

STATE OF MICHIGAN
IN THE SUPREME COURT

JENNIFER BUHL,

Supreme Court Case No. 160355

Plaintiff-Appellant,

Court of Appeals No. 340359

v.

Oakland County Circuit Court
Case No. 17-157097-NI

CITY OF OAK PARK,

Defendant-Appellee.

**DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Statement of Jurisdiction	v
Introduction	1
Counter-Statement of Question Presented For Review.....	3
Counter-Statement of Facts	4
Standard of Review	9
Argument.....	10
I. The text of 2016 PA 491 and MCL 691.1412 unambiguously evince that the Legislature did not intend for 2016 PA 419 to be a change in MCL 691.1402a making the open and obvious defense available to municipalities for the first time, but instead that it intended for 2016 PA 419 to make clear that the open and obvious defense has <i>always</i> been available to municipalities pursuant to MCL 691.1412.....	10
II. There is no basis for ignoring the legislature's clear intent as expressed by the text of 2016 pa 419 and mcl 691.1412 that the open and obvious defense has always been available to municipalities, as 2016 pa 491 is remedial in nature and does not impair any vested, substantive rights	16
Conclusion & Relief Requested	21
Proof of Service	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Brewer v AD Transport Express, Inc,</i> 486 Mich 50, (2010)	9, 14, 17
<i>Buhl v City of Oak Park, ___ Mich App ___, (2019).....</i>	7, 8, 11, 15
<i>City of Ecorse v Peoples Comm'ty Hosp Authority,</i> 336 Mich 490, (1953)	20
<i>Cona v Avondale Sch Dist,</i> 303 Mich App 123, (2013)	20
<i>Cusick v Feldpausch,</i> 259 Mich 349, (1932)	20
<i>Frank W Lynch & Co v Flex Technologies, Inc,</i> 463 Mich 578, (2001)	9, 10, 14
<i>Franks v White Pine Copper Division,</i> 422 Mich 636, (1985)	10, 14, 18
<i>Hurd v Ford Motor Co,</i> 423 Mich 521 (1985)	14
<i>In re Certified Questions from the US Court of Appeals for the Sixth Circuit,</i> 416 Mich 558 (1982)	14
<i>Johnson v Pastoriza,</i> 491 Mich 417 (2012)	14
<i>Jones v Entertel, Inc,</i> 467 Mich 266 (2002),	passim
<i>LaFontaine Saline, Inc v Chrysler Group, LLC,</i> 496 Mich 26 (2014)	14

<i>Lahti v Fosterling</i> , 357 Mich 578, (1959)	20
<i>Leonard v Lans Corp</i> , 379 Mich 147, (1967)	20
<i>Los Angeles v Oliver</i> , 102 Cal App 299, (1929)	19
<i>Mack v Detroit</i> , 467 Mich 186, (2002)	18
<i>Maskery v Univ of Mich Bd of Regents</i> , 468 Mich 609, (2003)	12
<i>McCahan v Brennan</i> , 492 Mich 730, (2012)	15, 16
<i>Moore v Austin</i> , 73 Mich App 299, (1977)	20
<i>Morales v Auto-Owners Ins Co</i> , 469 Mich 487, (2003)	12
<i>Nawrocki v Macomb Co Rd Com'n</i> , 463 Mich 143, (2000)	12
<i>Pohutski v City of Allen Park</i> , 465 Mich 675, (2002)	11, 19
<i>Robinson v City of Lansing</i> , 486 Mich 1, (2010)	11, 12, 19
<i>Rookledge v Garwood</i> , 340 Mich 444 (1954)	14, 19, 20
<i>Rowland v Washtenaw Co Rd Comm'n</i> , 477 Mich 197, (2007)	17
<i>Stanton v Battle Creek</i> , 466 Mich 611, (2002)	12

<i>Sun Valley Foods Co v Ward</i> , 460 Mich 230, (1999)	12
<i>Wayne Co v Hathcock</i> , 471 Mich 445, (2004)	12
<i>Williams v Detroit</i> , 364 Mich 231, (1961)	11
<i>Wylie v Comm’n of Grand Rapids</i> , 293 Mich 571 (1940),	20
<u>Statutes / Court Rules / Other Authorities</u>	
2016 PA 419	passim
MCL 491.1402a	11
MCL 691.1401 <i>et seq</i>	4, 11
MCL 691.1402a	passim
MCL 691.1407(1)	12
MCL 691.1412	passim
MCL 691.1492a	14
MCR 7.303(B)	v
MCR 7.305(B)(3)	v, 2
MCR 7.305(B)(5)	v
MCR 7.305(B)(5)(a)	1

