in the new act which states that it should be given retrospective or prospective application. Second, a statute is not regarded as operating retrospectively solely because it relates to an antecedent event. Third, a retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. Fourth, a remedial or procedural act which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute. [*Id.* at 570-571 (quotation marks, citations, and brackets omitted).]

Under rule one, the intent of the Legislature governs the question of whether a statute applies retroactively. *Johnson*, 491 Mich at 429. Indeed, our Supreme Court has stated that " '[t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.' " *Lynch*, 463 Mich at 583 (citation omitted). Absent such clear indication that the Legislature intended retroactive application, it is presumed that a statute applies only prospectively. *Brewer v A D Transp Express, Inc*, 486 Mich 50, 55-56; 782 NW2d 475 (2010); *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715 (1985).

RECEIVED by MSC 10/10/2019 4:16:52 PM

"Second rule cases relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute," *id.* at 571, which is not applicable here. "The third rule and the cases thereunder define those retrospective situations that *are not* legally acceptable, whereas the fourth rule defines those that *are* acceptable." *Id.* at 572 (emphasis added). Because the retroactivity analysis is based in part on reasonable reliance, the proper analysis is whether a new statute "would impair rights a party possessed when he acted[.]" *Landgraf*, 511 US at 280.

C. APPLYING THE RETROACTIVITY TEST

1. STATUTORY TEXT

The first factor to consider is whether the text of the statute at issue provides that it is to be given retroactive or prospective effect. *In re Certified Questions*, 416 Mich at 570; see also *Johnson*, 491 Mich at 429. Our Supreme Court "has recognized that 'providing 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 (citation omitted). In the present case, the statute did not include a future effective date, but rather was given immediate effect. "Use of the phrase 'immediate effect' does not at all suggest that a public act applies retroactively." *Id.* at 430. Rather, "immediate effect" means only "that the Legislature by a ⅔ vote expressed an intention that the amendatory act take effect on the date it was filed." *Id.* at 431 n 30. Thus, the lack of any language here regarding retroactivity weighs in favor of prospective application only.

2. TAKING AWAY OR IMPAIRING VESTED RIGHTS

"A cause of action becomes a vested right when it accrues and all the facts become operative and known." *Doe v Dep't of Corrections*, 249 Mich App 49, 61-62; 641 NW2d 269 (2001), citing *In re Certified Questions*, 416 Mich at 572-573. If the retroactive application of a law would take away or impair vested rights, then its retroactive application is prohibited by rule three; rule four provides the mirror image, providing that "a remedial or procedural act which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute." *In re Certified Questions*, 416 Mich at 572. As far as a plaintiff asserting a claim is concerned, retroactive application is prohibited if an "accrued cause of action would be totally barred or taken away by a new act."

Here, the statute at issue did not totally bar or take away a cause of action; rather it made available to municipal corporations common-law defenses, including the open and obvious doctrine. Importantly, even after the enactment of the amended statute, plaintiff could still assert the identical cause of action against defendant, and the full range of damages previously available to a prevailing plaintiff is unchanged by the statutory amendment. Cf. *Johnson*, 491 Mich at 433-434 (holding that an amendment which created a new right of prevailing plaintiffs to receive damages for loss of consortium and other damages not previously available creates a new legal burden on defendants, which may not be applied retrospectively). By the plain language of *In re Certified Questions*, only the abolition of an existing or accrued cause of action takes away or impairs a plaintiff's vested rights. Moreover, *In re Certified Questions*, 416 Mich at 577, specifically noted that only a "legal bar" would implicate the "totally barred or taken

RECEIVED by MSC 10/10/2019 4:16:52 PM

away by the new act" language. The question in that case was whether the adoption of a comparative negligence statute would apply to a cause of action for products liability, and if so, whether the comparative negligence statute would be applied retroactively. See *id.* at 561. In analyzing the issue, our Supreme Court stated:

> While the total damages which plaintiff could have received were significantly reduced by § 2949, *plaintiff's cause of action was not legally barred or taken away.*
>
> *Section 2949 does not bar any claim, legal or equitable*, but it states that "damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff." Section 2949 *is not a legal bar*, but is a principle established by the Legislature which mitigates damages in products liability actions.
>
> In short, we hold that the applicability of the products liability statute in the instant case did not offend Michigan's general rule against the retrospective application of a statute which "take[s] away vested rights." [*Id.* at 577-578 (citations omitted; emphasis added).]

The Supreme Court's analysis was based on the plaintiff's cause of action not being "*legally* barred or taken away"; because the act at issue in that case was not "a legal bar," it did not deprive the plaintiff of a vested right.

Thus, under *In re Certified Questions*, a cause of action can be "totally barred or taken away by the new act" only if the act extinguishes it as a matter of law. For example, causes of action for alienation of affection which previously existed were "totally barred by a new act" when the Legislature repealed them because the legislative action rendered such causes of action extinct. See former MCL 551.301-551.311, repealed by 1980 PA 180. The cause of action against a municipality for a defective sidewalk was not rendered extinct by the enactment of 2016 PA 419—the cause of action still exists.

The dissent seemingly understands this point when it cites the *In re Certified Questions* test that rule three is implicated when an "accrued cause of action would be totally barred or taken away by a new act," but then goes on to argue for the misapplication of the test. The dissent argues that if the open and obvious doctrine is applied, plaintiff will lose her case; this, the dissent states, constitutes plaintiff's cause of action being " 'totally barred or taken away *by [the] new act*.' " (Emphasis added). The dissent asserts, contrary to *In re Certified Questions*, that "[w]hether the statutory amendment at issue abolishes Buhl's cause of action outright or its application results in dismissal of her lawsuit, albeit after a judicial finding on the question of whether the danger was open and obvious, makes no difference. Either way, Buhl's 'accrued cause of action [is] totally barred or taken away by a new act.' "

However, to the extent that that plaintiff's case is subject to dismissal under the open and obvious doctrine, it is *not* "totally barred or taken away" "by a new act," but because in this particular case, the hazard was readily apparent and thus the *facts* preclude recovery. In other words, plaintiff's cause of action is barred not "by a new act," but rather by a new act *plus* the

RECEIVED by MSC 10/10/2019 4:16:52 PM

RECEIVED by MSC 10/10/2019 4:16:52 PM

particular facts relating to her injury. A dismissal based on factual infirmities is not a "legal bar" but a "factual bar." As such, rule three is inapplicable because a cause of action being barred by application of a new act plus particular facts simply cannot be squared with the language used by our Supreme Court, or by its discussion of rule three, in *In re Certified Questions*.

Even setting aside the dissent's misreading of the "by a new act" language from *In re Certified Questions*, its position here is curious—it would decide a *legal* issue (the retroactive availability of the open and obvious doctrine to municipalities) on the basis of a purely *factual* determination (whether there is merit to a defense claim that a particular hazard was open and obvious). However, because it involves a legal doctrine, the question of whether or not the statute is to be applied retroactively must apply equally in all cases; the statute either is retroactive or it is not. However, as a question of fact, the open and obvious doctrine surely will not apply in every case in which it is invoked. Some defendants will argue that a particular plaintiff is barred from recovery because a hazard was open and obvious, but a jury nevertheless will find factually that the hazard was not so readily apparent. Applying the dissent's position, then, courts would have to decide on a case-by-case basis whether a particular plaintiff's case would be defeated by application of open and obvious doctrine; if the answer is that it would be, that would mean, according to the dissent, that the cause of action would be "totally barred or taken away by the new act" and thus the act could not be applied retroactively to such a case. This approach never would settle the question presented here but instead would require the legal determination of the retroactivity question to be made in each lawsuit, on a case-by-case basis. The dissent cites no authority for the proposition that the retroactivity decision must be decided anew in each case, and that the decision will turn on the factual vagaries of a particular case.

The distinction between a cause of action failing for legal reasons as opposed to factual reasons is so common that the Michigan Court Rules distinguish between them. See MCR 2.116(C)(8) (governing motions for summary disposition based on a legal failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (governing motions for summary disposition based on failure of proof). The *In re Certified Questions* analysis under rule three applies the same distinction. Applying that analysis here, the cause of action for injuries sustained on a municipal sidewalk remains extant; no one would say, in light of the statutory amendment at issue, that plaintiff's complaint fails to state a claim upon which relief can be granted in that the cause of action no longer exists. Consequently, for purposes of applying the test of *In re Certified Questions*, plaintiff's cause of action has not been "totally barred or taken away by a new act." And of course, as noted above, reading "totally barred or taken away by a new act" in this manner means the retroactivity question will be decided by a single legal standard, and will not vary from case to case based on the facts.

Moreover, as noted, a relevant consideration for determining whether a party had a vested right is whether the new statute "would impair rights a party possessed when he acted[.]" *Landgraf*, 511 US at 280. As one federal court of appeals has noted, a strong consideration in determining whether a plaintiff's rights have been impaired is whether the plaintiff relied on the state of the law prior to the statutory amendment. *Southwest Ctr for Biological Diversity v US Dep't of Agriculture*, 314 F3d 1060, 1062 (CA 9, 2002). However, as the *Southwest Ctr* court noted, "Surely the [plaintiff's] expectation of success in its litigation is not the kind of settled expectation protected by *Landgraf*'s presumption against retroactivity. As the [defendant] points out, if that expectation were sufficient then no statute would ever apply to a pending case unless

Congress expressly made it so applicable. The *Landgraf* inquiry would become pointless." *Id.* at 1062 n 1.[3] The dissent here commits exactly that error, by stating that "[t]he legal question before us is whether the Legislature clearly stated its intention to apply 2016 PA 419 retroactively." That would be true for a rule one analysis; it is incorrect for the rule three and rule four analyses applicable here because it would override and therefore make pointless any analysis under those rules.[4]

In the present case, the only claimed reliance on plaintiff's part is to the non-applicability of the open and obvious doctrine. In the words of the dissent, 2016 PA 419 is "a game changer" because it so radically changed the " 'expectation of success' in [plaintiff's] ligitation." As *Southwest Ctr* held, however, that is not the kind of settled expectation protected by *Landsgraf*. To the contrary, the United States Supreme Court has noted that "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 US at 271. This principle explains cases such as *Brewer*, which denied retroactive application. In *Brewer*, an amendment to the workers' compensation act created "an entirely new jurisdictional standard, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan." *Brewer*, 486 Mich at 57.[5] Retroactive application thus would have upset expectations regarding

---

[3] Our courts have made the same point. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370-371; 803 NW2d 698 (2010) ("[A] vested right is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.") (quotation marks and citations omitted).

[4] The dissent dismisses our reliance on *Southwest Ctr* as based on a distinction between a right of action and a right of recovery and states that its position is based only on a right of action. However, no such distinction exists. *Southwest Ctr* involved a Freedom of Information Act exemption, which was enacted after the plaintiff had filed suit; if the exemption was applicable, it was undisputed that it would bar the suit completely. The court held that "The [plaintiff] contends that application of § 207 'impairs [a] right the [plaintiff] possessed when it acted,' because the [plaintiff] had a right to the information when it filed its suit (or when it made its earlier request) and it loses that right by application of the new exemption. But the 'action' of the [plaintiff] was merely to request or sue for information; it was not to take a position in reliance upon existing law that would prejudice the [plaintiff] when the law was changed." *Southwest Ctr*, 314 F3d at 1062 (cleaned up). *Southwest Ctr* thus flatly rejected the argument accepted by the dissent here that plaintiff "has a vested right to continue her cause of action under the substantive law in existence before the statutory amendment." Because plaintiff had no vested right in the pre-existing substantive law, this case falls within rule four rather than rule three.

[5] Part I.C.3 of this opinion discusses how the legislation at issue in *Brewer* created an entirely new jurisdictional standard, which is relevant to discussion of why the present case falls within

RECEIVED by MSC 10/10/2019 4:16:52 PM

employers' potential liability based on existing law by imposing "a new legal burden on out-of-state employers not previously subject to the jurisdiction of the Workers' Compensation Agency," *id.*, and "also potentially enlarged existing rights for Michigan residents injured in other states under contracts of hire not made in Michigan," *id.* at 58.

Here, by contrast, the allegations were of negligence leading to a slip and fall. By definition, no one expects to slip and fall; thus, the "familiar considerations of fair notice, reasonable reliance, and settled expectations," *Landgraf*, 511 US at 270, have significantly less force. In other words, because the statute at issue relates to acts which necessarily are unplanned, it is not unreasonable, at least in the abstract, to expect that 2016 PA 419 would apply to antecedent events or transactions which would not have been changed even if the participants had been aware that a different legal regime might attach.

As our Supreme Court has stated in a different context, "[T]o have reliance[,] the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000). However, as noted, a slip and fall is not something which is planned, and thus there could not have been any reliance interest in avoiding a particular application of the law to such an occurrence. " 'An act of the Legislature, though it have retrospective effect, is not necessarily invalid, and does not, for that reason, come into conflict with any constitutional provision, unless vested, not potential, rights are disturbed.' " *Lahti*, 357 Mich. at 594 (citation omitted). Rights regarding a slip and fall which has not yet occurred are of course potential only. On the morning of May 16, 2016, the date of plaintiff's injury, it is inconceivable that she would have acted differently if she had known that eight months later the Legislature would make the open and obvious doctrine applicable to any slip and fall which might occur that day; in other words, in no way could she have reasonably relied on the existing state of the law, i.e., the inapplicability of the open and obvious doctrine, in going about her business and conducting her affairs.

The dissent cites *Vartelas v Holder*, 566 US 257, 272; 132 S Ct 1479; 182 L Ed 2d 473 (2012), for the proposition that plaintiff "need not demonstrate reliance on the prior law in structuring her conduct. *Landgraf* contains no such requirement." The dissent misreads both *Landgraf* and our majority opinion.

> While the presumption against retroactive application of statutes does not require a showing of detrimental reliance, *reasonable reliance has been noted among the 'familiar considerations' animating the presumption*, see *Landgraf*, 511 US at 270 (presumption reflects "familiar considerations of fair notice, reasonable reliance, and settled expectations"). *Although not a necessary predicate for invoking the antiretroactivity principle, the likelihood of reliance on prior law strengthens the case for reading a newly enacted law prospectively.*" [*Vartelas*, 566 US at 273-274 (some citations omitted; emphasis added).]

---

rule four. For present purposes, it is sufficient to note that the legislation in *Brewer* upset reliance interests.

RECEIVED by MSC 10/10/2019 4:16:52 PM

For the reasons stated, plaintiff could not have reasonably relied on prior law, thereby failing to "strengthen[] the case for reading [2016 PA 219] prospectively." *Id.*

3. A REMEDIAL OR PROCEDURAL ACT WHICH DOES NOT DESTROY A VESTED RIGHT; LEGISLATIVE OVERRULING OF PRIOR JUDICIAL DECISIONS

a. REINSTATING THE PREVIOUS STATE OF THE LAW

Finally, under rule four, a remedial or procedural act which does not destroy a vested right will be given retroactive effect even in instances in which the injury or claim is antecedent to the enactment of the statute. *In re Certified Questions*, 416 Mich at 571. "A statute is remedial or procedural in character if it is designed to correct an existing oversight in the law or redress an existing grievance." *Davis v State Employees' Ret Bd*, 272 Mich App 151, 158-159; 725 NW2d 56 (2006). On the other hand, if the legislation enacts a substantive change to the law, it is to be given prospective application. *Johnson*, 491 Mich at 430. Under this analysis, "An amendment may apply retroactively where the Legislature enacts an amendment to clarify an existing statute and to resolve a controversy regarding its meaning." *Mortgage Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 126; 721 NW2d 276 (2006). Thus, our Supreme Court recognizes that if the Legislature adopts an amendment directed at a particular judicial decision, and through that amendment not only overrules the judicial decision but also reinstates the state of the law as it existed prior to the judicial decision, then the amendment is considered remedial and will be applied retroactively. This is so because legislatively reversing an erroneous judicial decision and reinstating the status quo ante corrects "an existing oversight in the law" and "redress[es] an existing grievance," *Davis*, 272 Mich App at 158-159, and also "clarif[ies] an existing statute" and "resolve[s] a controversy regarding its meaning," *Mortgage Electronic Registration Sys*, 271 Mich App at 126.

