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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.	

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

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

JENNIFER BUHL,

Plaintiff-Appellant,

v.

CITY OF OAK PARK,

Defendant-Appellee.

Court of Appeals No. 340359

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

DEFENDANT-APPELLEE, CITY OF OAK PARK'S BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED****

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JURISDICTIONAL STATEMENT

On January 31, 2017, Plaintiff-Appellant, Jennifer Buhl, initiated this action seeking to impose liability on Defendant-Appellee, City of Oak Park, as a result of a trip and fall on a City sidewalk which occurred on May 4, 2016. The City of Oak Park originally filed a motion to dismiss Plaintiff's complaint pursuant to MCR 2.116(C)(7) and (8). The circuit court denied the City's motion without prejudice, pending the deposition of Plaintiff. On July 10, 2017, the City renewed its motion. In an order entered on September 6, 2017, the Oakland County Circuit Court granted the City's motion. (**Exhibit A**, September 6, 2017 Order Granting Defendant's Motion to Dismiss) Plaintiff filed a claim of appeal from the circuit court's order on September 27, 2017. Appellate jurisdiction in the Michigan Court of Appeals over Plaintiff's appeal is conferred by MCR 7.203(A)(1) and MCR 7.204(A)(1)(a).

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. **Where Plaintiff's claim seeking to avoid governmental immunity and impose tort liability on the City of Oak Park was filed after the effective date of Public Act 419 (2016) which amended MCL 691.1402a to allow the City to assert the defense of open and obvious, did the amended statute control Plaintiff's claim?**

Plaintiff-Appellant says: "No."

Defendant-Appellee says: "Yes."

The circuit court said: "Yes."

II. **Even assuming that the date Plaintiff's complaint was filed was not dispositive of which version of MCL 691.1402a applied to Plaintiff's claim, where Public Act 419 (2016) is a procedural and remedial statute that does not impact any vested right, did the Circuit Court reversibly err in applying the statute retroactively?**

Plaintiff-Appellant says: "Yes."

Defendant-Appellee says: "No."

The circuit court said: "No."

III. **Where there existed no genuine issue of material fact that the sidewalk discontinuity which caused Plaintiff's fall was open and obvious, and where no special aspects existed, did the Circuit Court reversibly err in dismissing Plaintiff's complaint?**

Plaintiff-Appellant says: "Yes."

Defendant-Appellee says: "No."

The circuit court said: "No."

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STATEMENT OF FACTS

This premises liability lawsuit arises from an incident which occurred May 4, 2016 on a sidewalk located in front of 8580 W. Nine Mile Rd., Oak Park, MI 48237. Plaintiff claims to have suffered injuries in that area when she "tripped over a sidewalk." This fall appears to be credited to a "vertical discontinuity defect of more than two inches" on the sidewalk. (**Exhibit B**, Complaint).

Plaintiff alleged that, on May 4, 2016, her husband dropped her off at the curb in front of Trend Express. (**Exhibit C**, deposition of Jennifer Buhl, pages 18-19). She had been to this store many times before. (**Exhibit C**, page 7). When she exited the vehicle, she noticed a defect in the sidewalk. (**Exhibit C**, pages 10, 14-15). Nothing was blocking her view. (**Exhibit C**, pages 11, 17). Plaintiff testified that, instead of looking down, she was "paying attention to the store" and continued to walk forward without watching her step. (**Exhibit C**, pages 15, 17). At that point, she alleges that she tripped and was injured as a result. (**Exhibit C**, page 7).

Photographs of the area where Plaintiff claims to have fallen demonstrate a defect in the sidewalk that is several feet wide. (**Exhibit 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. (**Exhibit D**). There are no apparent barriers to pedestrians observing the area at issue while walking on the sidewalk. (**Exhibit D**). 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. (**Exhibit C**, page 16).