STATEMENT OF JURISDICTION

Defendant-Appellee concedes that this Court has discretion to exercise jurisdiction to review the Court of Appeals' decision affirming the Circuit Court's grant of summary disposition to Defendant-Appellee. See MCR 7.303(B). However, Defendant-Appellee denies that this Court should exercise such jurisdiction by granting Plaintiff-Appellant's application for leave to appeal. As explained *infra*, Plaintiff-Appellant has failed to show that this case involves an issue of major significance to Michigan jurisprudence, MCR 7.305(B)(3), or that the Court of Appeals committed clear error resulting in material injustice, MCR 7.305(B)(5).

INTRODUCTION

Plaintiff-Appellant Jennifer Buhl (“Plaintiff”) claims that she sustained injury when she tripped over a vertical discontinuity in a sidewalk under the jurisdiction of Defendant-Appellee City of Oak Park (“Defendant”). Shortly after Plaintiff’s incident, and *before* Plaintiff filed her Complaint against Defendant, the Legislature enacted 2016 PA 419 to make clear that, contrary to this Court’s prior conclusion in *Jones v Entertel, Inc*, 467 Mich 266 (2002), the Legislature had intended for the open and obvious defense to be available to municipalities faced with a claim that the municipality had violated its statutory duty to maintain sidewalks in reasonable repair.

The Circuit Court held that 2016 PA 419 applies retroactively, and further held that the alleged defect in the sidewalk was open and obvious. Thus, the Circuit Court granted summary disposition in Defendant’s favor and dismissed Plaintiff’s Complaint. In a published decision, the Court of Appeals majority affirmed the Circuit Court’s ruling that the alleged defect in the sidewalk was open and obvious. Plaintiff *does not* seek leave to appeal from that ruling. Rather, Plaintiff only seeks leave to appeal from the Court of Appeals’ majority’s affirmance of the Circuit Court’s ruling that 2016 PA 419 applies retroactively, thus permitting Defendant to raise the open and obvious defense.

This Court should deny Plaintiff’s application for leave to appeal.

First of all, Plaintiff cannot establish that the Court of Appeals majority committed clear error. MCR 7.305(B)(5)(a). The text of 2016 PA 419 and MCL 691.1412 make clear that the Legislature intended for 2016 PA 419 to repudiate *Jones* and signify that

the Legislature has *always* intended for MCL 691.1412 to mean what it plainly says, which is that defenses available to private individuals, such as the open and obvious defense, are available to municipalities such as Defendant. Moreover, the Legislature's enactment of 2016 PA 419 was remedial in nature, and *not* a change in the law that impaired any vested, substantive right held by Plaintiff.

Second, Plaintiff cannot demonstrate that this case involves an issue of major significance to Michigan's jurisprudence. MCR 7.305(B)(3). Contrary to Plaintiff's assertion that this case involves a "significant, far-reaching question," (Plaintiff's Brief, 3), the simple fact of the matter is that at this point any other sidewalk trip-and-falls that may have occurred before 2016 PA 419 was enacted on January 3, 2017, will likely be time-barred by the 3 year statute of limitations by the time this Court has opportunity to consider and decide upon Plaintiff's application. And they would most certainly be time-barred by the time this Court issued a decision if it were to grant Plaintiff's application for leave to appeal. Thus, there can be no jurisprudential significance to any consideration by this Court of Plaintiff's application.

Accordingly, Defendant would respectfully request that this honorable Court deny Plaintiff's application for leave to appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals majority and the Circuit Court correctly determine that 2016 PA 419’s amendment to MCL 691.1402a clearly signifies the Legislature’s intent that the open and obvious doctrine has *always* been applicable to municipalities by virtue of MCL 691.1412, and thus that 2016 PA 419 is remedial in nature and not a change in the law impairing any vested or substantive right held by Plaintiff?