Brewer provides an example of this principle. An earlier decision, *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), had held that the previous statute provided for application of workers' compensation coverage regarding out-of-state injuries only if the contract of hire had been made in Michigan. As previously noted, the amendment "created an entirely new jurisdictional standard, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan," *Brewer*, 486 Mich at 57, and thus was plainly a substantive change in the law which could not be applied retroactively. *Id.* at 56-57. Continuing its analysis, the *Brewer* Court noted:

> Further undermining any notion of a legislative intent to apply the amendment of MCL 418.845 retroactively is the fact that, *although the Legislature adopted the amendment after our decision in* Karaczewski, *it did not reinstate the pre-*Karaczewski *state of the law.* On the contrary, the amendment enacted by 2008 PA 499 created an entirely new jurisdictional standard, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan. *That is, this amendment did not restore the status quo before* Karaczewski, which required a Michigan contract of hire for jurisdiction, *but instead created a new rule* under which either a Michigan contract of hire or Michigan residency would suffice. [*Id.* at 57 (emphasis added, emphasis in original removed).]

RECEIVED by MSC 10/10/2019 4:16:52 PM

The obvious teaching of this aspect of *Brewer* is that if the legislation which overruled *Karaczewski* also had restored the pre-*Karaczewski* status quo, then the new enactment would have applied retroactively.

The rationale of *Brewer* regarding the reinstating of a prior doctrine is clear. By overturning a particular judicial decision, the Legislature states that the decision was erroneous. However, that fact alone is insufficient for retroactive application because, as *Brewer* shows, even when a previous decision is repudiated, if the legislation rejecting it imposes new burdens not previously extant or enlarges existing rights, it unsettles legitimate expectations. See also *Bd of Trustees of City of Pontiac Police v City of Pontiac*, 502 Mich 868, 872 (2018) (ZAHRA, J., dissenting) (quotation marks and citations omitted) ("Retroactive application of legislation presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions."). But so long as no vested right is affected, as is the case here, retroactive application is warranted. This conclusion is reinforced by the fact that by limiting that aspect of *Brewer* to legislative changes which restore the prior state of the law, the rule vitiates the unfairness which could result from retroactive application, as " 'no right is destroyed when the law restores a remedy which had been lost.' " *Lahti*, 357 Mich at 589 (citation omitted). Thus, the Legislature's reinstatement of a prior doctrine, which "had been lost through" judicial decision and which, according to the Legislature, should have applied all along, works no unfairness because it is "designed to correct an existing oversight in the law or redress an existing grievance." *Davis*, 272 Mich App at 158-159. It is also a permissible mechanism by which "the Legislature enacts an amendment to clarify an existing statute and to resolve a controversy regarding its meaning." *Mortgage Electronic Registration Sys*, 271 Mich App at 126.

The *Brewer* restoration rule applies to 2016 PA 419. In this case, the statutory amendment overturned legal doctrine which had made the open and obvious doctrine inapplicable to claims against a municipality involving a statutory duty to maintain a sidewalk, and as explained in detail below, the act also restored the status quo ante of the repudiated legal doctrine.

b. THE CHANGES BROUGHT ABOUT BY 2016 PA 419, INCLUDING REINSTATEMENT OF THE 1964 ACT

At common law, municipalities such as defendant were not subject to liability at all. Rather, they were cloaked with "governmental immunity." See *Pohutski v City of Allen Park*, 465 Mich 675, 682; 641 NW2d 219 (2002). In 1964, the Legislature enacted the GTLA. See 1964 PA 170. That act generally preserved governmental immunity involving sidewalks, providing that "[t]he duty of the state and the county road commissions to repair and maintain highways, and the liability therefor, shall extend only to the improved portion of the highway designed for vehicular travel and shall not include sidewalks, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel." *Id.*, § 2.

In 1999 PA 205, the Legislature enacted the first version of § 2a, the provision at issue here. The 1999 act generally maintained immunity for municipal corporations for "injuries arising from[] a portion of a county highway outside of the improved portion of the highway

RECEIVED by MSC 10/10/2019 4:16:52 PM

designed for vehicular travel, including a sidewalk." 1999 PA 205, § 2a(1). However, the 1999 act also provided that there would be liability if, "[a]t least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk[.]" *Id.*, § 2a(1)(a). And the act provided that "[a] discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." *Id.*, § 2a(2).

Importantly, § 12 of the GTLA provides that "[c]laims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons." MCL 691.1412. In fact, that provision has never been modified or repealed and has remained in force as enacted since the GTLA's inception in 1964. We interpret statutory language regarding the Legislature's intent as of the time of enactment. *Oole v Oosting*, 82 Mich App 291, 295; 266 NW2d 795 (1978). By using the word "available," the Legislature preserved defenses which, as of the date of passage of § 12, were legally recognized. As of 1964, when § 12 was enacted, it was well established that "claims sounding in tort brought against private persons" were subject to a common-law defense that the risk of a dangerous condition was open and obvious, and thus that a person who was injured under such circumstances was barred from recovering, see, e.g., *Kaukola v Oliver Iron Min Co*, 159 Mich 689; 124 NW 591 (1910).

In *Jones v Enertel, Inc*, 467 Mich 266; 650 NW2d 334 (2002), in light of the statutory enactments, our Supreme Court addressed the availability of the "open and obvious" doctrine to a municipality which allegedly failed to maintain a sidewalk in reasonable repair. "The basic duty owed to an invitee by a premises possessor is 'to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.' " *Id.* at 269 (citation omitted). The Court noted that "this duty does not generally require a premises possessor to remove open and obvious conditions because, absent special aspects, such conditions are not unreasonably dangerous precisely because they are open and obvious." *Id.* The Court concluded:

> However, such reasoning cannot be applied to the statutory duty of a municipality to maintain sidewalks on public highways because the statute requires the sidewalks to be kept in "reasonable repair." The statutory language does not allow a municipality to forego such repairs because the defective condition of a sidewalk is open and obvious. Accordingly, we conclude that the open and obvious doctrine of common-law premises liability cannot bar a claim against a municipality under MCL 691.1402(1). [*Id.*[6]]

The Court also held that municipal corporations could not rely on the statutory language of § 12 of 1964 PA 170, providing that "[c]laims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons," to invoke the open and

---

[6] This Court had reached the same result in other cases. See, e.g., *Walker v City of Flint*, 213 Mich App 18, 23; 539 NW2d 535 (1995). For ease of reference, this opinion uses the term "the *Jones* doctrine" to refer to all such cases, whether decided by our Supreme Court or this Court.

RECEIVED by MSC 10/10/2019 4:16:52 PM

obvious doctrine. The Supreme Court explained that because the open and obvious defense has no application to the statutory duty of a municipality for the reasons already explained in its opinion and discussed above, that defense simply did not apply, regardless of the general rule in § 12. *Jones*, 467 Mich at 270-271.

Thus, as a matter of law under the *Jones* doctrine, the defense of open and obvious was not available to a municipality sued for injuries caused by a sidewalk which it had a statutory duty to maintain. And there things stood until the Legislature passed 2016 PA 419.

As noted, the language of 2016 PA 419, § 2a(5) provides, "In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, 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." Given the development of the law culminating in the *Jones* doctrine, it is readily apparent that the Legislature intended to abrogate that doctrine. "[A] general rule of statutory construction is that the Legislature is presumed to know of and legislate in harmony with existing laws." *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016) (quotation marks and citation omitted). The 1964 Act provided that "all defenses available to private parties" were available under it; those defenses included the open and obvious doctrine; nevertheless, and as a matter of law under the *Jones* doctrine a hazard being open and obvious was inapplicable as a defense to claims involving a municipal corporation's statutory duty to maintain a sidewalk in reasonable repair; and the Legislature then passed 2016 PA 419, providing that a municipal corporation "may assert *any* defense available under the common law," and even though "any defense" necessarily includes the open and obvious doctrine, and to further ensure that there were no ambiguities, the Legislature added the words "including, but not limited to, a defense that the condition was open and obvious." 2016 PA 419, § 2a(5) (emphasis added).

c. THE *BREWER* RETROACTIVITY RULE APPLIED TO 2016 PA 419

The sequence of events recited above shows that the Legislature abrogated the *Jones* doctrine, the first part of the *Brewer* retroactivity test. It would be difficult to think of words which more precisely reject the rationale of the *Jones* doctrine than do the words of § 5 of 2016 PA 419. The 1964 Act had afforded municipalities sued under the act "*all* of the defenses available to claims sounding in tort brought against private persons," 1964 PA 170, § 12 (emphasis added); in the aftermath of *Jones*, the 2016 act afforded those same municipalities "*any* defense available under the common law with respect to a premises liability claim," (emphasis added). There is no material distinction in meaning between "all" and "any"; our Supreme Court has noted that the word " '[a]ny' is defined as 'every; all.' " *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 527; 734 NW2d 533 (2007). Moreover, making "any" defenses applicable to claims against a municipality, expressly including the open and obvious doctrine, was the only substantive change the amendment wrought. Indeed, if 2016 PA 419 was *not* intended to overrule *Jones*, the Legislature had no discernable purpose in enacting it. "When construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory," *Karpinsky v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 543; 606 NW2d 45 (1999). Based on the language employed by the Legislature as well as the rule of statutory

RECEIVED by MSC 10/10/2019 4:16:52 PM

construction against surplusage, we find that the 2016 Act directly repudiated and overruled the *Jones* doctrine by making clear that the open and obvious doctrine was to be available to municipal corporations which had a statutory duty to maintain a sidewalk.[7]

For retroactivity to apply, the second prong of the exception to the *Brewer* test requires not only that a statutory amendment overrule a prior judicial decision, but also mandates that in overruling the decision the Legislature return the state of the law to the pre-decision status quo. For the same reasons, 2016 PA 219 did so, by reinstating for municipal corporations all common-law defenses, as had been provided for in the initial, 1964 Act.

Thus, by enacting 2016 PA 219, the Legislature has stated that the *Jones* doctrine was not what it had intended for the law to be; rather, the amendment shows that it was the Legislature's intent for defenses available to private parties, as provided for by the 1964 Act, to have applied all along. In essence, the amendment states, "The *Jones* doctrine is overruled," thereby satisfying the first prong of *Brewer*. In addition, 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 we set forth in the 1964 Act," thereby satisfying the second prong of *Brewer*. By so acting, the legislation also clarified the Legislature's intent regarding the previous law and settled the

---

[7] The dissent cites *Adrian Sch Dist v Mich Pub Sch Employees Retirement Sys*, 458 Mich 326, 337; 582 NW2d 767 (1998) (quotation marks and citations; emphasis added), for the proposition that the 2016 act cannot be construed to clarify the Legislature's intent because only "when a legislative amendment is enacted *soon* after a controversy arises regarding the meaning of an act" is it "logical to regard the amendment as a legislative interpretation of the original act . . . ." The dissent states that the 14 years which passed between the Supreme Court's decision in *Jones* and the 2016 enactment is too lengthy a period of time to inform our analysis. However, *Adrian Sch Dist* involves a different point than did *Brewer*. In *Adrian Sch Dist*, the Legislature amended a statute "as a ratification of the position of the retirement board," *id.* at 337; see also *id.* at 326 n 11 ("We do not give the 1996 amendment retroactive effect. Rather, we give effect to the retirement board's 1993 declaratory ruling."), which did not necessarily reflect the position originally set forth by the Legislature. In *Brewer* and here, by contrast, the Legislature acted to conclusively reaffirm the position *it* had previously taken. The dissent cites no authority, and we have found none, to the effect that there is a temporal limit on the Legislature's authority to overrule a precedent with which it disagrees and to thereby reinstate its previous exposition of the law; and 14 years is not a particularly lengthy period preceding a legislature's decision to statutorily reverse a court decision. See Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale LJ 331, 424 (Appendix I), citing the following: PL 100-703, § 201; 102 Stat 4674, 4676 (1988), overruling *United States v Morton Salt Co*, 338 US 632; 70 S Ct 357; 94 L Ed 401 (1950), after 38 years; PL 99-654, § 2; 100 Stat 3660, 3660-3663 (1986), overruling *Williams v United States*, 327 US 711; 66 S Ct 778; 90 L Ed 962 (1946), after 40 years; PL 99-628, § 5(b)(1); 100 Stat 3510-3511 (1986), overruling *Caminetti v United States*, 242 US 470; 37 S Ct 192; 61 L Ed 442 (1917), and *Cleveland v United States*, 329 US 14; 67 S Ct 13; 91 L Ed 12 (1946), after 59 and 40 years respectively.

RECEIVED by MSC 10/10/2019 4:16:52 PM

controversy created by the *Jones* doctrine regarding its meaning, which is to be applied retroactively.

It is this second aspect of the amendment, in which the Legislature clarified that it never had intended for the *Jones* doctrine to be the law, which the dissent rejects, stating that "applying 2016 PA 419 retroactively eliminates the city's duty," and thereby impairs plaintiff's vested rights. The dissent states that *Brewer* stands for the rule 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 56, citing *Hurd v Ford Motor Co*, 423 Mich 531, 533; 377 NW2d 300 (1985) (emphasis added). That is of course true but not relevant—the point of the reinstatement doctrine is that if the Legislature overrules a judicial decision by restoring the status quo ante, it demonstrates what it intended the law to be all along; under such circumstances, the new legislation does not enact a substantive change in the law.

This point demonstrates the fundamental disagreement between the majority and the dissent. The majority's view is that the Legislature, through the 1964 act and 2016 PA 219, clearly manifested what its intention was for the law to have been all along, i.e., the availability of the open and obvious doctrine to municipalities, and thus properly understood, the 2016 act did not effect a change in the law. The dissent's view is that the *Jones* doctrine was the law prior to the enactment of 2016 PA 219, notwithstanding that the Legislature has now clearly manifested its view that the *Jones* doctrine was erroneous all along. Thus, the dissent views retroactive application of 2016 PA 219 as improperly denying plaintiff a right because the act constituted a substantive change in the law; the majority's view is that allowing plaintiff to reap the benefits of a repudiated rule, which the Legislature has conclusively stated was incorrect and never should have applied, does not constitute "a substantive change in the law," would constitute an unwarranted windfall for plaintiff, and therefore cannot constitute "a vested right."[8]

Thus, while it might be true in some sense that the amendment changed the city's duty, as the dissent argues, that change only came about because of the Legislature's determination that courts had been misapplying that duty all along. Therefore, this change did not affect a vested right because " 'no right is destroyed when the law restores a remedy which had been lost.' " *Lahti*, 357 Mich at 589 (citation omitted). Thus, the Legislature's reinstatement of the prior legal standard, which "had been lost through" application of the *Jones* doctrine and which, according to the Legislature in 2016 PA 419, should have applied all along, works no unfairness and may

---

[8] The dissent also states that the discussion in *Brewer* of the reinstatement rule is dicta. "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007) (quotation marks and citations omitted). The discussion in *Brewer* is not dicta, given that it begins with the words "Further undermining" and then continues the analysis, demonstrating that it was part of the Supreme Court's rationale. The dissent's citation to *Hurd* also is unavailing, because *Hurd* did not discuss the four-part test of the *In re Certified Questions* line of cases, but merely relied on a lack of expressed legislative intent for retroactive application. See *Hurd*, 423 Mich at 535.

RECEIVED by MSC 10/10/2019 4:16:52 PM

be applied retroactively because it was "designed to correct an existing oversight in the law or redress an existing grievance." *Davis*, 272 Mich App at 158-159, citing *Lahti*, 357 Mich at 589. Our analysis thus fully complies with the requirement that we look beyond the label of "remedial" to the substance of whether an amendment affects substantive rights. "[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; 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, the mere fact that a statute is characterized as remedial is of little value in statutory construction. Again, the question is one of legislative intent." [*Johnson*, 491 Mich at 433 (citation omitted).]

No one has a substantive right to litigate based on an erroneous legal rule; quite the contrary is true. The Legislature's action in repudiating and clarifying the correct interpretation of the *Jones* doctrine is thus remedial and plainly cannot violate any substantive right of plaintiff.