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Procedural History

On January 31, 2017, Plaintiff filed her complaint alleging that the City owed her a duty to maintain the sidewalk in question in reasonable repair pursuant to MCL 691.1402a and breached that's duty, causing her injuries. (**Exhibit B**) On February 22, 2017, the City of Oak Park filed a motion to dismiss, arguing that the City was entitled to governmental immunity. The circuit court denied the motion, pending the deposition of Plaintiff. Following the completion of Plaintiff's deposition, the City renewed its motion to dismiss. (**Exhibit E**, Defendant's Renewed Motion to Dismiss) The City 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 because Public Act 419 (2016) – which amended MCL 691.1402a to include the open and obvious defense - did not apply to Plaintiff's claim. (**Exhibit F**, Plaintiff's Response) The City filed a reply. (**Exhibit G**, Defendant's Reply)

A hearing on the City's motion was held on August 23, 2017. (**Exhibit H**, August 23, 2017 transcript). The Circuit Court granted the City's motion, concluding that the statute, as amended by Public Act 419, controlled Plaintiff's claim, that the amendment to the statute was procedural, not substantive, in nature and did not impact a vested right. (**Exhibit H**, pages 3-11) The Circuit Court also concluded that the condition of the sidewalk was open and obvious and that no special aspects existed to preclude application of the defense. (**Exhibit H**, pages 12-21). The Circuit Court entered an order

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granting the City summary disposition of Plaintiff's complaint on September 9, 2017. **(Exhibit A)**

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STANDARD OF REVIEW

On appeal, Plaintiff claims that the circuit court erred in granting governmental immunity and summary disposition to the City of Oak Park. This Court reviews a trial court's decision regarding the applicability of governmental immunity *de novo*. *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2007). This Court also reviews *de novo* whether the Legislature's amendment of a statute applies retroactively. *Cona v Avondale Sch Dist*, 303 Mich App 123, 137; 842 NW2d 277, 285 (2013), citing *Brewer v AD Transport Express, Inc,* 486 Mich 50, 53; 782 NW2d 475 (2010).

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ARGUMENT

I. MCL 691.1402a, AS AMENDED, WAS THE STATUTE GOVERNING PLAINTIFF'S CLAIM BECAUSE PLAINTIFF'S CLAIM SEEKING TO AVOID GOVERNMENTAL IMMUNITY AND IMPOSE TORT LIABILITY ON THE CITY OF OAK PARK WAS FILED AFTER THE EFFECTIVE DATE OF PUBLIC ACT 419 (2016) WHICH AMENDED MCL 691.1402a TO ALLOW THE CITY TO ASSERT THE DEFENSE OF OPEN AND OBVIOUS.

Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, with certain exceptions, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). This immunity "is expressed in the broadest possible language—it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki v Macomb Co Rd Com'n*, 463 Mich 143, 156; 615 NW2d 702 (2000). While there are exceptions to governmental immunity, these exceptions must be narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

In other words, a party does not have a right or ability to sue a governmental agency for tort liability unless the Legislature has granted the party that right. *Moraccini v City of Sterling Heights,* 296 Mich App 387, 392; 822 NW2d 799, 802 (2012) ("A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions.") In order to state a claim against a governmental entity, a plaintiff must sustain the burden of pleading "his or her claim in avoidance of

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governmental immunity." *Hannay v Dep't of Transp*, 497 Mich 45, 58; 860 NW2d 67 (2014) (citation omitted). "To be effective, such pleading[s] must state a claim that fits within a statutory exception to immunity . . . ." *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006).

When Plaintiff's claim for tort liability against the City of Oak Park was filed in this case – i.e., on January 31, 2017 – her claim did not plead in avoidance of governmental immunity because she pled that she was injured by a condition which was, undisputedly, open and obvious, and therefore barred by MCL 691.1402a(5). Regardless of the fact that the incident occurred prior to the effective date of Public Act 419 (2016) (**Exhibit I**), the civil action was not initiated by Plaintiff until *after* the effective date of the amendment, meaning that the statute which Plaintiff was required to plead in avoidance of was the statute in effect at the time the Complaint was filed.