Plaintiff-Appellant says: “No.”

Defendant-Appellee says: “Yes.”

The Court of Appeals said: “Yes.”

The Circuit Court said: “Yes.”

COUNTER-STATEMENT OF FACTS

On September 12, 2002, this Court issued its decision in *Jones v Entertel, Inc*, 467 Mich 266 (2002), stating its belief that “the open and obvious doctrine of common-law premises liability is inapplicable [as a defense] to a claim that a municipality violated its statutory duty [pursuant to Michigan’s governmental tort liability act (“GTLA”)]¹ to maintain a sidewalk on a public highway in reasonable repair,” *id.* at 267. This Court reached its belief despite the fact that the Legislature had specifically provided in MCL 691.1412 that “[c]laims under th[e GTLA] are subject to all of the defenses available to claims sounding in tort brought against private persons.” *Jones, supra* at 270-271.

On May 4, 2016, Plaintiff-Appellant Jennifer Buhl (“Plaintiff”) claims to have suffered injuries when she “tripped over a sidewalk” under the jurisdiction of Defendant-Appellee City of Oak Park (“Defendant”), which Plaintiff claims “had a vertical discontinuity defect of more than two inches.” (**Exhibit 1-B**, Plaintiff’s Complaint).

More specifically, Plaintiff claims that on May 4, 2016, her husband dropped her off at the curb in front of a store that she had visited many times before. (**Exhibit 1-C**, deposition of Jennifer Buhl, pages 7, 18-19). When Plaintiff exited the vehicle, she noticed a defect in the sidewalk. (*Id.* at 10, 14-15). Nothing was blocking her view. (*Id.* at 11, 17). Plaintiff testified that, instead of looking down, she was “paying attention to

¹ MCL 691.1401 *et seq.*

the store” and continued to walk forward without watching her step. (*Id.* at 15, 17). At that point, she alleges that she tripped and was injured as a result. (*Id.* at 7).

Photographs of the area where Plaintiff claims to have fallen demonstrate a defect in the sidewalk that is several feet wide. (**Exhibit 1-D**, photographs). This area is composed entirely of dirt and a tree stump and it differs starkly in appearance from the surrounding patches of sidewalk. There are no apparent barriers to pedestrians observing the area at issue while walking on the sidewalk. During Plaintiff’s deposition, she confirmed that these photographs accurately depicted the area where she alleges to have fallen on the date of the incident. (*Id.* at 16).

On January 3, 2017, the Michigan Legislature enacted 2016 PA 419, (**Exhibit 1-D**), effective immediately, to make clear that this Court had wrongly decided *Jones*. Specifically, the Legislature sought to correct this Court’s erroneous conclusion that MCL 691.1412 was not intended to make the open and obvious doctrine a defense to a claim that a municipal corporation had breached its statutory duty to maintain a sidewalk by making clear that MCL 691.1412 was, in fact, *always* intended to do so. The Legislature did this by inserting subsection (5) into MCL 691.1402a, which as amended provides 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.

* * *

(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. . . .

Nearly one month later, on January 31, 2017, Plaintiff filed a complaint alleging that Defendant owed her a duty to maintain the sidewalk in question in reasonable repair pursuant to MCL 691.1402a, and that Defendant breached that duty, causing her injuries. **(Exhibit 1-B)**.

On February 22, 2017, Defendant filed a motion to dismiss and/or for summary disposition, arguing that Defendant is entitled to governmental immunity. The circuit court denied the motion, pending the deposition of Plaintiff. Following the completion of Plaintiff's deposition, Defendant renewed its motion. **(Exhibit 1-E, Defendant's Renewed Motion to Dismiss and/or for Summary Disposition)**. Defendant argued that, pursuant to MCL 691.1402a, the open and obvious danger doctrine precluded Plaintiff's claim. Plaintiff filed a response, arguing that the open and obvious danger doctrine did not apply to bar Plaintiff's claim. Specifically, Plaintiff asserted that 2016 PA 419 constituted a substantive change in MCL 691.1402a making the open and obvious doctrine available to municipalities for the first time, rather than being a Legislative clarification that MCL 691.1412 has *always* rendered the open and obvious doctrine a defense available to a municipality faced with a claim under MCL 691.1402a. **(Exhibit 1-F, Plaintiff's Response)**. Defendant filed a reply. **(Exhibit 1-G, Defendant's Reply)**.