Because the Legislature has told us that the *Jones* doctrine never should have applied, it is not the case that 2016 PA 219 enacted a substantive change in the law. The dissent cannot explain how an abrogated doctrine, coupled with a legislative determination to instead impose the intended status quo ante and allow a defense which should have been applicable all along, can result in a duty and thus a vested right in plaintiff's favor, except by assuming that the *Jones* doctrine was the law all along. But by doing so, the dissent simply reiterates the rationale of *Jones*, implicitly rejecting the Legislature's authority to determine the propriety of *Jones* with regard to plaintiff under the circumstances applicable here.[9]

Moreover, to reach its conclusion, the dissent disputes that the open and obvious doctrine is a "defense" within the meaning of 2016 PA 219, by reading it in a technical manner as affecting the duty of a municipal corporation. However, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate

---

[9] The dissent relies heavily on this Court's unpublished opinion in *Schilling v Lincoln Park*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019 (Docket No. 342448). Few rules are as clearly established as that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Thus, it is beyond dispute that *Schilling* is not controlling. However, unpublished opinions may be cited for their persuasive value. See *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017). However, *Schilling* is not persuasive because it did not address the Legislature's overruling of the *Jones* doctrine, the reinstatement of the status quo ante, and the application of the *Brewer* rule, which are the major bases for the majority opinion here. Thus, it is not clear what value the dissent properly ascribes to *Schilling*.

RECEIVED by MSC 10/10/2019 4:16:52 PM

meaning." MCL 8.3a. While the term "affirmative defense" has a technical legal meaning, the term "defense" does not. "An affirmative defense is a defense that does not controvert the establishment of a prima facie case, but that otherwise denies relief to the plaintiff." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712; 550 NW2d 797 (1996) (citation omitted), aff'd 457 Mich 593; 580 NW2d 817 (1998). "An affirmative defense presumes liability by definition." *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994). A "defense," by contrast, is "[t]hat which is offered and alleged by the party proceeded against in an action or suit . . . to diminish plaintiff's cause of action or defeat recovery," *Roberson Builders, Inc v Larson*, 482 Mich 1138, 758 NW2d 284 (2008) (MARKMAN, J., dissenting), or "that which is alleged by the party proceeded against in a suit as a reason why plaintiff should not recover or establish what he seeks," *Gelman Sciences, Inc v Fireman's Fund Ins Cos*, 183 Mich App 445, 448; 455 NW2d 328 (1990). A defense, therefore, is a non-technical concept which can be either factual, legal, or a combination. And because it is a non-technical concept, it is construed through "common and approved usage of the language." MCL 8.3a.

Here, the Legislature created a statutory hybrid, under which municipalities are obligated to maintain sidewalks, but under which an injured party has no private right of recovery if a sidewalk nevertheless has an open and obvious defect because such an open and obvious defect is a "defense" to liability. 2016 PA 419, § 5. The Legislature is permitted to define terms and causes of action in such a manner, and by restoring the right to invoke as a "defense" the doctrine of open and obvious, which had been lost through the *Jones* doctrine, the Legislature in no way impaired any substantive right of plaintiff. See *Lahti*, 357 Mich at 589 (" '[N]o right is destroyed when the law restores a remedy which had been lost.' ").

Simply put, we find that the Legislature's enactment of 2016 PA 419, which did not legally bar plaintiff's cause of action, and through which the Legislature overruled the *Jones* doctrine and reinstated the pre-*Jones* state of the law, overcomes the presumption for prospective application and thus has retroactive effect to events which preceded its enactment, including plaintiff's injury. Therefore, defendant can avail itself of the open and obvious defense, and we next turn to an analysis of how the open and obvious doctrine applies to the facts of this case.

II. OPEN AND OBVIOUS

Because the amendment has retroactive effect, we must determine whether there is a genuine issue of material fact on the question of whether the condition was open and obvious. Plaintiff argues that the trial court erred when it determined that the condition was open and obvious. We disagree.

This Court reviews de novo a lower court decision on a motion for summary disposition. *Moraccini*, 296 Mich App at 391. Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In deciding a motion for summary disposition under this subrule, the moving party must "identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). If the moving party meets the required burden, the burden then shifts to the party opposing the motion to

RECEIVED by MSC 10/10/2019 4:16:52 PM

provide "specific facts" that show that there is "a genuine issue of disputed fact." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The court evaluates all evidence "in the light most favorable to the party opposing the motion." *Id.*

A condition is open and obvious when "an average person of ordinary intelligence [would] discover the danger and the risk it presented on casual inspection." *Price v Kroger Co of Mich*, 284 Mich App 496, 501; 773 NW2d 739 (2009). This is an objective test. *Id.* Thus, because the test is objective, a court is to focus on "whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478-479; 760 NW2d 287 (2008).

In *Price*, the plaintiff was injured when she fell after walking into a "one-inch-long broken wire or 'barb' protruding from [a] bin at ankle level" at a grocery store. *Price*, 284 Mich App at 498-499. This Court held that there was a genuine issue of material fact regarding whether "an ordinary user upon casual inspection" could have discovered the wire because "[a] jury could reasonably infer that a casual inspection of the premises in which plaintiff shopped would not have revealed the barb, in light of its small size, its location at close to floor level, the impediment to visibility posed by the bulk of the candy-filled bin, and [an employee's] failure to detect the anomaly." *Id.* at 501-502.

In this case, plaintiff argues that the defect was not open and obvious because she saw only the crack in the sidewalk, not the height difference in the cement slabs after the crack. Defendant argues that the defect was open and obvious because plaintiff testified that she was not looking at the ground as she walked towards the store and because she admitted that she was able to see the defect.

While defendant supplied photographs of the area where plaintiff fell, these photographs were taken at some point after the area had changed because a tree which had been there at the time of plaintiff's injury was cut down by the time defendant's photo was taken. Plaintiff provided a screenshot from Google maps that showed that there was still a tree in that location on September 2016, several months after her injury. Plaintiff also provided a photograph in which the shade from the tree shows that the tree was still intact at the time of the photograph. However, plaintiff does not claim that the tree obscured her view of the defect at the time of her fall.

While plaintiff had been to Trend Express in the past, she testified that she had never entered the store through the front entrance prior to the date of her injury. It was raining and "darker" on the day of her injury, which could have obscured the dip in the sidewalk. However, plaintiff's photographs clearly show that the sidewalk was sloping at an upward angle (which was a different angle than the surrounding slabs of sidewalk) where she testified she tripped. Notably, plaintiff also testified that nothing was obscuring her view and that she did not discern the differing heights only because she was looking at the store rather than the ground, but not because the condition precluded her from being able to see the condition if she had looked. Indeed, plaintiff admitted that she would have seen the condition of the sidewalk if she had been looking. Thus, plaintiff would have "discover[ed] the danger and the risk it presented on casual

RECEIVED by MSC 10/10/2019 4:16:52 PM

inspection." *Id.* at 501. As such, the condition was open and obvious, and the trial court properly granted defendant's motion for summary disposition on this ground.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Colleen A. O'Brien
/s/ Jonathan Tukel

RECEIVED by MSC 10/10/2019 4:16:52 PM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 10/10/2019 4:16:52 PM

STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER BUHL,

Plaintiff-Appellant,

v

CITY OF OAK PARK,

Defendant-Appellee.

FOR PUBLICATION
August 29, 2019

No. 340359
Oakland Circuit Court
LC No. 2017-157097-NI

Before: O'BRIEN, P.J., and TUKEL and LETICA, JJ.

LETICA, J. (*dissenting*).

I respectfully dissent. The sole question is whether the amendment allowing a municipality to employ an open and obvious defense to an action brought under the defective sidewalk exception to governmental immunity, MCL 691.1402a, may be applied retroactively. In my opinion, the statutory language confirms the Legislature intended prospective application. In addition, this portion of the statutory amendment must apply prospectively because it is a substantive change impairing Jennifer Buhl's vested rights, as plainly evidenced by the circuit court's dismissal.[1] I would reverse and remand for further proceedings.

[1] Another panel of this Court earlier reached the same conclusion. *Schilling v Lincoln Park*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019 (Docket No. 342448). See also *Farley v United States*, unpublished opinion of the United States District Court for the Southern District of West Virginia, issued September 30, 2015 (Case No. 2:13-cv-17090) (following the state Supreme Court's abrogation of the open and obvious defense, the federal district court declined to retroactively apply a West Virginia statute, W Va Code 55-7-28, reinstating the plaintiff's pre-existing cause of action). Also, a separate panel of this Court held that an earlier 2012 amendment, 2012 PA 50, applied prospectively; the 2012 amendment added a statutory presumption describing circumstances under which a municipality would have satisfied its duty to keep a sidewalk in reasonable repair. *Sufi v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued February 17, 2015 (Docket No. 312053), p 6 ("[T]he

RECEIVED by MSC 10/10/2019 4:16:52 PM

I. STANDARD OF REVIEW

The question of whether the amendment of MCL 691.1402a, which added an open and obvious defense, applies retroactively is a question of law reviewed de novo. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

II. THE APPLICABLE LEGAL PRINCIPLES

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v USI Film Prod*, 511 US 244, 265; 114 S Ct 1483; 128 L Ed 2d 229 (1994). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* Applying legislation retroactively " 'presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions.' " *Downriver Plaza Group v Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994), quoting *Gen Motors Corp v Romein*, 503 US 181, 191; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

For these reasons, our Supreme Court requires the Legislature to "make its intentions clear when it seeks to pass a law with retroactive effect." *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014). Moreover, in determining whether a law has retroactive effect, our courts keep four principles in mind:

> 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.[2] 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 (citations omitted).]

III. THE STATUTORY LANGUAGE SUPPORTS PROSPECTIVE APPLICATION

The first principle that this Court must consider is whether the amendment's language indicates it is to have retroactive effect. "In determining whether a statute should be applied retroactively or prospectively only, '[t]he primary and overriding rule is that legislative intent

---

amended version of MCL 691.1402a is inapplicable to plaintiff's claims because it is prospective, not retroactive.").

[2] I agree with the majority that the second principle "relate[s] to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute," *In re Certified Questions*, 416 Mich 558, 571; 331 NW2d 456 (1982), and is not at issue here.

governs. All other rules of construction and operation are subservient to this principle.' " *Frank W Lynch & Co*, 463 Mich at 583, quoting *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715 (1985) (alteration in original). "Statutes are presumed to apply prospectively only unless a contrary intent is clearly manifested." *Brewer v A D Transp Express, Inc*, 486 Mich 50, 56; 782 NW2d 475 (2010). Indeed, "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Frank W Lynch & Co*, 463 Mich at 584.[3] "Use of the phrase 'immediate effect' does not at all suggest that a public act applies retroactively." *Johnson v Pastoriza*, 491 Mich 417, 430; 818 NW2d 279 (2012). To the contrary, when the Legislature provides a law will take immediate effect, this "only confirms its textual prospectivity." *LaFontaine Saline, Inc*, 496 Mich at 40. Here, the Legislature directed the statutory amendment "to take immediate effect" and used no retroactive language. This weighs against retroactive effect, and, instead, confirms the statutory amendment applies prospectively.

IV. PROSPECTIVE APPLICATION IS ALSO REQUIRED BECAUSE THE AMENDMENT TAKES AWAY OR IMPAIRS PLAINTIFF'S PRE-EXISTING CAUSE OF ACTION

The third question to be answered in determining whether a statutory amendment may be applied retroactively is whether it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *In re Certified Questions*, 416 Mich 558, 571; 331 NW2d 456 (1982), quoting *Hughes v Judges' Retirement Bd*, 407 Mich 75, 85; 282 NW2d 160 (1979) (quotation marks omitted). Stated otherwise, "this rule is . . . triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act." *In re Certified Questions*, 416 Mich at 577.

The circuit court ruled Buhl had no vested right in not having an open and obvious defense raised. The court explained that Buhl was "not getting left out in the cold" as she "still has the very claim that she had on the day that she fell and was injured." The circuit court added that the city's ability to raise the open and obvious defense was simply "a procedural change and not a substantive change in [Buhl's] ability to bring her claim[.]" The majority accepts these conclusions, holding that the statutory amendment operates in a remedial or procedural manner and, therefore, may be applied retrospectively.

However, the law is clear that "the term 'remedial' in this context should only be employed to describe legislation that *does not affect substantive rights.*" *Frank W Lynch & Co*,

---

[3] During the 2016 session alone, the Legislature passed several statutes explicitly providing for retroactive application. See e.g., 2016 PA 7, enacting § 1, amending MCL 205.92 ("This amendatory act is retroactive and is effective December 15, 2013."); 2016 PA 15, enacting § 1, adding MCL 600.6094a ("This amendatory act applies retroactively to all judgments entered after May 6, 2015."); 2016 PA 283, enacting § 2, amending the Michigan Medical Marihuana Act, MCL 333.26421, *et seq*. ("This amendatory act is curative and applies retroactively as to the following: . . . ."); 2016 PA 372, enacting § 1, amending MCL 205.54w ("This amendatory act is retroactive and effective for taxes levied after December 31, 2012.").

RECEIVED by MSC 10/10/2019 4:16:52 PM

463 Mich at 585 (emphasis added). And the Michigan Supreme Court has held that where an amended statute is enacted to invalidate a prior decision of the Court, it "effect[ed] a substantive change in the law" and would apply prospectively. *Hurd v Ford Motor Co*, 423 Mich 531, 534; 377 NW2d 300 (1985). A substantive right is one "that can be protected or enforced by law; a right of substance rather than form." *Black's Law Dictionary* (10th ed), p 1520.

Michigan law is "clear that once a cause of action accrues,—*i.e.,* all the facts become operative and are known—it becomes a 'vested right'." *In re Certified Questions*, 416 Mich at 573 (citations omitted). A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v Walker*, 445 Mich 682, 699; 520 NW2d 135 (1994). In this case, Buhl's cause of action accrued on May 4, 2016—the day she fell. This was well before the January 4, 2017 effective date of the statutory amendment.

The next question is not simply whether the statutory amendment destroyed Buhl's ability to sue, but also whether it *impaired* Buhl's vested right or her substantial rights. To answer this question it is helpful to understand how the open and obvious defense functions in a premises-liability action and how it previously functioned in a suit seeking recovery for an injury resulting from a municipal corporation's failure to maintain its sidewalk in reasonable repair.

In general, "whether a duty exists in a tort action is . . . a question of law to be decided by the court, and when a court determines that a duty was not owed, no jury-submissible question exists." *Hoffner v Lanctoe*, 492 Mich 450, 476; 821 NW2d 88 (2012) (citations omitted). A possessor of land owes no duty to an invitee to protect from, or to warn the invitee of, dangers that are open and obvious "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 460-461. "Whether a danger is open and obvious depends on whether it is reasonable to expect an average person with ordinary intelligence would have discovered it upon casual inspection." *Id.* at 461. This is an objective standard that is not dependent on whether the plaintiff actually discovered the hazard. *Id.* The open and obvious doctrine is not an exception to the duty or duties owed by a landowner; instead, it is an integral part of the definition of that duty or duties. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Accordingly, "establishing whether a duty exists in light of the open and obvious nature of a hazard is an issue within the province of the court." *Hoffner*, 492 Mich at 476.

Before the statutory amendment at issue in this case became effective, our appellate courts held that the open and obvious doctrine of common-law premises liability was "inapplicable to a claim that a municipality violated its statutory duty to maintain a sidewalk on a public highway in reasonable repair." *Jones v Enertel, Inc*, 467 Mich 266, 267; 650 NW2d 334 (2002). See also *Haas v Ionia*, 214 Mich App 361; 543 NW2d 21 (1996); *Walker v City of Flint*, 213 Mich App 18; 539 NW2d 535 (1995). Unlike a typical landowner, who had no duty to make repairs to protect invitees, the statutory exception to governmental immunity imposed a duty on a municipality to keep its sidewalks in good repair so as to be reasonably safe for public travel. *Jones*, 467 Mich at 268-269; *Haas*, 214 Mich App at 362; *Walker*, 213 Mich App at 22-23. As this Court explained, if the open and obvious doctrine applied, a municipality "could meet its statutory duty merely by allowing the . . . sidewalks to deteriorate until their appearance made any danger apparent to the public." *Haas*, 214 Mich App at 363. "Thus, absolving the city of

RECEIVED by MSC 10/10/2019 4:16:52 PM

liability in this situation would be tantamount to allowing the open and obvious danger rule to swallow the statutory duty to maintain . . . sidewalks[] in good repair." *Id.*[4] Finally, the Supreme Court had no difficulty rejecting the city's argument that, under MCL 691.1412,[5] it must be allowed to advance "the open and obvious 'defense' . . . available to private parties," holding:

> We disagree. Assuming for purposes of discussion that MCL 691.1412 read in isolation would allow [the city] to use the open and obvious doctrine as a defense in the present case, we conclude that MCL 691.1412 would have to yield to the more specific statutory duty to maintain highways in reasonable repair under MCL 691.1402(1). "[W]here a statute contains a general provision and a specific provision, the specific provision controls." *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994). . . . MCL 691.1402(1) imposes a duty on municipalities specific to maintaining highways (including sidewalks on highways) in reasonable repair. In contrast, MCL 691.1412 applies generally to all claims under the [governmental tort liability act]. Thus, the specific provisions of MCL 691.1402(1) prevail over any arguable inconsistency with the more general rule of MCL 691.1412. [*Jones*, 467 Mich 270-271 (second alteration in original).]