In *Cona, supra*, the Court of Appeals held that a statutory amendment altering the standard of review for a teacher tenure decision applied to the petitioner's claim because the petition was filed after the statute was amended – even though the underlying conduct giving his to his claim occurred prior to the amendment:

> Petitioner argues that, because the underlying conduct that formed the basis of the tenure charges against him occurred before July 19, 2011, the Commission should have applied the "reasonable and just cause" standard of the former MCL 38.101. We disagree. Although petitioner's conduct occurred before July 19, 2011, the written tenure charges were brought on September 6, 2011, more than a month after the effective date of the amendment. Whereas the retrospective application of a law is improper when it would take away or impair a vested right acquired under an existing statute, *Morgan v Taylor Sch Dist*, 187 Mich App 5, 9-10; 466 NW2d 322 (1991), petitioner cannot demonstrate the existence of any such

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> vested right in this case. "It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959). Until the tenure charges against petitioner were actually filed, petitioner had no more than a mere expectancy that any particular statutory standard would be applied to his conduct. See *Morgan*, 187 Mich App at 12; see also *Detroit v Walker*, 445 Mich 682, 700; 520 NW2d 135 (1994). The Commission properly applied the amended "not arbitrary or capricious" standard of MCL 38.101(1) in this case.

Cona, supra at 137-38.

It is on this basis that the decisions in *Moraccini v City of Sterling Heights*, 296 Mich App 387; 822 NW2d 799 (2012) and *Sufi v City of Detroit*, unpublished per curiam opinion of the Court of Appeals (Docket No. 312053, February 17, 2015) are distinguishable. In both of these cases, not only did the underlying accident or incident occur prior to the amendment at issue, but the *claim itself* was filed prior to the amendment. Accordingly, in those cases, at the time the claim was pled, the claim was in fact pled in avoidance of governmental immunity because the claim was pled in accordance with the statute in effect at the time the complaint was filed. The fact that the statute was later amended to change the nature and/or extent of the immunity afforded to the governmental entity, did not change the fact that the plaintiff had properly pled his or her claim in avoidance of immunity at the time the complaint was filed. Accordingly, it made sense to apply to the plaintiff's claim the statute in effect at the time the complaint was filed.

Here, the statute in effect at the time the Complaint was filed – i.e., the time at which Plaintiff was required to plead her claim in avoidance of governmental immunity –

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was the statute as amended by Public Act 419 (2016). That statute stated that the open and obvious defense was applicable to claims seeking to impose liability on the City for failing to maintain sidewalks in reasonable repair. The Complaint did not plead in avoidance of the applicable governmental immunity standard because the Complaint did not plead – nor could Plaintiff prove in response to the City's motion to dismiss – that the alleged vertical discontinuity was anything other than an open and obvious danger. Because Plaintiff's claim did not plead in avoidance of the immunity afforded to the City of Oak Park under MCL 691.1402a, the claim should have been dismissed.

II. EVEN ASSUMING THAT THE DATE PLAINTIFF'S COMPLAINT WAS FILED WAS NOT DISPOSITIVE OF WHICH VERSION OF MCL 691.1402a APPLIED TO PLAINTIFF'S CLAIM, PUBLIC ACT 419 (2016) IS A PROCEDURAL AND REMEDIAL STATUTE THAT DOES NOT IMPACT ANY VESTED RIGHT AND THEREFORE WAS PROPERLY APPLIED RETROACTIVELY TO BAR PLAINTIFF'S CLAIM.

Even assuming that the date of the injury – rather than the date that Plaintiff was required to plead in avoidance of governmental immunity – is the relevant date by which to evaluate which version of the statute applied, the City was nevertheless entitled to assert the open and obvious defense under MCL 691.1402a(5) because the statute was properly applied retroactively. Again, the City of Oak Park is immune from the tort liability alleged by Plaintiff unless the Legislature created an exception to MCL 691.1401. MCL 691.1402a is such an exception and imposes upon the City a duty to maintain its sidewalks "in reasonable repair." The earlier version of this statute was interpreted by the Michigan Supreme Court in *Jones v Enertel*, 467 Mich 266; 650 NW2d

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334 (2002) as not affording municipal corporations the ability to assert the open and obvious doctrine as a defense to trip-and-fall incidents on sidewalks. Public Act 419 was passed in 2016 in order to rectify this issue and to allow municipal corporations such as the City of Oak Park to assert "any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious". Public Act 419 (**Exhibit I**). The effective date of this legislation was January 4, 2017. No specific language was included by the Legislature as to whether this amendment to MCL 691.1402a was to be applied retroactively or prospectively.