A hearing on Defendant's motion was held on August 23, 2017. (**Exhibit 1-H**, August 23, 2017 transcript). The Circuit Court granted Defendant's motion, concluding that 2016 PA 419 was intended by the Legislature to have so-called "retroactive" effect and does not impair any vested or substantive right held by Plaintiff, thus rendering the open and obvious defense available to Defendant. (**Exhibit 1-H**, pages 3-11) The Circuit Court further concluded that the condition of the sidewalk was open and obvious and that no special aspects existed to preclude application of the defense. (**Exhibit 1-H**, pages 12-21).

The Circuit Court thus entered an Order on September 9, 2017, granting summary disposition in Defendant's favor and dismissing Plaintiff's Complaint. (**Exhibit 1-A**).

Plaintiff then appealed to the Court of Appeals. In a published decision, Judges Tukul and O'Brien affirmed the Circuit Court's grant of summary disposition to Defendant. In doing so, the Court of Appeals majority held that because 2016 PA 419 was intended by the Legislature to repudiate this Court's decision in *Jones* and return the state of the law to its pre-*Jones* existence, 2016 PA 419 applies "retroactively" "because no vested right of plaintiff was impaired by the Legislature's actions and because the Legislature's actions were remedial in nature." *Buhl v City of Oak Park*, __ Mich App __, __ (2019)(**Exhibit 2**, slip opn. at 1). The majority therefore affirmed the Circuit Court's determination that 2016 PA 419 applied to render it appropriate for Defendant to rely upon the defense that the defect in the sidewalk was open and obvious. Moreover,

the Court of Appeals majority affirmed the Circuit Court's determination that the defect in the sidewalk was, in fact, open and obvious.

Judge Letica dissented, stating her belief that the Legislature intended for 2016 PA 419 to apply prospectively only, as well as her belief that 2016 PA 419 represents a substantive change in the law that affects a vested right held by Plaintiff and, therefore, should not be interpreted as applying retroactively. *Id.*, slip opn. at 15.

Plaintiff now seeks leave to appeal from this Court. Plaintiff *does not* seek leave to appeal from the Court of Appeals' affirmance of the Circuit Court's ruling that the alleged defect in the sidewalk was open and obvious. Rather, Plaintiff *only* seeks leave to appeal from the Court of Appeals' affirmance of the Circuit Court's ruling that 2016 PA 419 applies "retroactively," thus rendering the open and obvious defense available to Defendant.

For the reasons discussed *infra*, this Court should deny Plaintiff's application for leave to appeal.

STANDARD OF REVIEW

Plaintiff claims that the Circuit Court and Court of Appeals erroneously determined that 2016 PA 419 applies retroactively to render the open and obvious doctrine a defense available to Defendant. The issue of whether the Legislature's amendment of 691.1402a via its enactment of 2016 PA 419 applies retroactively is an issue of statutory interpretation, which this Court reviews de novo. *Brewer v AD Transport Express, Inc*, 486 Mich 50, 53 (2010); *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583 (2001).

ARGUMENT

THE COURT OF APPEALS MAJORITY AND THE CIRCUIT COURT CORRECTLY DETERMINED THAT 2016 PA 419'S AMENDMENT TO MCL 691.1402a CLEARLY SIGNIFIES THE LEGISLATURE'S INTENT THAT THE OPEN AND OBVIOUS DOCTRINE HAS ALWAYS BEEN APPLICABLE TO MUNICIPALITIES BY VIRTUE OF MCL 691.1412, AND THUS THAT 2016 PA 419 IS REMEDIAL IN NATURE AND NOT A CHANGE IN THE LAW IMPAIRING ANY VESTED OR SUBSTANTIVE RIGHT HELD BY PLAINTIFF

- I. The text of 2016 PA 491 and MCL 691.1412 unambiguously evince that the Legislature did not intend for 2016 PA 419 to be a change in MCL 691.1402a making the open and obvious defense available to municipalities for the first time, but instead that it intended for 2016 PA 419 to make clear that the open and obvious defense has *always* been available to municipalities pursuant to MCL 691.1412**

As this Court has noted, the intent of the Legislature is the ““primary and overriding”” consideration in determining whether a statutory amendment signifies that the Legislature intended for the statute to apply to events antecedent to the amendment. *Frank W Lynch & Co, supra*, 463 Mich at 583, quoting *Franks v White Pine Copper Division*, 422 Mich 636, 670 (1985). Indeed, “[a]ll other rules of construction and operation are subservient to this principle.” *Id.*, quoting *Franks, supra*, 422 Mich at 670.