Here, the statutory amendment vitiates the municipal corporation's duty through application of the open and obvious doctrine, resulting in the dismissal of Buhl's lawsuit. Buhl's substantial rights and vested right were negatively impacted. As the *Schilling* panel succinctly explained when confronted with the identical question of how the statutory amendment adding an open and obvious defense applied:

> [P]laintiff had a vested right in her cause of action that accrued when her trip and fall accident occurred before the effective date of the statutory amendment under 2016 PA 419. Under the applicable version of MCL 691.1402a, at the time her action accrued, the City was liable for a breach of its statutory duty to maintain its sidewalk in reasonable repair, so long as plaintiff could prove that the City had the requisite knowledge of the defect and could rebut the statutory presumption that the sidewalk was in reasonable repair. MCL 691.1402a(1)-(3). Before the amendment under 2016 PA 419, the municipality could not assert an open and obvious defense to claims brought pursuant to its statutory duty under MCL 691.1402a. *Jones*, 467 Mich at 269-270; *Walker*, 213 Mich App at 22-23.

---

[4] Although "the openness and obviousness of the danger does not absolve a municipality of its statutory obligation to repair its sidewalks," it may establish comparative negligence on the plaintiff's part. *Haas*, 214 Mich App at 364.

[5] MCL 691.1412 provides that claims brought under the governmental tort liability act, MCL 691.1401 *et seq.*, "are subject to all of the defenses available to claims sounding in tort brought against private persons."

RECEIVED by MSC 10/10/2019 4:16:52 PM

> The amendment, adding subsection (5) to permit a municipality to assert the open and obvious defense, in effect, now additionally absolves a municipality of liability stemming from a dangerous condition that is open and obvious, i.e., where "it is reasonable to expect that an average person with ordinary intelligence would have discovered [the condition] upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Accordingly, the amended version of MCL 691.1402a not only shields a municipality from liability for injuries caused by a vertical discontinuity defect of less than two inches, MCL 691.1402a(3), but additionally shields a municipality from liability if the dangerous condition of the sidewalk was open and obvious. MCL 691.1402a(5). Thus, *the amendment clearly further limits a municipality's liability for injuries arising from a defective sidewalk, and conversely, effectively precludes an injured party from bringing a claim, where he or she previously could, if the dangerous condition of the sidewalk was open and obvious.* The amendment under 2016 PA 419, thus, would impair and effectively destroy any claim resulting from a condition of the sidewalk that is open and obvious and not unreasonably dangerous. *Hoffner*, 492 Mich at 461-463. [*Schilling*, unpub op at 11 (footnote omitted; emphasis added; second alteration in original)].

Just like the plaintiff in *Schilling*, Buhl may sue, but if the dangerous condition of the municipality's sidewalk is open and obvious, her suit is doomed to dismissal because she cannot establish the municipality had a duty.[6] See *Benton v Dart Props Inc*, 270 Mich App 437, 440;

---

[6] Other jurisdictions have recognized that a statute providing a defense that may operate to bar a plaintiff's cause of action applies prospectively. See, e.g., *Anagnost v Tomecek*, 390 P3d 707, 712; 2017 OK 7 (2017) (reversing trial court's dismissal retroactively applying an amendment that "create[d] a new defense to causes of action involving first amendment rights [because it] effectively provide[d] immunity from suit and would act as a complete bar to the plaintiff's claim"); *Pollock v Highlands Ranch Community Ass'n*, 140 P3d 351, 354 (Colo App, 2006) (reversing the trial court's grant of summary disposition after retroactively applying a release statute that "recognizes a substantive defense to negligence claims that often will operate as a complete bar to relief"); *Cole v Silverado Foods, Inc*, 78 P3d 542, 548; 2003 OK 81 (2003) (reinstating the Workers' Compensation Court judge's refusal to retrospectively apply an amendment that refashioned a statutory defense "into a different and more extensive liability-defeating mechanism" that "destroy[ed] the claimant's right to present her claim free from being subjected to new and more extensive instruments of destruction"); *Irvine v Salt Lake Co*, 785 P2d 411 (Utah, 1989) (reversing the trial court's dismissal via retroactive application of statute providing for a governmental immunity defense for flood control activities where the conduct giving rise to cause of action occurred before amendment went into effect); *Brookins v Sargent Indus, Inc*, 717 F2d 1201, 1203 (CA 8, 1983) (reversing the trial court's application of a new defense because it "potentially cuts off a plaintiff's right to recover[,]" and adding, "[W]e have no difficulty in concluding that this is not a procedural change but is a substantive change in rights and obligations.").

RECEIVED by MSC 10/10/2019 4:16:52 PM

715 NW2d 335 (2006) (identifying a duty owed the plaintiff as an essential element of actions sounding in premises liability). Stated otherwise, Buhl's accrued cause of action is "totally barred or taken away by [the] new act." *In re Certified Questions*, 416 Mich at 577. This statutory amendment is not remedial or procedural, it is a substantive game-changer and applies prospectively.

V. RESPONSE TO THE MAJORITY

The majority reframes Buhl's argument, suggesting she has no vested right, but simply an "expectation of success" in her litigation. I recognize that there is a distinction between a right of action and a right of recovery. Accrual of a cause of action means the right to institute and maintain the action. On the other hand, recovery depends not only on successful litigation, but also on the defendant's ability to pay. Buhl, however, does not argue she has a vested right to recover damages from the municipality; instead, she contends she has a vested right to continue her cause of action under the substantive law in existence before the statutory amendment. Again, the law recognizes Buhl has a vested right in her cause of action. *Id.* at 573. Whether the statutory amendment at issue abolishes Buhl's cause of action outright or its application results in dismissal of her lawsuit, albeit after a judicial finding on the question of whether the danger was open and obvious, makes no difference. Either way, Buhl's "accrued cause of action [is] totally barred or taken away by a new act." *Id.* at 577.

Moreover, the majority's discussion of the relevancy of reliance to determine the amendment's retroactivity is unpersuasive. Even if Buhl was not relying on the municipality's statutory duty when she fell, she need not demonstrate reliance on the prior law in structuring her conduct. *Landgraf* contains no such requirement. *Vartelas v Holder*, 566 US 257, 272; 132 S Ct 1479; 182 L Ed 2d 473 (2012). Rather "[t]he essential inquiry . . . is 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Id.* at 273. That is precisely what happened here.

To buttress its conclusion that the Legislature's intent to overrule our Supreme Court's 2002 *Jones* decision renders the 2016 statutory amendment remedial and retroactive, the majority extracts from *Brewer* a rule that substantive changes are only to apply prospectively "if the Legislature adopts an amendment directed at a particular judicial decision, and through that amendment not only overrules the judicial decision but also reinstates the state of the law as it existed prior to the amendment, then the amendment is considered remedial and will be applied retroactively." But in *Brewer*, the Supreme Court explained 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 56, citing *Hurd*, 423 Mich at 533. See also *Johnson*, 491 Mich at 430, quoting *Brewer*, 486 Mich at 56. The Supreme Court did not incorporate the majority's rule. See also *Frank W Lynch & Co*, 463 Mich at 585 ("[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.' "). Thus, while the majority applies a rule it derives from *Brewer*, I discern non-binding obiter

RECEIVED by MSC 10/10/2019 4:16:52 PM

dictum.[7] *Perry v Sied*, 461 Mich 680, 687 n 9; 611 NW2d 516 (2000) ("[O]bservations by way of obiter dicta are not binding.")

The majority further buttresses its conclusion describing this amendment as a clarification that resolved a controversy about the statute's meaning. But "[a]n amendment that affects substantive rights generally will not fall within this rule." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 372; 803 NW2d 698 (2010). And our Supreme Court has explained this clarification rule applies "when a legislative amendment is enacted *soon* after a controversy arises regarding the meaning of an act [because] it is logical to regard the amendment as a legislative interpretation of the original act . . . ." *Adrian Sch Dist v Mich Pub Sch Employees Retirement Sys*, 458 Mich 326, 337; 582 NW2d 767 (1998) (quotation marks and citations; emphasis added). Fourteen years is not "soon" and characterizing this amendment as clarifying ignores the Legislature's passage of the interim 2012 amendment before it added this "new defense." House Legislative Analysis, HB 4686 (December 9, 2015), p 2.

Finally, the majority repeatedly quotes *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959), quoting *Evans Prod Co v State Bd of Escheats*, 307 Mich 506, 545; 12 NW2d 448 (1943), for the proposition that " 'no right is destroyed when the law restores a remedy which had been lost.' " In *Lahti*, the Supreme Court retroactively applied an amendment to a workers' compensation statute that eliminated a two-year limitation on the payment of medical benefits for work-related injuries. *Id.* at 582-583. The Court explained that the workers' compensation law "was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, . . . the expense of the hospital and medical bills of the injured employee . . . ." *Id.* at 585. If the worker had been the plaintiff in a common-law tort action, he would have had the right to recover lifetime medical benefits, leading the Court to conclude the amendment at issue simply "restored" this remedy. *Id.* at 589. The Court also determined that the amendment did not affect any vested rights because it "did not afford the employee a new cause of action, but merely expanded the remedies then in effect." *Id.* at 587. In other words, although the amendment reduced the statutory protections afforded to the employer, the employer was still in a better position than it would have been had it been subject to common-law tort liability. This is not true here—application of the open and obvious doctrine vitiates the municipality's duty, defeating Buhl's preexisting cause of action. Moreover, our Supreme Court later clarified that "[a]n amendment that affects substantive rights is not

---

[7] After concluding there was no language clearly manifesting a legislative intent to apply the new statute retroactively, the Supreme Court held "the amendment applies only to injuries occurring on or after" its effective date. *Brewer*, 486 Mich 56. The Court also reviewed the effective date language in 2008 PA 499 ("to take immediate effect"), and held that it, too, supported the conclusion that the statute should be applied prospectively. *Id.* Only at that point did the Court mention that "[f]urther undermining any notion of a legislative intent to apply the amendment . . . retroactively is the fact that, although the Legislature adopted the amendment after our decision in *Karaczewski* [*v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007),] it did not reinstate the pre-*Karaczewski* state of the law[,]" but opted for a new rule. *Brewer*, 486 Mich at 57.

RECEIVED by MSC 10/10/2019 4:16:52 PM

considered 'remedial' . . . ." *Brewer*, 486 Mich at 57. See also *Frank W Lynch & Co*, 463 Mich at 585 ("[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.' ").

The question here is not whether the Legislature may alter the law. It surely may. The legal question before us is whether the Legislature clearly stated its intention to apply 2016 PA 419 retroactively. Like my colleagues in *Schilling*, I answer "no." *Schilling*, unpub op at 10. A follow-up question before us is whether retroactive application of this statutory amendment would take away or impair a vested right. Again, like my colleagues in *Schilling*, I answer "yes." *Id.* at 10-11. So, like my colleagues in *Schilling*, I conclude 2016 PA 419 applies prospectively. *Id.* at 12-13.

VI. THE CITY'S REMAINING ARGUMENT

The city also relies upon *Rookledge v Garwood*, 340 Mich 444; 65 NW2d 785 (1954), for the proposition that a statutory defense is not a vested right. In that case, the plaintiff was injured in an automobile accident while walking to lunch. *Id.* at 449. On the date of the accident, the workers' compensation law provided the plaintiff two mutually exclusive options: he could either sue the responsible tortfeasor or seek recovery from his employer and leave his employer to pursue the tortfeasor. *Id.* at 448. The plaintiff opted to recover from his employer under the workers' compensation law. *Id.* at 449. Thereafter, the law was amended to allow the plaintiff to recover from the tortfeasor notwithstanding his choice to seek compensation under the workers' compensation law. *Id.* at 450. The plaintiff then sued the tortfeasor. *Id.* at 449. The tortfeasor argued that the earlier statute had given him "a substantive right, and that the statute [was] not retroactive," while the plaintiff maintained that the amended statute was remedial and afforded him both rights. *Id.* at 452.

The Supreme Court agreed with the plaintiff, discussing the remedial nature of the statute and noting that it had previously addressed the injustice of requiring this particular election, characterizing it "as working a hardship solely to the advantage of the third party tortfeasor." *Id.* at 453-454. Importantly, the Court noted that in amending the statute to eliminate the election requirement, the Legislature had rejected a proposal to limit its application to those employees who had not previously made an election. *Id.* at 454. The Court also explained that the amendment did not create "a new cause of action against the defendant, thereby affecting a vested or substantive right, nor [did] it impose a new liability upon the defendant where none existed before." *Id.* at 456. The Court further discussed the difficulty of determining what constituted a vested right, but agreed that it was "a right of which the individual could not be deprived without injustice" or one "of which the individual could not be deprived arbitrarily without injustice." *Id.* (quotation marks and citations omitted). Applying these definitions, the tortfeasor defendant "did not have a vested right in the statutory defense accorded him under the prior provision of the Workmen's Compensation Act. His right then . . . 'sprang from the kindness and grace of the legislature. And it is the general rule that that which the legislature gives, it may take away.' " *Id.* at 457, quoting *Wylie v City Comm'n of Grand Rapids*, 293 Mich 571, 588; 292 NW 668 (1940). The Court added that "[a] statutory defense, though a valuable right, is not a vested right and the holder thereof may be deprived of it after the cause of action to which it may be interposed has arisen." *Rookledge*, 340 Mich at 457.

RECEIVED by MSC 10/10/2019 4:16:52 PM

Rookledge is easily distinguished. There, the statute removed a defense that was dependent on a choice made by the plaintiff in a situation where the tortfeasor defendant did not have a right to avoid liability even before the amendment. In this case, the amendment added a new defense that abrogated the duty the city owed and resulted in dismissal of Buhl's suit.

VII. CONCLUSION

I have no doubt the Legislature intended to extend the same protection and cost savings land possessors enjoy by employing the open and obvious danger defense to a municipal corporation's duty to maintain its sidewalks in reasonable repair.[8] But, applying 2016 PA 419 retroactively eliminates the city's duty and impairs Buhl's substantive rights, namely, her ability to pursue her pre-existing cause of action. In my opinion, the law and the Legislature's chosen language require us to apply this amendment prospectively.

/s/ Anica Letica

[8] The following argument was made in support of the bill:

> [It] extends cost savings already enjoyed by the private sector, to taxpayers in the public sector. How so? Proponents note that courts have permitted private enterprise to employ an 'open and obvious' defense for years, such that today it is routinely considered their first line of protection in such cases. So, while the private sector has a common law duty to make its premises reasonably safe, it is protected from liability if a visitor suffers an injury due to a dangerous condition that is an 'open and obvious' one. The same policy should apply in the public sector. [House Legislative Analysis, HB 4686 (December 9, 2015), p 2.]

RECEIVED by MSC 10/10/2019 4:16:52 PM

RECEIVED by MSC 10/10/2019 4:16:52 PM

Act No. 419
Public Acts of 2016
Approved by the Governor
January 3, 2017
Filed with the Secretary of State
January 4, 2017
EFFECTIVE DATE: January 4, 2017

STATE OF MICHIGAN
98TH LEGISLATURE
REGULAR SESSION OF 2016

Introduced by Reps. Santana, Gay-Dagnogo and Banks

ENROLLED HOUSE BILL No. 4686

AN ACT to amend 1964 PA 170, entitled "An act to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers, employees, and volunteers and for paying damages sought or awarded against them; to provide for the legal defense of public officers, employees, and volunteers; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal acts and parts of acts," by amending section 2a (MCL 691.1402a), as amended by 2012 PA 50.

The People of the State of Michigan enact:

Sec. 2a. (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.

(2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

(3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:

(a) A vertical discontinuity defect of 2 inches or more in the sidewalk.

(b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.

(4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.

(5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, 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.

(6) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.

This act is ordered to take immediate effect.

Clerk of the House of Representatives

Secretary of the Senate

Approved .....

.....