And as the Court of Appeals majority aptly noted, the plain text of 2016 PA 419 makes clear that the Legislature *did not* intend for 2016 PA 2016 to effectuate a *change* in MCL 691.1402a that would be applicable only to prospective events. Rather, the text of 2016 PA 419 makes clear that it was intended by the Legislature to abrogate *Jones* and reaffirm what MCL 691.1402a and MCL 691.1412 have *always* meant – i.e., that the open and obvious defense has *always* been available to municipalities defending against a

claim brought under MCL 491.1402a. *Buhl, supra*, __ Mich App at __ (slip opn. at 12)(“by enacting 2016 PA [4]19, 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 . . . to have applied all along.*”)(Emphasis added).

Indeed, 2016 PA 419’s addition of subsection (5) to MCL 691.1402a was *not* a Legislative attempt to “add” the open and obvious doctrine as a defense to be available to municipalities “retrospectively” or “prospectively.” Instead, it was a statement by the Legislature that the open and obvious defense was *always* intended by the Legislature to be available to municipalities by virtue of its express statement in MCL 691.1412 that “[c]laims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons.”

This is made clear not only by the text of 2016 PA 419 and the text of MCL 691.1412, but also by considering the context in which the Legislature enacted 2016 PA 419.

As this Court is aware, in 1961 this Court abolished common-law governmental immunity from tort liability for municipalities. *Pohutski v City of Allen Park*, 465 Mich 675, 682 (2002), citing *Williams v Detroit*, 364 Mich 231, 250, 278 (1961); *Robinson v City of Lansing*, 486 Mich 1, 5 (2010). In swift reaction thereto, in 1964 the Legislature enacted the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, to, among other things, restore immunity for municipalities. *Id.* at 683; *Robinson, supra*, 486 Mich

at 5-6. The Legislature did this by providing in MCL 691.1407(1) that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function," except where the Legislature itself has expressly provided in the GTLA itself that such immunity does not pertain. *Robinson, supra*, 486 Mich at 5-6. This Court has correctly noted that the immunity from tort liability provided by the GTLA "is expressed in the broadest possible language," *Nawrocki v Macomb Co Rd Com'n*, 463 Mich 143, 156 (2000), whereas the limited statutory exceptions thereto are narrow, *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614 (2003). Indeed, this Court has repeatedly recognized that "it is a basic principle of our state's jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed." *Stanton v Battle Creek*, 466 Mich 611, 618 (2002), citing *Nawrocki, supra*, 463 Mich at 158.

Yet, in *Jones*, this Court not only strayed from this basic principle, but also from the fundamental tenet that statutory provisions such as MCL 691.1412 are to be applied according to what they plainly say, and that no "contrary judicial gloss" can be put thereon under the auspices of "construction." *Wayne Co v Hathcock*, 471 Mich 445, 456 (2004), quoting *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490 (2003); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). This Court so strayed when it narrowly construed the immunity conferred upon municipalities with regard to sidewalks and, instead, broadly construed the exception regarding a municipality's duty to maintain

sidewalks as including the duty to repair even open and obvious defects - thus making the potential liability for municipalities even *broader* than the potential liability of private individuals. Indeed, this Court did so despite the Legislature's express statement in MCL 691.1412 that all "[c]laims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons," and despite the fact that a claim brought against a municipality under MCL 691.1402a is, undoubtedly, a "[c]laim[] under th[e GTLA]." The Legislature's statement in MCL 691.1412 is plain and unambiguous, and in *Jones* this Court mistakenly re-wrote MCL 691.1412 as not applying to MCL 691.1402a under the auspices of "construction."

Thus, by enacting 2016 PA 419 to amend MCL 691.1402a to include the statement in subsection (5) that "a municipal corporation . . . may assert . . . any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious," the Legislature *was not* intending to make the open and obvious defense available to municipalities for the first time. Rather, the Legislature simply meant to make clear that MCL 691.1412 has *always* rendered the open and obvious defense available to municipalities; i.e, that MCL 691.1412 has *always* meant what it plainly says. In other words, the Legislature made clear that this Court incorrectly reasoned in *Jones* that MCL 691.1412 is a "general provision," whereas MCL 691.1402a is a "specific" provision, by making clear that MCL 691.1412 *is a "specific provision" that specifically means what it plainly says - that the*

narrow exceptions it created for tort liability were not intended to render a governmental agency subject to tort liability where a private individual would not be.

Plaintiff, like the Court of Appeals dissent, makes the mistake of attempting to attribute significance to the fact that the Legislature said that 2016 PA 419 was to be given “immediate effect,” rather than having said that 2016 PA 419 was to be given “retroactive effect.” But what Plaintiff and the Court of Appeals dissent fail to recognize is that 2016 PA 419 was not intended by the Legislature to be a substantive change in MCL 691.1492a that made the open and obvious defense available to municipalities for the first time. Thus, 2016 PA 419 is *not* akin to Legislative amendments affecting a substantive change in a statute’s meaning, whereupon this Court was called upon to determine whether the Legislature intended for that substantive change to apply “retroactively” or “prospectively.” See, e.g., *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014); *Johnson v Pastoriza*, 491 Mich 417 (2012); *Brewer, supra*, 486 Mich 50; *Franks, supra*, 422 Mich at 636; *Frank W Lynch & Co, supra*, 463 Mich 578; *In re Certified Questions from the US Court of Appeals for the Sixth Circuit*, 416 Mich 558 (1982); *Hurd v Ford Motor Co*, 423 Mich 521 (1985); *Rookledge v Garwood*, 340 Mich 444 (1954).

Indeed, 2016 PA 419 was not a substantive change in MCL 691.1402a at all, but instead as discussed above was a statement by the Legislature as to what MCL 691.1402a and MCL 691.1412 have *always* meant; i.e., that the open and obvious defense has *always* been available to municipalities defending against a claim brought under MCL

691.1402a. That being the case, it is disingenuous to assert that the Legislature did not always intend for MCL 691.1402a and MCL 691.1412 to mean what they have always said simply because the Legislature did not unnecessarily and redundantly say “we retroactively intend for MCL 691.1402a and MCL 691.1412 to mean what we always intended them to mean, as we made clear when we unambiguously stated in MCL 691.1412 that ‘[c]laims under [MCL 691.1402a] are subject to *all* of the defenses available to claims sounding in tort brought against private persons.’” (Emphasis added).

As a final matter, the Court of Appeals dissent asserted that the notion that 2016 PA 419 makes clear that the Legislature has *always* intended for the open and obvious defense to be available to municipalities is somehow undercut by the fact that the Legislature enacted 2016 PA 419 approximately fourteen years after this Court decided *Jones. Buhl, supra*, ___ Mich App at ___ (slip opn. at 20)(Letica, J, dissenting). The fallacy with the dissent’s argument, however, is that it is nothing more than an attempt to utilize “the ‘highly disfavored’ theory of legislative acquiescence in support of [the dissent’s] conclusion that the Legislature ‘approved’ of” this Court’s misinterpretation of the GTLA in *Jones. McCahan v Brennan*, 492 Mich 730, 749 (2012). But, as this Court explained in *McCahan*:

[L]egislative acquiescence has been repeatedly repudiated by this Court because it is as an exceptionally poor indicator of legislative intent. When used in a case like this, the theory requires a court to intuit legislative intent not by anything that the Legislature actually enacts, but by the *absence* of action. Yet “a legislature legislates by legislating, not by doing nothing, not by keeping silent.” Thus, the doctrine of legislative acquiescence “is a highly disfavored doctrine of statutory construction; sound principles of

statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence.” [*Id.* at 749-750 (citations omitted; emphasis in original).]