Governor

RECEIVED by MSC 10/10/2019 4:16:52 PM

RECEIVED by MSC 10/10/2019 4:16:52 PM

2019 WL 4282069
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Alan DRAKE, Plaintiff-Appellee,
v.
CITY OF OAK PARK, Defendant-Appellant.

No. 340975
|
September 10, 2019

Oakland Circuit Court LC No. 2017-158907-NO

Before: K. F. Kelly, P.J., and Riordan and Gadola, JJ.

Opinion

Per Curiam.

***1** Defendant, City of Oak Park, appeals as of right the trial court order denying its motion for summary disposition premised on governmental immunity. We reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

On November 15, 2016, plaintiff was jogging on defendant's sidewalk in front of a home located at 1407 Ludlow. He asserted that he "was ... suddenly and violently caused to trip and fall" by a 3½ inch vertical discontinuity in the sidewalk. Plaintiff contended that he suffered severe injuries as a result. He filed a complaint on May 23, 2017, alleging negligence, specifically challenging defendant's failure to maintain the sidewalk in a safe condition and asserting that the defect existed for more than 30 days before his injury such that defendant knew or should have known of the condition. The complaint acknowledged that the statute governing municipal liability for maintenance of sidewalks was recently amended on January 4, 2017, but claimed that the amendment had no application because it did not apply retroactively.

On June 20, 2017, defendant filed a motion to dismiss pursuant to MCR 2.116(C)(7), (8), and (10), alleging that MCL 691.1402a was amended to allow it to raise a defense that the condition was open and obvious. Defendant asserted that it was entitled to summary disposition because the condition was open and obvious where an average user with ordinary intelligence would have discovered the danger and the risk upon casual inspection. It offered the photographs of the area purportedly to demonstrate that the sidewalk's condition was clearly visible to an ordinary user upon casual inspection. Further, defendant contended that there were no special aspects to the open and obvious condition that made the risk unreasonably dangerous.

On August 24, 2017, plaintiff filed an answer in opposition to the dispositive motion. Plaintiff asserted that his claim arose on November 15, 2016, but the statutory amendment did not take effect until January 4, 2017. Because the statute did not contain any reference to retroactivity, plaintiff alleged that any amendment should be applied prospectively only. Plaintiff further contended that the defect was in excess of two inches, the defect was in existence for more than 30 days, and therefore, plaintiff was entitled to summary disposition pursuant to MCR 2.116(I)(2) with a trial necessary to address damages only.

In reply, defendant asserted that MCL 691.1402a was entitled to retroactive application because the statute did not impact vested rights, and plaintiff failed to challenge the open and obvious nature of the condition of the sidewalk. Following oral argument, the trial court denied defendant's motion for summary disposition, holding that the statutory amendment was presumed to apply prospectively and there was no clear manifestation of the intent to grant retroactive application by the Legislature. In light of the holding that the statute was given prospective application only, the court did not address whether the condition of the sidewalk was open and obvious. The trial court also denied summary disposition to plaintiff pursuant to MCR 2.116(I)(2), concluding that there were factual issues regarding defendant's knowledge of the defect and any possible comparative negligence by the plaintiff. From this ruling, defendant appeals.

II. LEGAL STANDARDS AND APPLICATION

***2** Appellate courts review a trial court's decision on a motion for summary disposition de novo. *Magley v.M & W Inc*, 325 Mich. 307, 402; 926 N.W.2d1 (2018). The application of governmental immunity and a statutory exemption to governmental immunity also present questions of law subject to review de novo. *Petersen Fin LLC v.City of*

RECEIVED by MSC 10/10/2019 4:16:52 PM

Kentwood, 326 Mich. App.433, 441; 928 N.W.2d245 (2018). Summary disposition is proper pursuant to MCR 2.116(C)(7) when a claim is barred premised on "immunity granted by law." When there is no pertinent factual dispute, the issue of whether a claim is barred by MCR 2.116(C)(7) presents a question of law for the court to decide. *Snead v.John Carlo, Inc*, 294 Mich. App.343, 354; 813 N.W.2d 294 (2011). "If, however, a pertinent factual dispute exists, summary disposition is not appropriate." *Id.*

The government tort liability act (GTLA), MCL 691.1401 *et seq.*, entitles a governmental agency to immunity from tort liability if the agency was engaged in a governmental function unless an exception applies. *Johnson-McIntosh v.City of Detroit*, 266 Mich. App.318, 322; 701 N.W.2d 179 (2005). The highway exception to governmental immunity, MCL 691.1402(1) provides, in pertinent part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

The term "highway" is defined to "include[ ] a bridge, sidewalk, trailway, crosswalk, or culvert on the highway." MCL 691.1401(c). Pursuant to MCL 691.1402a, municipalities have a duty to maintain sidewalks in reasonable repair and states:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.
>
> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
>
> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
>
> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subjection (3) has been rebutted is a question of law for the court.
>
> (5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect a premises liability claim, including, but not limited to, a defense that the condition was open and obvious.
>
> (6) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.91131.

MCL 691.1402a was amended effective January 4, 2017, following the passage of 2016 PA 419, with the substantive change to the statute being the allowance of the open and obvious defense to municipalities.

***3** In the present case, the parties acknowledge that plaintiff's alleged injury occurred on November 15, 2016, before the statutory amendment to MCL 691.1402a became effective on January 4, 2017. However, the complaint was filed after the amendment that permits a municipality to advance an open and obvious defense to a claim for breach of duty to maintain a sidewalk. Thus, the parties dispute the applicability of the open and obvious defense to this case. However, the dispute regarding the retroactive or prospective applicability of the statutory amendment was recently resolved in *Buhl v.City of Oak Park*, —— Mich. App.——, ——; —— N.W.2d—— (2019) (Docket No. 340359). The *Buhl* majority held that "the Legislature's enactment of 2016 PA 419 ... overcomes the presumption

RECEIVED by MSC 10/10/2019 4:16:52 PM

for prospective application and thus has retroactive effect to events which preceded its enactment," and therefore, a municipality was entitled to utilize the open and obvious defense. *Id.* at ——; slip op. at 17. We must follow the precedent established by *Buhl.* MCR 7.215(C)(2), (J)(1). Accordingly, we reverse the trial court's holding that MCL 691.1402a applies prospectively only and remand for the trial court to address the application of the open and obvious defense.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, the prevailing party, may tax costs.

All Citations

Not Reported in N.W. Rptr., 2019 WL 4282069

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 10/10/2019 4:16:52 PM

2017 WL 1488969
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

David MACKLIS, Plaintiff–Appellee,
v.
FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, Defendant–Appellant.

No. 330957
|
April 25, 2017

Synopsis
Background: Driver brought action under Michigan Assigned Claims Plan (MAP) seeking personal injury protection (PIP) benefits. The Circuit Court, Wayne County, No. 15–000822–NF, denied insurer's motion for summary disposition. Insurer filed application for leave to appeal, which was granted.

Holdings: The Court of Appeals held that:

version of PIP statute in effect at time of accident, rather than version in effect at time suit for benefits was filed, applied, and

genuine issue of material fact existed as to whether driver unlawfully took vehicle.

Affirmed.

Wayne Circuit Court, LC No. 15–000822–NF

Before: Sawyer, P.J., and Saad and Riordan, JJ.

Opinion

Per Curiam.

***1** In this claim for first-party no-fault benefits, defendant, Farm Bureau General Insurance Company of America, appeals the trial court's order that denied its motion for summary disposition.[1] Although the trial court incorrectly used the amended version of MCL 500.3113(a) instead of the prior version that was in effect at the time plaintiff's claims accrued, we nonetheless affirm.

I. BASIC FACTS

This is a no-fault case for PIP benefits brought under the Michigan Assigned Claims Plan (MACP). According to plaintiff's version of the facts, which we are obliged by law to view in a light most favorable to plaintiff when we review a motion for summary disposition, on January 20, 2014, George Graham and another individual known as "Kay" drove a grey van to meet plaintiff because they wanted plaintiff to drive them to see a doctor that plaintiff knew, in order to illegally obtain some prescription drugs. Graham and Kay asked plaintiff to drive the van because plaintiff knew the location of the doctor's office. Kay told plaintiff that the van belonged to Graham: this was the first time plaintiff ever saw the van. Although plaintiff did not have a driver's license, he agreed to drive. Again, we note that despite the inherent implausibility of this story, we are not at liberty to judge its credibility. But, the saga continues.

While driving the van, plaintiff made stops to pick up two other people. After this last person was picked up, plaintiff also stopped to pick up some marijuana. Afterward, while en route to the doctor's office, another vehicle ran through a stop sign and collided with the van. Plaintiff was taken to the hospital for his injuries and released later that same day.

Plaintiff subsequently sought benefits under the MACP, and this litigation eventually ensued. Defendant moved for summary disposition and argued that plaintiff could not recover benefits under MCL 500.3113(a) essentially because plaintiff could not have had a reasonable belief that he was entitled to use the van. Also, defendant says plaintiff should not get PIP benefits because he did not have a license, was smoking marijuana, and took the trip, with the van, to illegally purchase drugs. In other words, defendant takes the not entirely unreasonable position that plaintiff should not be rewarded for engaging in multiple criminal behavior. Plaintiff argued that unlawful use, alone, did not void a right to the benefits.

The trial court held that summary disposition was improper under the amended version of MCL 500.3113(a). In doing so,

RECEIVED by MSC 10/10/2019 4:16:52 PM

the court distinguished between unlawful taking and unlawful use. The court concluded that issues of fact existed concerning who owned the van and whether plaintiff should have known who owned the van. As the court explained:

> Here Defendant asserts Plaintiff's admittedly nefarious conduct precludes him from obtaining the typical statutory mandated no-fault benefits.
>
> ***2** Defendant's position does not comport with the plain language of the operative statutory provision, at least not as a matter of law on this record.
>
> Plaintiff was unquestionably unlicensed and possibly intoxicated on marijuana while driving this mysterious van, but this does not mean Plaintiff had taken this vehicle unlawfully.
>
> * * *
>
> The Court merely holds that on this current record Plaintiff is not excluded under MCL 500.3113(a) as a matter of law as there are genuine issues of fact regarding the ownership of the subject van and what plaintiff knew or should have known about such ownership.

II. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) de novo. *McCoig Materials, LLC v. Galui Constr., Inc.*, 295 Mich. App. 684, 693; 818 N.W.2d 410 (2012). Judgment for the moving party hinges on whether there exists a genuine issue of material fact. *Curry v. Meijer, Inc.*, 286 Mich. App. 586, 590; 780 N.W.2d 603 (2009). When reviewing a motion under MCR 2.116(C)(10), a court considers all of the documentary evidence submitted in the light most favorable to the nonmoving party. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362; 547 N.W.2d 314 (1996). The motion is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* To the extent this issue involves issues of statutory interpretation, including whether a statute should be applied retroactively or prospectively, this Court's review is likewise de novo. *Davis v. State Employees' Ret. Bd.*, 272 Mich. App. 151, 152–153; 725 N.W.2d 56 (2006).

III. ANALYSIS

A. WHICH VERSION OF MCL 500.3113(a) APPLIES?

We first address which version of MCL 500.3113(a) applies in this case. Although plaintiff's accident occurred nearly a year before the January 13, 2015 effective date of the amended statute,[2] the trial court applied this latter version because plaintiff filed his suit after the amendment became effective. We hold that the trial court erred when it applied the amended version and that the prior version applies instead.

Statutes are presumed to operate prospectively unless the Legislature manifests a contrary intent. *Frank W. Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich. 578, 583; 624 N.W.2d 180 (2001). An exception lies if the statute is remedial or procedural in nature. *Davis*, 272 Mich. App. at 158. "A statute is remedial in nature when it corrects an existing oversight in the law, redresses an existing grievance, introduces regulations conducive to the public good, or intends to reform or extend existing rights." *Lenawee Co. v. Wagley*, 301 Mich. App. 134, 174–175; 836 N.W.2d 193 (2013). However, a statute that affects or creates a substantive right is not remedial and therefore not retroactive absent a clear indication of legislative intent otherwise. *Lynch & Co.*, 463 Mich. at 585. Substantive rights are essential rights that affect the outcome of a lawsuit and can be protected or enforced by law. *Black's Law Dictionary* (3d ed).

Before the Legislature amended MCL 500.3113(a) in 2014 PA 489, the statute precluded an individual from receiving PIP benefits if the individual used a motor vehicle *that he or she took unlawfully* unless the individual reasonably believed he or she had the right to take and use it. *Henry Ford Health Sys. v. Esurance Ins. Co.*, 288 Mich. App. 593, 599–600; 808 N.W.2d 1 (2010). Section 3113 provided in relevant part before the amendment:

> ***3** A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle *which he or she had taken unlawfully*, unless the person reasonably believed that he or she was entitled to take and use the vehicle. [Emphasis added.]

RECEIVED by MSC 10/10/2019 4:16:52 PM

The amendment subsequently removed the requirement that an individual must unlawfully take a vehicle and, instead, required that an individual either unlawfully take a vehicle *or* knowingly and willingly use an unlawfully taken vehicle. The amended version of § 3113 provides in relevant part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

Regarding the amended language, "[m]ost instructive is the fact that the Legislature included no express language regarding retroactivity." *Lynch & Co.*, 463 Mich. at 584. This is highly significant because "the Legislature ... knows how to make clear its intention that a statute appl[ies] retroactively." *Id.*

Further, according to the Michigan Senate's Legal Analysis report, 2014 SB 1140 was written in response to this Court's holding in *Henry Ford.*[3] *Henry Ford* held that under the prior version of MCL 500.3113(a), only a person who had unlawfully taken a vehicle *and* used it could be excluded from no-fault benefits. *Henry Ford*, 288 Mich. App. at 603. The Court recognized that the Legislature's drafting may have resulted in an unintended consequence, but if the Legislature desired to not limit the preclusion of no-fault benefits to those who unlawfully took the vehicle, it was for the Legislature to amend the statute. See *id.* at 607–608. The Legislature thereafter responded and passed the amended version, which according to the legislative analysis "ensure[d] that a person who willingly uses a stolen vehicle at the time of a car accident and injury is not protected by no-fault." Senate Legislative Analysis, SB 1140, April 8, 2015.

The legislative history makes clear that the amendment was intended to ban from no-fault benefits those who knowingly use an unlawfully taken vehicle regardless of who unlawfully took the vehicle in the first place. Because this necessarily diminishes 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), we hold that the amendment can only be applied prospectively. See *Brewer v. AD Transport Express, Inc.*, 486 Mich. 50, 58; 782 N.W.2d 475 (2010) (holding that the statute at issue was not retroactive where, among other things, the Supreme Court's prior interpretation of the statute triggered the amendment, the amendment otherwise imposed a new legal burden, and the Legislature did not indicate the amendment was retroactive); *Franks v. White Pine Copper Div.*, 422 Mich. 636, 672; 375 N.W.2d 715 (1985) (remedial statutes may be applied retroactively unless they destroy, enlarge or diminish existing rights). Accordingly, the trial court erred when it retroactively applied the amended version of MCL 500.3113(a) when plaintiff's claims accrued under the prior version of the statute.

B. APPLICATION OF PRIOR VERSION OF MCL 500.3113(a)

***4** Thus, the governing version of MCL 500.3113(a) is the pre-amendment version:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

Defendant argues that plaintiff is barred from recovering no-fault benefits because as a matter of law those without driver's licenses (or those who are intoxicated) have no reasonable belief that they are entitled to use a vehicle. Thus, defendant focuses on the statute's language that "the person reasonably believed that he or she was entitled to take and use the vehicle." However, as this Court has explained, "It is the unlawful nature of the taking, not the unlawful nature of the use, that is the basis of the exclusion under § 3113(a)." *Amerisure Ins. Co. v. Plumb*, 282 Mich. App. 417, 426; 766 N.W.2d 878 (2009) (quotation marks and citations omitted), disagreed in part on other grounds *Rambin v. Allstate Ins. Co.*, 495 Mich. 316, 323 n. 7; 852 N.W.2d 34 (2014). Consequently, "[w]hen applying § 3113(a), the first level of inquiry will always be whether the taking of the vehicle was unlawful. If the taking was lawful, the inquiry ends because § 3113(a) does not apply." *Henry Ford*, 288 Mich. App. at 599 (quotation marks and citation omitted).

The Michigan Supreme Court has held that to be considered an unlawful taking, the taking itself must be in violation of a provision of the Michigan Penal Code, MCL 750.1 *et seq. Spectrum Health Hosp. v. Farm Bureau Mut. Ins. Co. of Mich.*, 492 Mich. 503, 509, 537; 821 N.W.2d 117 (2012).