Moreover, as this Court also noted in *McCahan*, “[n]otwithstanding these inherent problems with the theory of legislative acquiescence, its use in this case is particularly unavailing” because, in impermissibly re-writing MCL 691.1412 in *Jones* to narrow the immunity available to municipalities and broaden the exception thereto, “this Court not only usurped the Legislature’s power but simultaneously *made legislative amendment to what the Legislature wanted*” – broad immunity for municipalities that *does not* include liability for open and obvious defects in a sidewalk. *McCahan, supra*, 492 Mich at 750.

Thus, the inescapable conclusion is that 2016 PA 419 clearly reflects that the Legislature intended for the open and obvious defense to be available to municipalities such as Defendant antecedent to the enactment of 2016 PA 419, by virtue of MCL 691.1412, and thus that the Legislature similarly clearly intended that the open and obvious defense has *always* been available to Defendant in defense of Plaintiff’s January 31, 2017, Complaint alleging that Defendant is liable in tort for Plaintiff’s May 4, 2016, trip and fall.

II. There is no basis for ignoring the legislature's clear intent as expressed by the text of 2016 pa 419 and mcl 691.1412 that the open and obvious defense has always been available to municipalities, as 2016 pa 491 is remedial in nature and does not impair any vested, substantive rights

When this Court corrects its own prior misinterpretation of a statute, absent “exigent circumstances” this Court’s decision is given full retroactive effect. *Hathcock*,

supra, 471 Mich at 484 n 98. And, as this Court has held, no such “exigent circumstances” exist when this Court’s decision does not create a new rule of law but, instead, simply “return[s] the law to that which existed before [this Court’s misinterpretation] and which was mandated by [the GTLA].” *Rowland v Washtenaw Co Rd Comm’n*, 477 Mich 197, 221 (2007). The same is of course true when the Legislature itself corrects a prior misinterpretation of the GTLA by this Court, and in doing so makes clear what it always intended the law to be. Indeed, as this Court has recognized, a legislative invalidation of a prior decision of this Court is only given “prospective application” when such legislative invalidation does more than simply “restore the status quo,” *Brewer, supra*, 486 Mich at 57, but instead also creates a “substantive change in the law,” *id.* at 56.

Here, as discussed above, the Legislature’s enactment of 2016 PA 419 *did not* create a substantive change in the law by making the open and obvious defense available to municipalities where previously it was not. Rather, 2016 PA 419 simply “restore[d] the status quo” by making clear that the open and obvious defense has *always* been available to municipalities by virtue of MCL 691.1412. Thus, there is no cause here for this Court to disregard the Legislature’s clear intention and instead afford 2016 PA 419 “prospective,” as opposed to “retrospective,” application.

Indeed, 2016 PA 419 is *not* an amendment that “affects substantive rights,” but instead is a “remedial” amendment ““which neither create[d] new rights nor destroy[ed], enlarge[d], or diminish[ed] existing rights.”” *Brewer, supra*, 486 Mich at 57, quoting

Franks, supra, 422 Mich at 672. As such, amendments such as 2016 PA 419 “are generally held to operate retrospectively unless a contrary legislative intention is manifested.” *Franks, supra* 422 Mich at 672. Here, as discussed above, the Legislature has manifested no intention that 2016 PA 419’s indication that MCL 691.1412 has always made the open and obvious defense available to municipalities should only apply “prospectively.” Indeed, nowhere has the Legislature made any indication that it has not always wanted for MCL 691.1402a and MCL 691.1412 to mean what they have always plainly said.

Nor does 2016 PA 419 create any new right for Defendant, or enlarge any existing right for Defendant. Indeed, immunity from tort liability has been “a characteristic of government” possessed by municipalities since the enactment of the GTLA, and even prior thereto under the common-law. *Mack v Detroit*, 467 Mich 186, 198 (2002). And, this characteristic has *always* included the availability of *all* defenses that could be raised by a private person defending against a tort suit, such as the open and obvious defense, when the municipality is faced with a tort “[c]laim[] under th[e GTLA,]” which includes a claim brought under MCL 691.1402a. 2016 PA 419 vested Defendant with no defense that Defendant did not have before. Nor did it enlarge the open and obvious defense for Defendant. Rather, 2016 PA 419 simply reaffirmed that Defendant has *always* had available to it the *same* open and obvious defense as would be available to a non-governmental defendant; i.e., that the GTLA was *never* intended by the Legislature to subject municipalities to potential liability where a private individual would not be.