RECEIVED by MSC 10/10/2019 4:16:52 PM

Further, any such analysis must be done from the perspective of the driver, and not the vehicle's owner. *Ramblin*, 495 Mich. at 323 n 7. Here, defendant does not cite to any violation of the Michigan Penal Code as to whether plaintiff unlawfully took the van. Instead, defendant claims that plaintiff unlawfully took the vehicle because he did not have permission from the van's actual owner because the van was purportedly stolen. We find that there is a question of fact on this matter, which bars the grant of summary disposition.

Defendant asserts that plaintiff's taking was unlawful because he never obtained permission from the van's owner, which defendant suggests was not Graham or Kay. But, when viewing the evidence in a light most favorable to plaintiff, the record, to date, does not prove that the van was stolen and, importantly, leaves open the question whether plaintiff knew that Graham lacked the authority to grant him permission to drive it. And for purposes of defendant's motion, we must view the evidence in a light most favorable to plaintiff, which means that defendant, on the record to date, failed to show that defendant knowingly drove a stolen vehicle. [4]

Accordingly, we hold that the trial court correctly determined that there is an open question which precludes the grant of defendant's motion for summary disposition.

IV. CONCLUSION

***5** In sum, the trial court erred when it applied the current version of MCL 500.3113(a) retrospectively. Further, as the party moving for summary disposition, defendant had the initial burden of proof to show that there was no genuine issue of material fact. While defendant focused its proofs and arguments on whether plaintiff could reasonably have thought he was entitled to use the van, defendant failed to offer conclusive evidence that plaintiff took the van unlawfully. Accordingly, on this narrow legal issue, there is a genuine issue of material fact of whether plaintiff unlawfully took the van, and defendant's motion was properly denied. [5]

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

All Citations

Not Reported in N.W. Rptr., 2017 WL 1488969

Footnotes

1 We granted defendant's application for leave to appeal. *Macklis v. Farm Bureau Gen. Ins. Co. of Mich.*, unpublished order of the Court of Appeals, entered June 6, 2016 (Docket No. 330957).

2 2014 PA 489.

3 "In order to determine legislative intent, this Court may examine the legislative history of an act to ascertain the reason for the act and the meaning of its provisions." *Swan v. Wedgwood Christian Youth & Family Servs. Inc.*, 230 Mich. App. 190, 197; 583 N.W.2d 719 (1998).

4 Of course, a fact-finder at trial could find either way.

5 We are aware that this result appears absurd because it rewards criminal behavior. Perhaps, the Legislature will attend to this anomalous result.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 10/10/2019 4:16:52 PM

2019 WL 2146298
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Rhonda SCHILLING, Plaintiff-Appellee,
v.
CITY OF LINCOLN PARK, Defendant-Appellant.

No. 342448
|
May 16, 2019

Wayne Circuit Court, LC No. 17-004104-NO

Before: Sawyer, P.J., and Cavanagh and Servitto, JJ.

Opinion

Per Curiam.

***1** Defendant, the City of Lincoln Park (the City), appeals as of right an order denying its motion for summary disposition in this negligence action stemming from plaintiff's trip and fall on a city sidewalk. We affirm and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL BACKGROUND

On February 15, 2016, plaintiff was walking on the sidewalk near her home when she tripped and fell. Plaintiff testified in her deposition that she did not see any issues with the condition of the sidewalk before she tripped and fell. She was looking towards her house, not down at the sidewalk, when she suddenly "caught [her] right foot" on the sidewalk and tripped, causing her to fall. After she fell, she heard two "snaps" and believed she had broken her foot. Plaintiff could not walk and her neighbors carried her home. She did not look at the sidewalk to see what caused her to trip, but assumed her toe came in contact with the sidewalk, causing her to fall. Plaintiff went to the hospital where she underwent surgery for a fractured ankle. At some point after her cast was removed, she returned to the sidewalk where she tripped and took photographs, which depicted a slab of sidewalk raised about two inches higher than the adjacent slab.

On March 9, 2017, plaintiff filed this negligence case asserting that the vertical discontinuity in the sidewalk caused her to trip and fall, and claiming that the City breached its statutory duty under MCL 691.1402a(1) to maintain the sidewalk in reasonable repair. The City asserted governmental immunity as an affirmative defense and filed a motion for summary disposition under MCR 2.116(C)(7) and (10), arguing that plaintiff could not establish that the vertical discontinuity defect in the sidewalk was two inches or more, necessary to rebut the presumption under MCL 691.1402a(3) that the City maintained the sidewalk in reasonable repair. The City relied on a series of photographs showing the raised sidewalk slab in the area where plaintiff purportedly tripped and fell, i.e., a vertical discontinuity, measuring slightly less than two inches. The City also relied on the deposition testimony of John Kozuh, a civil engineer employed by the City as the Director of the Department of Public Services, that he "speculated" from review of the photographs of the subject sidewalk that the "raise" was an inch and seven-eighths in one photograph and an inch and a half in another photograph, albeit it was not clear to which photographs he was referring. From his inspection of the sidewalk, Kozuh, who was familiar with how vertical discontinuities in sidewalks form, testified that he believed the sidewalk was likely raised by tree roots, which could take years to occur. Alternatively, the City asserted that it was entitled to assert an open and obvious defense under MCL 691.1402a(5), as recently amended by 2016 PA 419, and plaintiff's claim was barred because of the open and obvious nature of the defective sidewalk that was not unreasonably dangerous.

***2** In response, plaintiff argued that the evidence established, or minimally was sufficient to survive summary disposition, that the vertical discontinuity was at least two inches and therefore she rebutted the statutory presumption under MCL 692.1402a(3) that the City maintained the sidewalk in reasonable repair. She ultimately relied on a photograph purportedly depicting the area of the sidewalk where she tripped and fell, showing the vertical discontinuity in the area measuring at slightly less than or, at best, just at two inches. Plaintiff also argued that the City could not assert an open and obvious defense under MCL 691.1402a(5), as amended by 2016 PA 419, because the amendment took effect after her cause of action accrued. Plaintiff argued that the amendment, adding subsection (5) to allow the City to assert an open and obvious defense, affected her substantive right to

RECEIVED by MSC 10/10/2019 4:16:52 PM

bring her accrued action against the City and thus should not be retroactively applied. Even so, plaintiff maintained that the open and obvious doctrine would not bar her claim because the sidewalk's hazardous condition presented an unreasonable risk of harm.

At the hearing on the City's motion for summary disposition, the trial court reviewed the photographs of the subject sidewalk and expressed its belief that the vertical discontinuity appeared to be less than two inches, but ultimately found that it presented an issue of fact for the jury to decide, and thus denied the motion. After hearing argument regarding the applicability of the open and obvious defense, the trial court agreed that the amendment to MCL 691.1402a was substantive in nature and declined to grant summary disposition on that issue as well. After the trial court entered its order denying the City's motions for summary disposition and reconsideration, the City appealed.

II. TWO-INCH RULE UNDER MCL 691.1402a(3)

The City first claims that the trial court erred in denying its motion for summary disposition because plaintiff failed to establish a vertical discontinuity defect in the sidewalk of two or more inches at the point where she tripped and fell, necessary to rebut the statutory presumption under MCL 691.1402a(3) that the City maintained the sidewalk in reasonable repair. We disagree.

The City brought its motion for summary disposition under MCR 2.116(C)(7) and (C)(10). This Court in *Moraccini v. City of Sterling Heights*, 296 Mich. App. 387, 391; 822 N.W.2d 799 (2012), set forth the standard to review a (C)(7) motion as follows:

> This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v. Dep't of Transp.*, 456 Mich. 331, 337; 572 N.W.2d 201 (1998). The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal. *Snead v. John Carlo, Inc.*, 294 Mich. App. 343, 354; 813 N.W.2d 294 (2011). MCR 2.116(C)(7) provides for summary disposition when a claim is "barred because of ... immunity granted by law...." The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v. Wayne Co.*, 482 Mich. 459, 466; 760 N.W.2d 217 (2008). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* We must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *RDM Holdings, Ltd. v. Continental Plastics Co.*, 281 Mich. App. 678, 687; 762 N.W.2d 529 (2008). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id.* But when a relevant factual dispute does exist, summary disposition is not appropriate. *Id.*

"A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim." *Innovative Adult Foster Care, Inc. v. Ragin*, 285 Mich. App. 466, 474-475; 776 N.W.2d 398 (2009). In evaluating a motion brought under (C)(10), "the court views the evidence in the light most favorable to the party opposing the motion." *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "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." *Id.* (citations omitted). A trial court must not "weigh the evidence or make determinations of credibility when deciding a motion for summary disposition." *Innovative Adult Foster Care*, 285 Mich. App. at 480.

***3** The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, generally grants governmental agencies immunity from tort liability but there are several exceptions. *Moraccini*, 296 Mich. App. at 391-392. Relevant to this case is the highway exception, which is set forth at MCL 691.1402(1), and provides, in relevant part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may

RECEIVED by MSC 10/10/2019 4:16:52 PM

> recover the damages suffered by him or her from the governmental agency.

More specifically, under MCL 691.1402a, municipalities have a statutory duty to maintain sidewalks in reasonable repair, and an individual who sustains injury due to the failure of a municipality to maintain its sidewalks in reasonable repair may recover damages from the municipality. *Walker v. City of Flint*, 213 Mich. App. 18, 21-23; 539 N.W.2d 535 (1995). At the time of plaintiff's trip and fall accident, MCL 691.1402a provided, in pertinent part:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.
>
> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
>
> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
>
> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court. [1]

Accordingly, to invoke the sidewalk exception to governmental immunity, plaintiff must overcome the presumption under MCL 691.1402a(3) that the City maintained the sidewalk in reasonable repair by showing that a proximate cause of her injury was a vertical discontinuity defect of at least two inches and/or a dangerous condition in the sidewalk itself of a character other than solely a vertical discontinuity. [2]

***4** There is no dispute that the photographs of the area of the subject sidewalk where plaintiff identified with an "X" the point where she tripped and fell—at the very right-hand edge of the sidewalk slightly left of a weed protruding out of the crack in the slab—depicts an area of the sidewalk that is clearly uneven and raised higher than the adjacent slab, i.e., "a vertical discontinuity." The parties dispute whether the evidence was sufficient to create a question of fact as to whether the vertical discontinuity defect in the sidewalk was two or more inches, required to rebut the presumption under MCL 691.1402a(3) that the City maintained the sidewalk in reasonable repair.

As proof that the vertical discontinuity in the sidewalk failed to meet the two-inch threshold, the City relied primarily on a photograph showing a ruler placed at a point that appears to be within the area plaintiff purportedly tripped and fell, at a point slightly left of the protruding weed on the right-hand edge of the sidewalk. While the photograph is black and white and somewhat blurry, the ruler in that photograph shows a measurement of the vertical discontinuity of the sidewalk at that point of slightly less than two inches. [3] Defendant also refers to the deposition testimony of Kozuh, the City's DPS director and a civil engineer, who viewed photographs and testified that he believed the vertical discontinuity was less than two inches, speculating that the "raise" was "an inch and seven-eight[h]s" on one photograph and "approximately an inch and a half" on a second photograph, albeit it is not clear from the record which photographs he viewed.

To establish that the vertical discontinuity defect met the two-inch threshold necessary to rebut the statutory presumption of reasonable repair, MCL 692.1402a(3), plaintiff directs this Court to a photograph that appears to depict the same general area of the sidewalk where she purportedly tripped and fell—on the right-hand edge of the raised sidewalk slab near a protruding weed. [4] This photograph measures the vertical discontinuity with a measuring tape, which appears to be placed at a point farther left from, but still in the same general area, of the "X" identifying where plaintiff tripped and fell. Specifically, the "X" plaintiff identified as the spot she tripped is at, or slightly left, of the large weed protruding out of the crack of the raised slab at the right-hand edge of the sidewalk and the measuring tape in plaintiff's photograph appears to be at a point further left from the large protruding weed. [5] Nevertheless, the measurement in plaintiff's photograph, while not exactly at the point of the "X", appears to be in the same general three-to-four inch area surrounding the point where she purportedly tripped and

RECEIVED by MSC 10/10/2019 4:16:52 PM

fell. The photograph shows one end of the measuring tape, at the point of the bend of the shadow, measuring the vertical discontinuity at slightly less than two inches. At the other end of the measuring tape, the discontinuity appears to be very close to or just at the two-inch mark on the tape, but the position of the measuring tape is tilted at a slight angle, is not directly perpendicular to the raised sidewalk, and appears to be sitting on leaf debris, making it difficult to definitively discern if the vertical discontinuity is at least two inches. At best, the photograph shows a measurement of the vertical discontinuity in the sidewalk just at two inches.

***5** While we agree, after carefully reviewing the photographs relied on by the parties, that it appears that the vertical discontinuity in the area where plaintiff tripped and fell may be just short of the two inches necessary to rebut the statutory presumption that the City maintained the sidewalk in reasonable repair, MCL 691.1402a(3), the photographic evidence is not definite. In considering a motion for summary disposition brought under MCR 2.116(C)(7) or (C)(10), we must view the evidence in the light most favorable to the nonmoving party, *Moraccini*, 296 Mich. App. at 391, and not "weigh the evidence or make determinations of credibility," *Innovative Adult Foster Care*, 285 Mich. App. at 480. Viewing the photograph presented and relied on by plaintiff, in a light most favorable to plaintiff, we cannot say that the vertical discontinuity of the sidewalk in the area where she tripped and fell measured below two inches as a matter of law. Instead, giving the benefit of reasonable doubt to plaintiff, reasonable minds could differ regarding whether the raised slab in plaintiff's photograph measured below or just at the two-inch threshold. See *West*, 469 Mich. at 183; *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 429; 789 N.W.2d 211 (2010). Thus, although a close question, we conclude that the photographic evidence was sufficient to establish a question of fact regarding whether the vertical discontinuity was at least two inches, necessary to rebut the presumption of reasonable repair under MCL 691.1402a(3), and to survive summary dismissal under MCR 2.116(C)(7) and (10). [6] See *Moraccini*, 296 Mich. App. at 391; *Dextrom*, 287 Mich. App. at 429. Accordingly, the trial court did not err in denying the City's motion for summary disposition on the issue.

However, contrary to the trial court's ruling, the question whether the vertical discontinuity met the two-inch threshold necessary to rebut the presumption under MCL 691.1402a(3) is not a question of fact for a jury. MCL 691.1402a(4) expressly provides that "[w]hether a presumption under subsection (3) has been rebutted is a question of law for the court." Furthermore, this Court in *Dextrom*, 287 Mich. App. at 430, has held that "trial is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7)." As in *Dextrom*, 287 Mich. App. at 430-433, we instruct the trial court, on remand, to conduct an evidentiary hearing to determine whether further factual development can establish that the vertical discontinuity in the sidewalk was at least the two inches necessary to overcome the presumption under MCL 691.1402a(3) that the City maintained the sidewalk in reasonable repair. If the trial court determines that the vertical discontinuity in the area of the sidewalk where plaintiff tripped and fell met the two-inch threshold, then plaintiff has rebutted the presumption of reasonable repair and her claim should not be summarily dismissed under MCR 2.116(C)(7) on that basis. See *Dextrom*, 287 Mich. App. at 433. However, if the trial court determines that the vertical discontinuity defect is less than two inches, then plaintiff cannot overcome the presumption that the City maintained the sidewalk in reasonable repair as a matter of law and the City would be entitled to governmental immunity, in which case the court should grant the City's motion for summary disposition under MCR 2.116(C)(7). See *id.*

III. APPLICATION OF MCL 691.1402a(5)

Next, the City claims that MCL 691.1402a, as amended by 2016 PA 419, to add subsection (5), which permits a municipality to assert the common law defense that the condition of the sidewalk was open and obvious, applies retroactively in this case and the trial court erred in deciding otherwise. We disagree and conclude 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.

***6** We review de novo a trial court's ruling on a motion for summary disposition. *Johnson v. Pastoriza*, 491 Mich. 417, 428; 818 N.W.2d 279 (2012). Whether a statutory amendment applies retroactively presents a question of statutory interpretation which is also subject to de novo review. *Id.* at 428-429.

The sidewalk exception, under MCL 691.1402a, imposes a statutory duty on municipalities to maintain their sidewalks in reasonable repair. MCL 691.1402a(1); *Jones v. Enertel,*

RECEIVED by MSC 10/10/2019 4:16:52 PM

Inc., 467 Mich. 266, 268; 650 N.W.2d 334 (2002); *Walker*, 213 Mich. App. at 21-23. An individual who sustains injury due to the failure of a municipality to maintain its sidewalks in reasonable repair has a right to bring a cause of action to recover from the municipality under MCL 691.1402a. *Id.* However, a municipality's liability is limited under MCL 691.1402a. *Moraccini*, 296 Mich. App. at 396 (MCL 691.1402a "was enacted to limit municipal liability relative to injuries occurring caused by defective sidewalks.").

Plaintiff's cause of action, premised on the City's violation of its statutory duty under MCL 691.1402a to maintain the sidewalk in reasonable repair, accrued on February 5, 2016, when she tripped on the raised sidewalk slab causing her to fall to the ground and suffer injuries. When all of the elements of a cause of action can be alleged in a complaint, a cause of action for tortious injury accrues. *Stephens v. Dixon*, 449 Mich. 531, 539; 536 N.W.2d 755 (1995). At the time her cause of action accrued, for the City to be liable under the sidewalk exception for the injuries she sustained due to the defective condition of the sidewalk, plaintiff was required to prove that, at least 30 days before the occurrence of her injury, the City knew or should have known of the existence of the defect in the sidewalk. See MCL 691.1402a(2). Further, for the City to be liable, it was necessary for plaintiff to rebut the presumption under MCL 691.1402a(3) that the City maintained the sidewalk in reasonable repair with evidence that the proximate cause of her injury was a vertical discontinuity defect in the sidewalk of two inches or more and/or a dangerous condition in the sidewalk itself other than solely a vertical discontinuity. MCL 691.1402a(3).

Effective January 4, 2017, the Legislature, in 2016 PA 419, amended the sidewalk exception under MCL 691.1402a by adding subsection (5) to allow a municipality to assert an open and obvious defense, providing:

> (5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, 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. [7]

Prior to the amendment under 2016 PA 419, under the prevailing common law, a municipality was limited in the defenses it could assert in cases brought under the sidewalk exception to governmental immunity, MCL 691.1402a. Pertinent here, our Courts held that the open and obvious doctrine did not apply to a cause of action premised on the statutory duty under MCL 691.1402a to maintain the sidewalk in reasonable repair. *Jones*, 467 Mich. at 269-270; *Walker*, 213 Mich. App. at 22-23.

***7** The parties dispute whether the amendment to MCL 691.1402a applies in this case to permit the City to assert an open and obvious defense. The City argues that the amendment applies retroactively, and thus it is permitted to assert an open and obvious defense under MCL 691.1402a(5). Plaintiff asserts that the amendment applies prospectively only, and thus the City cannot assert an open and obvious defense because her cause of action accrued before the effective date of the amendment. "In determining whether a statute applies retroactively or prospectively, the intent of the Legislature governs." *Johnson*, 491 Mich. at 429, citing *Frank W. Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich. 578, 583; 624 N.W.2d 180 (2001). "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Johnson*, 491 Mich. at 429, citing *Brewer v. A.D. Transp. Express, Inc.*, 486 Mich. 50, 55-56; 782 N.W.2d 475 (2010). "This is 'especially true when giving a statute retroactive operation will ... create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed.' " *Johnson*, 491 Mich. at 429-430, quoting *Hansen-Snyder Co. v. Gen. Motors Corp.*, 371 Mich. 480, 484; 124 N.W.2d 286 (1963). Further, when an amendment enacts a substantive change in the law, it is limited to prospective application. *Johnson*, 491 Mich. at 430, quoting *Brewer*, 486 Mich. at 56.

There is an exception to the presumption that statutes apply prospectively where a statute is remedial or procedural in nature, which the City relies on here. See *Johnson*, 491 Mich. at 432-433; *Lynch*, 463 Mich. at 584. The exception provides 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

RECEIVED by MSC 10/10/2019 4:16:52 PM

432-433, quoting *Lynch*, 463 Mich. at 584. "Simply calling a statute 'remedial,' however, is not enough for retroactive application, as explained in *Lynch*:

> [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, ... the term "remedial in this context should only be employed to describe legislation that does not affect substantive rights. Otherwise, the mere fact that a statute is characterized as remedial is of little value in statutory construction. Again, the question is one of legislative intent." [*Johnson*, 491 Mich. at 433, quoting *Lynch*, 463 Mich. at 585 (internal citations and emphasis in *Lynch* omitted).]

Thus, the "exception to the presumption of prospective application for remedial statutes" does not apply if the "statutory amendment affects substantive rights." *Johnson*, 491 Mich. at 433.

In *In re Certified Questions*, 416 Mich. 558, 570; 331 N.W.2d 456 (1982), our Supreme Court identified four principles in determining whether a new statute should be applied retroactively. First, a court should determine whether there is "specific language in the new act which states that it should be given retrospective or prospective application." *Id.* "Second, '[a] statute is not regarded as operating retrospectively [solely] because it relates to an antecedent event.' " *Id.* at 570-571, quoting *Hughes v. Judges' Retirement Bd.*, 407 Mich. 75, 86; 282 N.W.2d 160 (1979). Third, a new law should not be retroactivity applied " 'which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.' " *In re Certified Questions*, 416 Mich. at 572, quoting *Hughes*, 407 Mich. at 85. "Fourth, a remedial or procedural act which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute." *In re Certified Questions*, 416 Mich. at 571.

Regarding the first principle, 2016 PA 419 contains no specific language indicating either retroactive or prospective only application. MCL 691.1402a; *In re Certified Questions*, 416 Mich. at 570-571. The Legislature gave 2016 PA 419 immediate effect on January 4, 2017, the date it was filed, but did not include any language in 2016 PA 419 indicating retroactive application. MCL 691.1402a; House Legislative Analysis, HB 4686, December 9, 2015. Our Supreme Court has recognized that " 'the Legislature has shown ... that it knows how to make clear its intention that a statute apply retroactively.' " *Johnson*, 491 Mich. at 430, quoting *Lynch*, 463 Mich. at 584. Accordingly, the Legislature is "cognizant of the operative language necessary to apply any particular provision in the amendatory act retroactively, but did not include such language in" 2016 PA 419. *Johnson*, 491 Mich. at 431. Further, the Supreme Court "has recognized that 'providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.' " *Id.* at 432, quoting *Brewer*, 486 Mich. at 56. This is "akin" to what the amendment to MCL 691.1402a does: "it provides a specific effective date, that being the date of filing with the Secretary of State, without the slightest hint of retroactive application." *Id.* The absence of any language expressing a legislative intent to apply the amendment to MCL 691.1402a(5) retroactively weighs in favor of prospective only application. See *id.*

***8** The second principle—that a statute does not operate retroactively solely because it relates to an antecedent event—does not appear relevant to this case. See *In re Certified Questions*, 416 Mich. at 570-571. These types of cases "relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute," such as "measuring the amount of a judicial pension not only by years served subsequent to enactment but also by years served under a previous act." *Id.* at 571. In contrast, this case "relates to what if any changes may be made with respect to a cause of action begun under one rule of law by a subsequent statute." *Id.*

"The third rule states that retrospective application of a law is improper where the law 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.' " *Id.* at 572, quoting *Hughes*, 407 Mich. at 85; see also *Johnson*, 491 Mich. at 429-430; *Lynch*, 463 Mich. at 583. A statutory "amendment is limited to prospective application if it enacts a substantive change in the law." *Johnson*, 491 Mich. at 430. "The general rule against retrospective application has been applied in cases where a new statute abolishes an existing cause of action." *In re Certified Questions*, 416 Mich. at 573. "It is clear that once a cause of action accrues,—i.e., all the facts become operative and are known—it becomes a 'vested right.' " *Id.* The general rule against retroactive application is "triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act." *Id.* at 577.

RECEIVED by MSC 10/10/2019 4:16:52 PM

Here, plaintiff had a vested right in her cause of action that accrued when her trip and fall accident occurred before the effective date of the statutory amendment under 2016 PA 419. Under the applicable version of MCL 691.1402a, at the time her action accrued, the City was liable for a breach of its statutory duty to maintain its sidewalk in reasonable repair, so long as plaintiff could prove that the City had the requisite knowledge of the defect and could rebut the statutory presumption that the sidewalk was in reasonable repair. MCL 691.1402a(1)-(3). Before the amendment under 2016 PA 419, the municipality could not assert an open and obvious defense to claims brought pursuant to its statutory duty under MCL 691.1402a. *Jones*, 467 Mich. at 269-270; *Walker*, 213 Mich. App. at 22-23.

The amendment, adding subsection (5) to permit a municipality to assert the open and obvious defense, in effect, now additionally absolves a municipality of liability stemming from a dangerous condition that is open and obvious, i.e., where "it is reasonable to expect that an average person with ordinary intelligence would have discovered [the condition] upon casual inspection." [8] *Hoffner v. Lanctoe*, 492 Mich. 450, 460-461; 821 N.W.2d 88 (2012); *Novotney v. Burger King Corp. (On Remand)*, 198 Mich. App. 470, 474-475; 499 N.W.2d 379 (1993). Accordingly, the amended version of MCL 691.1402a not only shields a municipality from liability for injuries caused by a vertical discontinuity defect of less than two inches, MCL 691.1402a(3), but additionally shields a municipality from liability if the dangerous condition of the sidewalk was open and obvious. MCL 691.1402a(5). Thus, the amendment clearly further limits a municipality's liability for injuries arising from a defective sidewalk, and conversely, effectively precludes an injured party from bringing a claim, where he or she previously could, if the dangerous condition of the sidewalk was open and obvious. The amendment under 2016 PA 419, thus, would impair and effectively destroy any claim resulting from a condition of the sidewalk that is open and obvious and not unreasonably dangerous. *Hoffner*, 492 Mich. at 461-463.

***9** Thus, contrary to the City's argument, retroactive application of the amendment under 2016 PA 419 would affect the substantive rights of a party who, as here, had a vested right in her cause of action before the amendment but was injured by a dangerous condition of a sidewalk that is open and obvious. In such cases, retroactive application of the amendment would, in effect, legally bar or "take away" plaintiff's accrued cause of action against the City because the open and obvious nature of the sidewalk's condition would cut off the City's liability for her injuries. See *In re Certified Questions*, 416 Mich. at 573-577. Generally, the rule is against the retroactive application of a statute that takes away vested rights and "[a] new statute which abolishes an existing cause of action brings the statute with the general proscription of rule three." *Id.* at 573-578. Thus, the third principle weighs in favor of prospective application of 2016 PA 419.

Finally, the fourth principle considers whether the nature of the amendment is remedial or procedural. *In re Certified Questions*, 416 Mich. at 571, 578. "This Court has recognized that new remedial or procedural statutes which do not destroy vested rights should be given retrospective application." *Id.* at 578. But, "the term 'remedial' in this context should *only be employed to describe legislation that does not affect substantive rights*." *Johnson*, 491 Mich. at 433 (emphasis in original), quoting *Lynch*, 463 Mich. at 585. While the legislative history of 2016 PA 419 may suggest that the amendment to MCL 691.1402a was designed to address an oversight in the existing law, and thus could be characterized as remedial in nature, see House Legislative Analysis, HB 4686, December 9, 2015, the remedial nature of the amendment would not support retroactive application because the amendment affected substantive rights. *Lynch*, 463 Mich. at 584-585 ("[T]he term 'remedial' in this context should only be employed to describe legislation that does not affect substantive rights.").

Considering these relevant principles, we conclude that MCL 691.1402a, as amended by 2016 PA 417, should not be given retroactive effect. The intent of the Legislature governs a determination whether a statute is applied prospectively or retroactively. *Johnson*, 491 Mich. at 429. "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Id.*; *Lynch*, 463 Mich. at 583. There is nothing in the language of the amendment to MCL 691.1402a suggesting that the Legislature intended retroactive application of the amendment. The Legislature specified a future effective date of January 4, 2017, without reference to retroactive application, and thus it is evident that the Legislature intended that the amendment apply prospectively. " '[P]roviding a specific, future effective date and omitting any reference to retroactivity supports a conclusion that the statute should be applied prospectively only.' " *Johnson*, 491 Mich. at 432, quoting *Brewer*, 486 Mich. at 56. Further, to now allow a municipality to assert an open and obvious defense

RECEIVED by MSC 10/10/2019 4:16:52 PM

under MCL 619.1402a(5), which it could not do before, substantively alters a municipality's potential liability and, conversely, an injured plaintiff's existing right to recovery with regard to sidewalk defects by effectively absolving a municipality from liability in cases where the sidewalk's dangerous condition from which a plaintiff's injury arose was open and obvious. The amendment to MCL 691.1402a, if applied retroactively, would substantively affect plaintiff's vested or substantive rights in her cause of action which accrued before the amendment took effect, and thus, should be given prospective application only. See *Johnson*, 491 Mich. at 430.

Because plaintiff's trip and fall accident, from which her cause of action arose, occurred before the effective date of the amendment, the amended version, MCL 691.1402a(5), does not apply and the City cannot assert an open and obvious defense in this case. Nevertheless, the City argues that the amendment applies to plaintiff's lawsuit because it was filed after the amendment's effective date. However, in *Moraccini*, 296 Mich. App. at 389 n.1, involving a 2012 amendment to MCL 691.1402a, this Court recognized that the amended version applies prospectively, stating, "MCL 691.1402a was amended by 2012 PA 50, effective March 13, 2012. The amended version of the statute ... is not applicable here, considering the effective date of the amendment and the earlier date of the incident." Here, plaintiff filed her lawsuit on March 9, 2017, after the effective date of the amendment to MCL 691.1402a on January 4, 2017, but her cause of action accrued earlier than the effective date of the amendment, on February 15, 2016, when she tripped and fell on the sidewalk. Accordingly, as in *Moraccini*, the amendment to MCL 691.1402a applies prospectively and is not applicable in this case. The trial court did not err in denying defendant's motion for summary disposition on this basis.

***10** In light of our decision that the amendment to MCL 691.1402a does not govern this case, we need not address whether plaintiff can establish an issue of fact regarding whether the condition of the sidewalk was open and obvious or unreasonably dangerous. We note, however, that it appears from the photographs that the condition was open and obvious, i.e., there is no dispute that an average person with ordinary intelligence would have discovered the vertical discontinuity defect upon casual inspection. Nor do we believe that a raised sidewalk slab, a typical hazard that is commonly experienced, presented an unreasonable risk of harm. Instead, it is apparent from the photographs and plaintiff's testimony that the condition of the sidewalk had no special aspects that would make the open and obvious risk unreasonably dangerous or effectively unavoidable.

We affirm the trial court's denial of defendant's motion for summary disposition and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2019 WL 2146298

Footnotes

1 As we discuss later, effective January 4, 2017, MCL 691.1402a was amended to add subsection (5), which permits a municipality to assert any defense available under the common law with respect to a premises liability claim, including a defense that the condition was open and obvious. 2016 PA 419.

2 Plaintiff did not allege a dangerous condition in the sidewalk other than the vertical discontinuity, nor does she argue such on appeal. At the motion hearing, the City also argued that it was entitled to summary disposition on the basis that plaintiff did not trip and fall as a result of the vertical discontinuity, given her deposition testimony that she did not see what caused her to fall at the time of the accident and the EMS and medical records indicating that she slipped on ice, causing her to fall. However, plaintiff testified unequivocally that she tripped, and did not slip, the sidewalk was not snow covered or icy, and she did not recall telling the medical personnel who treated her that she slipped but believed she told them that she tripped. Further, although plaintiff testified that she did not know what caused her to trip at the time of the accident as she did not look, it could be reasonably inferred from the location of her accident, at a point where the sidewalk was clearly raised and uneven, that she fell as a result of tripping on the raised sidewalk. Minimally, the evidence presents a question of fact regarding the proximate cause of her injury.

3 Apparently, these are the photographs of the location of her trip and fall that plaintiff initially provided to the City.

4 As plaintiff pointed out on appeal, it is apparent that the series of photographs measuring the vertical discontinuity she originally submitted with her initial response to the City's motion for summary disposition depicts the opposite side of the sidewalk slab from where she tripped and fell. Thus, those photographs did not accurately reflect the vertical discontinuity

RECEIVED by MSC 10/10/2019 4:16:52 PM

defect at the point where she tripped and fell. Accordingly, we do not consider those photographs for purposes of this appeal.