Similarly, 2016 PA 419 did not destroy or diminish any “vested” or “substantive” right which Plaintiff held. As this Court recognized in *Rookledge v Garwood*, 340 Mich 444 (1954), a “vested” or “substantive” right “implies an interest ‘which it is proper for the state to recognize and protect, and of which the individual could not be deprived arbitrarily without injustice,’” *id.* at 456, quoting *Los Angeles v Oliver*, 102 Cal App 299, 311 (1929). As made clear by this Court in *Pohutski* and *Robinson*, Michigan law has *never* treated an individual’s ability to sue its government in tort as a protected “right” that could not be arbitrarily taken away without causing injustice.

Indeed, until 1961 Michigan’s common-law held that an individual had *no right* to sue a municipality in tort. *Pohutski, supra*, 465 Mich at 682; *Robinson, supra*, 486 Mich at 5. Moreover, even after this Court abolished the doctrine of common-law governmental immunity with respect to municipalities, thus briefly enabling individuals to sue municipalities in tort, the Michigan Legislature swiftly acted to take away that ability and restore immunity for municipalities. *Robinson, supra*, 486 Mich at 5.

And, the fact that the Legislature in enacting the GTLA did not choose to imbue municipalities and other “governmental agencies” with complete immunity from tort liability, but instead made such immunity subject to specified, narrowly drawn statutory exceptions, does not transmogrify those statutory exceptions into “vested rights,” as opposed to matters of Legislative grace. Indeed, “‘a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.’” *Cusick v Feldpausch*, 259 Mich

349, 352 (1932), quoting 2 Cooley, *Constitutional Limitations* (8th ed), p 749. In other words, the Legislature may at any time limit or abolish entirely any of the exceptions to governmental immunity that it has created as a matter of grace, and the citizens of Michigan have nothing more than a mere anticipation that the Legislature will not do so.

Furthermore, even if the statutory exceptions to governmental immunity are (improperly) viewed as “rights” to bring tort actions against governmental agencies, the fact remains that such statutory exceptions would only be *statutory* rights. And, this Court made clear in *Rookledge, supra*, 340 Mich at 457, that such statutory rights are *not* vested rights that cannot be arbitrarily taken away by the Legislature:

[D]efendant Garwood 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, as in the *Wylie [v Comm'n of Grand Rapids, 293 Mich 571 (1940),]* case, ‘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.’ 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.

‘There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal’. *Harsha v City of Detroit, 261 Mich 586, 594 [(1933)], 90 ALR 853.*

This principle has been repeatedly recognized by both this Court and the Michigan Court of Appeals. *Leonard v Lans Corp, 379 Mich 147, 157 (1967); Lahti v Fosterling, 357 Mich 578, 589 (1959); City of Ecorse v Peoples Comm'ty Hosp Authority, 336 Mich 490, 503 (1953); Wylie, supra, 293 Mich at 589; Cona v Avondale Sch Dist, 303 Mich App 123, 137-138 (2013); Moore v Austin, 73 Mich App 299, 305 (1977).*

Thus, both the Court of Appeals majority and the Circuit Court properly determined that 2016 PA 419's amendment of MCL 691.1402a was remedial in nature and did not impair any vested, substantive right of Plaintiff. Indeed, Plaintiff had nothing more than a mere expectation that the open and obvious doctrine would not be available to Defendant in defense of her claim – she had no “vested” or “substantive” right not to have the open and obvious doctrine be an available defense to Defendant.

CONCLUSION & RELIEF REQUESTED

WHEREFORE, Defendant-Appellee City of Oak Park respectfully requests that this Honorable Court enter an Order denying Plaintiff-Appellant's Application for Leave to Appeal.

Respectfully submitted,
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STATE OF MICHIGAN
IN THE SUPREME COURT

JENNIFER BUHL,

Plaintiff-Appellant,

v.

CITY OF OAK PARK,

Defendant-Appellee.

Supreme Court Case No. 160355

Court of Appeals No. 340359

Oakland County Circuit Court
Case No. 17-157097-NI

PROOF OF SERVICE

Proof of Service: I certify that a copy of **DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL** and this **PROOF OF SERVICE** were served on the following as indicated below:

Date of Service: November 7, 2019

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