5 The measuring tape in the photograph presented by plaintiff appears to be measuring a point farther left from the "X" than the measurement of the ruler in the photograph the City relied on to support its motion for summary disposition, albeit both measurements appear to be in the same general area.

6 While the deposition testimony indicates that the photographs presented by the parties were taken months after plaintiff tripped and fell, Kozuh, the City's DPS director and a civil engineer familiar with vertical discontinuities, testified that he believed the vertical discontinuity in the instant case was caused by tree roots, which would take years to develop. From this testimony, as well as the photographs of sidewalk where plaintiff purportedly tripped and fell, showing a large tree abutting the sidewalk with roots protruding, it is reasonable to infer that the discontinuity took a significant amount of time, i.e., years, to develop. Thus, although the photographs were taken months after she tripped and fell, they arguably accurately depicted the vertical discontinuity existing at the time of the accident.

7 In premises liability cases in the private sector, the open and obvious defense is well established. Under the doctrine, "a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises.... However, liability does not arise for open and obvious dangers unless special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Hoffner v. Lanctoe*, 492 Mich. 450, 455; 821 N.W.2d 88 (2012) (emphasis omitted). "The possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious 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 460-461, quoting *Riddle v. McLouth Steel Prods. Corp.*, 440 Mich. 85, 96; 485 N.W.2d 676 (1992). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered [the condition] upon casual inspection." *Hoffner*, 492 Mich. at 460-461. There is an exception where "the special aspects of an open and obvious hazard could give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable." *Id.* at 463 (emphasis omitted).

8 "[S]uch dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable precautions to avoid[,]" and thus, the premises owner has no duty to protect or warn of the dangers. *Hoffner*, 492 Mich. at 460-461.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 10/10/2019 4:16:52 PM

2015 WL 668887
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Nabil SUFI, as Personal Representative of the Estate of Ali Sufi, Deceased, Plaintiff–Appellee,
v.
CITY OF DETROIT, Defendant–Appellant.

Docket No. 312053.
|
Feb. 17, 2015.

Wayne Circuit Court; LC No. 10–013454–NO.

Before: MURRAY, P.J., and HOEKSTRA and WILDER, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals as of right an order denying its motion for summary disposition of plaintiff's negligence and wrongful death claims under the government tort liability act (GTLA), MCL 691.1401 *et seq.* We vacate the trial court's order and remand for a determination of defendant's motion for summary disposition on the merits.

On May 11, 2010, decedent, 77–year–old Ali Sufi, tripped and fell on the sidewalk in front of his Detroit home after exiting his car. On November 18, 2010, plaintiff, Ali's son, filed a two count complaint against defendant alleging negligence and wrongful death claims. [1]

On August 14, 2012, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Defendant argued that it was immune from liability under the GTLA because plaintiff failed to rebut the presumption created by MCL 691 .1402a(3) that the sidewalk was in reasonable repair. [2] Defendant further argued that plaintiff presented no evidence of a vertical defect in the sidewalk.

On August 20, 2012, the trial the trial court entered an order denying defendant's motion without a hearing:

> The Court dispenses with oral argument under MCR 2.119(E)(3). This motion is denied without prejudice. It was filed past the filing date for motions for summary disposition. Trial is set in this matter for [September 9, 2012].

On appeal, defendant argues that the trial court erred in declining to consider its motion without a hearing because under MCR 2.116(D)(3), summary disposition motions based on governmental immunity can be filed at any time, even after the dispositive motion cutoff date.

"This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kemerko Clawson, LLC v. RxIV, Inc.,* 269 Mich.App 347, 349; 711 NW2d 801 (2005). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Woodington v. Shokoohi,* 288 Mich.App 352, 355; 792 NW2d 63 (2010). Questions regarding the interpretation and application of court rules are reviewed de novo. *Lamkin v. Engram,* 295 Mich.App 701, 707; 815 NW2d 793 (2012).

Trial courts have general authority to set deadlines for the filing of motions. MCR 2.401(B)(2)(a)(*ii*). Plaintiff cites *People v. Grove,* 455 Mich. 439, 464; 566 NW2d 547 (1997), superseded on other grounds by MCR 6.310(B) as stated in *People v. Franklin,* 491 Mich. 916; 813 NW2d 285 (2012), and *Kemerko Clawson,* in support of its argument that the trial court had discretion to deny defendant's motion as untimely filed.

This Court interprets court rules according to the same rules applicable to statutory interpretation. *CAM Constr v. Lake Edgewood Condominium Ass'n.,* 465 Mich. 549, 553; 640 NW2d 256 (2002). The guiding principle of interpretation is to give effect to the intent of the authors. *Wilcoxon v. Wayne Co. Neighborhood Legal Services,* 252 Mich.App 549, 553; 652 NW2d 851 (2002). "The starting point to this endeavor is the language of the court rule." *Id.* Court rule language is given its plain meaning. *Ligons v. Crittenton Hosp,* 490 Mich. 61, 70; 803 NW2d 271 (2011). When that

RECEIVED by MSC 10/10/2019 4:16:52 PM

language is clear and unambiguous, the rule is enforced as written without further judicial construction or interpretation. *Grievance Administrator v. Underwood,* 462 Mich. 188, 193–194; 612 NW2d 116 (2000). In the event of a conflict between rules, a specific rule controls over a more general rule. *Haliw v. City of Sterling Hts.,* 471 Mich. 700, 706; 691 NW2d 753 (2005); see, also, MCR 1.103. Further, any construction that renders some part of the rule nugatory or surplusage should be avoided. *Grzesick v. Cepela,* 237 Mich.App 554, 560; 603 NW2d 809 (1999).

***2** MCR 2.116 governs motions for summary disposition. Generally, a party may move for summary disposition on all or part of a claim "at any time consistent with subrule (D) and (G)(1)[.]" MCR 2.116(B)(2). Subrule (D)(3) addresses the time during which motions grounded on governmental immunity may be filed. It states:

> (3) The grounds listed in subrule (C)(4) and the ground of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401. [MCR 2.116(D)(3).].
>
> The plain language of MCR 2.116(D)(3) provides that the trial court does not have discretion to deny motions based on governmental immunity merely because they are filed after the dispositive motion deadline in the scheduling order. To read the rule otherwise would render the second half of the rule, which explicitly permits filing after the cutoff date, nugatory. *Grzesick,* 237 Mich.App at 560. Staff comments to the rule reiterate this interpretation. See 2007 Staff Comment to MCR 2.116 (stating, "motions for summary disposition based on governmental immunity ... may be filed even if the time set for filing dispositive motions in a scheduling order has expired," and distinguishing a governmental immunity defense from the holding of *Grove, supra*).

Reading the language of subrule (D)(3) as a limit on the trial court's discretion is not out of step with *Kemerko Clawson,* which interpreted MCR 2.116(B)(2) and MCR 2.401(B)(2)(a)(*ii*). *Kemerko Clawson,* 269 Mich.App at 349–351. MCR 2.116(D)(3) differs from subrule (B)(2) in that it explicitly states that the cutoff date in a "scheduling order entered pursuant to MCR 2.401[,]" does not prohibit the filing of summary disposition motions grounded on governmental immunity. With its focus on only governmental immunity and subject-matter jurisdiction, (D)(3) is also more specific than the scheduling order language in MCR 2.401(B)(2)(a)(*ii*), and is therefore controlling. *Haliw,* 471 Mich. at 706. Moreover, governmental immunity is "not an affirmative defense but a characteristic of government...." *Mack v. Detroit,* 467 Mich. 186, 197 n 13; 649 NW2d 47 (2002). That characteristic does not cease to exist because a governmental defendant asserts it after the dispositive motion cutoff date. *Id.* Accordingly, the trial court abused its discretion in refusing to consider defendant's motion for summary disposition. [3]

Defendant next argues that the trial court erred in failing to grant its motion for summary disposition because plaintiff offered no evidence to rebut the statutory presumption that the sidewalk was in reasonable repair under MCL 691.1402a(3).

This Court reviews a trial court's grant or denial of summary disposition de novo. *Odom v. Wayne Co.,* 482 Mich. 459, 466; 760 NW2d 217 (2008). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Corley v.. Detroit Bd. of Ed.,* 470 Mich. 274, 277; 681 NW2d 342 (2004). Summary disposition should be granted if "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). In deciding a motion under subrule (C)(8), this Court accepts the allegations as true and construes them in a light most favorable to the nonmoving party. *Dalley v. Dykema Gossett PLLC,* 287 Mich.App 296, 304–305; 788 NW2d 679 (2010).

***3** A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a party's claims. *Skinner v. Square D. Co.,* 445 Mich. 153, 161; 516 NW2d 475 (1994). When reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other documentary evidence in a light most favorable to the nonmoving party. *Odom,* 482 Mich. at 466–467. Summary disposition should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 467; see MCR 2.116(C)(10). [4]

MCR 2.116(C)(7) permits summary disposition where the claim at issue is barred by governmental immunity. *Maiden v. Rozwood,* 461 Mich. 109, 119; 597 NW2d 817 (1999). "Although courts should start with the pleadings when reviewing a motion brought under MCR 2.116(C)(7), courts must also consider any affidavits, depositions, admissions, or other documentary evidence that the parties submit to determine whether there is a genuine issue of material fact." *Dextrom v. Wexford Co.,* 287 Mich.App 406, 431; 789 NW2d 211 (2010) (citations omitted). When the facts are not in

RECEIVED by MSC 10/10/2019 4:16:52 PM

dispute, the question of whether the claim is barred is an issue of law for the court. *Id.* "*But,* if a question of fact exists so that factual development could provide a basis for recovery," the trial court should hold an evidentiary hearing to determine whether an exception to governmental immunity applies. *Id.* (Emphasis in original).

Under the GTLA, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a government function," with limited exceptions. MCL 691.1407(1). One exception is the highway exception set forth in MCL 691.1402(1), which covers alleged defects in sidewalks. See MCL 691.1401(c) (defining "highway" to include sidewalks). At the time of Ali's fall, the statute provided in relevant part:

> (1) Except as otherwise provided in section 2a [MCL 691.1402a], each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1), as amended by 1999 PA 205. [5]]

Defendant argues that the trial court erred in denying its motion for summary disposition because plaintiff cannot establish that defendant failed to maintain the sidewalk in reasonable repair. Specifically, defendant relies on the presumption created by the 2012 amendment to MCL 691.1402a. Ali's injury occurred on May 11, 2010, and plaintiff filed the complaint on November 18, 2010. At the time Ali was injured, MCL 691.1402a provided:

> ***4** (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
>
> (2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair. [See 1999 PA 205.]

The Legislature amended the statute in 2012 with an effective date of March 13, 2012. See 2012 PA 50. The current version of the statute states in part:

> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
>
> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
>
> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court. [MCL 691.1402a(3), (4).]

Defendant argues that plaintiff failed to rebut the presumption that the sidewalk was in reasonable repair because, according to defendant, photographs of the sidewalk demonstrate no vertical discontinuity. But defendant is not entitled to the statutory presumption.

As defendant seems to recognize, the amended version of MCL 691.1402a is inapplicable to plaintiff's claims because

RECEIVED by MSC 10/10/2019 4:16:52 PM

it is prospective, not retroactive. See *Moraccini v. City of Sterling Heights,* 296 Mich.App 387, 389 n 1; 822 NW2d 799 (2012) (the amended version of the statute does not apply where the plaintiff's injury occurred before the effective date of the amendment). "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application ." *Johnson v. Pastoriza,* 491 Mich. 417, 429; 818 NW2d 279 (2012) (citation omitted). Here, 2012 PA 50 was given an effective date of March 13, 2012, with no mention of retroactive application. "[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, quoting *Brewer v. AD Transp. Express, Inc.,* 486 Mich. 50, 56; 782 NW2d 475 (2010). Because Ali was injured before the effective date of the amendment, the current version of MCL 691.1402a does not apply and there is no presumption that the sidewalk was in reasonable repair.

***5** Presumption aside, both parties implicitly suggest that this Court may resolve defendant's motion for summary disposition on the merits, even though the trial court did not do so.

"[T]o preserve an issue for appellate review, the issue must be raised before and decided by the trial court." *Detroit Leasing,* 269 Mich.App 233 at 237. This issue is unpreserved because the trial court did not decide whether, as defendant asserts, the sidewalk was in reasonable repair. While this Court may overlook preservation requirements where the issue involves a question of law and all the facts necessary for its resolution have been presented, see *Smith v. Foerster–Bolser Constr, Inc.,* 269 Mich.App 424, 427; 711 NW2d 421 (2006), those circumstances are not applicable here.

Because the trial court ruled on defendant's motion only seven days after it was filed, much of the evidence that could have been included in the lower court record is missing. Defendant filed its motion for summary disposition on August 14, 2012, with the hearing set for September 7, 2012. Plaintiff was not required to file and serve his response to the motion until August 31, 2012. See MCR 2.116(G)(1)(a)(*ii*). But the trial court denied defendant's motion on August 20, 2012, before plaintiff could file a response explaining its argument or submitting evidence to support his claims. As a result, the exhibits attached to plaintiff's brief on appeal cannot be considered because they were not included in the lower court record. *In re Rudell Estate,* 286 Mich.App 391, 405; 780 NW2d 884 (2009).

The evidence in the record is limited to several photographs of the allegedly defective sidewalk. These photographs alone are insufficient to render a decision on the merits. Further, defendant contends that the photographs show no vertical discontinuity, while plaintiff asserts they demonstrate a "5 to 6 inch gap" in the sidewalk. Our role is to review the summary disposition record and decision, not to decide a motion not even considered by the trial court. Remand is appropriate. [6]

We vacate the trial court's order and remand to the trial court for consideration of defendant's motion for summary disposition. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2015 WL 668887

Footnotes

1 Ali had passed away several months after he allegedly fell on the sidewalk.

2 MCL 691.1402a was amended by 2012 PA 50, effective March 13, 2012, to state that a governmental entity is "presumed to have maintained the sidewalk in reasonable repair." MCL 691.1402a(3). Whether a plaintiff has rebutted the presumption created by the amendment "is a question of law for the court." MCL 691.1402a(4).

3 Consideration of defendant's motion did not require oral argument. MCR 2.119(E)(3) grants the trial court discretion to dispense with oral argument on a contested motion. *Fast Air, Inc. v. Knight,* 235 Mich.App 541, 550; 599 NW2d 489 (1999). The trial court should have considered defendant's motion, but did not abuse its discretion on the narrow issue of declining to hold oral argument.

4 In its brief on appeal defendant relies in part on an outdated and overruled summary disposition (actually summary judgment under the 1963 court rules) standard, arguing that under MCR 2.116(C)(10) the trial court can only grant a motion if the claim or the defense cannot be supported at trial because of a deficiency which cannot be overcome, citing *Durant v. Stahlin,* 375 Mich. 628; 135 NW2d 392 (1965). Yet it has been *almost 15 years* since the Supreme Court (1) explicitly recognized that that standard was inapplicable under the Michigan Court Rules established in 1985, and (2)

RECEIVED by MSC 10/10/2019 4:16:52 PM

reversed the cases citing to that standard. See *Smith v. Globe Life Ins Co.,* 460 Mich. 446, 455 n 2; 597 NW2d 28 (1999). We recognized this point a decade ago in *Grand Trunk W. R., Inc. v. Auto Warehousing Co.,* 262 Mich.App 345, 350; 686 NW2d 756 (2004), yet still today we frequently receive briefs that contain this outdated, overruled, and obviously inapplicable standard. Appellate counsel need either to update their brief banks or their legal research methods to avoid citing to these summary judgment standards that were long ago set aside by the 1985 Court Rules that established a more intricate and different summary disposition standard.

5 Sidewalks were also included in the definition of "highway" as it appeared in the prior version of MCL 691.1401(e) at the time of Ali's injury. See 2001 PA 131.

6 No factual development is necessary to consider defendant's motion on the pleadings pursuant to MCR 2.116(C)(8), but reversal on this basis is not warranted. Plaintiff alleged that the sidewalk on which Ali fell was "defective, broken, uneven, and misleveled[,]" having a "vertical height differential of greater than two inches...." Thus, plaintiff alleged sufficient "facts warranting the application of an exception to governmental immunity." *Codd v. Wayne Co,* 210 Mich.App 133, 134–135; 537 NW2d 453 (1995).

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.