Generally, statutes and statutory amendments are presumed to operate prospectively. See *Davis v State Emples. Ret Bd*, 272 Mich App 151, 155; 725 NW2d 56, 60 (2006). However, there is an exception to this general rule where a statute or amendment is "remedial or procedural in nature, as long as it does not deny vested rights." *Davis* at 158 (citations omitted). The Supreme Court has held that four principles necessarily shape the analysis of whether a statute operates retroactively. *In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*,416 Mich 558, 570; 331 NW2d 456 (1982). The first consideration – whether the Legislature included specific language indicating prospective or retroactive application – is not at issue here because there is no dispute that no such language was included in Public Act 419 (2016). The second principle – that a statute's relation to a prior event alone will not render the statute retroactive, *LaFontaine Saline, Inc v Chrysler Grp, LLC*, 496 Mich 26, 40; 852 NW2d 78, 86 (2014) – is also not applicable as there is no specific reference to a particular event in the statute.

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The third and fourth principles discussed in *In re Certified Questions* are corollaries – "retroactive application of a law is improper where the law 'takes away or impairs vested rights acquired under existing laws'"; and "a remedial or procedural act not affecting vested rights may be given retroactive effect.'" *Id* at 572. ". . . Either an act is remedial or procedural *or* the act affects vested rights." *Perlin v Time, Inc*, 237 FSupp3d 623, 633 (ED 2017) 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" or if the law ". . . implies an intention to reform or extends existing rights." *Macomb Co Professional Deputies Ass'n v Macomb Co*, 182 Mich App 724, 730; 452 NW2d 902 (1990). "Remedial" has also been defined to include a statute that is related "to the means employed to enforce a right or redress an injury." *Rookledge v Garwood*, 340 Mich 444, 453, 65 NW2d 785, 791 (1954).

In contrast, a "vested right" is 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. "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 . . . " *GMAC LLC v Treasury Dep't*, 286 Mich App 365, 377; 781 NWd 310 (2009), quoting *Cusick v Feldpausch*, 259 Mich 349, 352; 243 NW 226 (1932). A statutory defense is not a vested right. *Id* at 456-458. The Michigan Supreme Court provided clearly in *Rookledge* that holders of statutory rights or defenses do not hold a vested right in the continuance of the statutory laws:

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> In the light of the tests just recited, defendant 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 Case* (p 588) "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 (90 ALR 853).

Rookledge at 457. See also *Cona, supra* at 138 ("Until the tenure charges against petitioner were actually filed, petitioner had no more than a mere expectancy that any particular statutory standard would be applied to his conduct.")

Here, the circuit court properly concluded that Public Act 419 did not impact a vested right. Plaintiff had nothing more than a mere expectation that the open and obvious defense would not apply to her claim – she had no vested right in the continuance of the prior statute. The only effect of Act Public 419 was to allow municipal corporations to use a defense that has long been available to the public. Thus, since no vested right has been impacted, Public Act 419 was correctly applied retroactively.

III. THE CIRCUIT COURT PROPERLY CONCLUDED THAT PLAINTIFF'S CLAIM WAS BARRED BY THE OPEN AND OBVIOUS DANGER DOCTRINE.

A. The Condition of the Sidewalk was Open and Obvious

Under Michigan law, a premises owner owes its business invitees a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused

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by a dangerous condition on the land. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012), citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). However, it has been repeatedly recognized that landowners are not insurers and are not charged with guaranteeing the safety of every person who comes onto their land. *Hoffner, supra* at 459, citing *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 517; 629 NW2d 384 (2001). A landowner's duty to its invitees does not generally encompass the removal of open and obvious dangers. *Hoffner, supra* at 461, citing *Riddle v McLouth Steel Products Corp*., 440 Mich 85, 96; 485 NW2d 676 (1992). Open and obvious dangers exist where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them. *Hoffner, supra* at 461, citing *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), and *Novotney v Burger King Corp. (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Hoffner, supra*; *Novotney, supra*. The test is objective so that a court must look not to whether plaintiff should have known that the condition was hazardous, but whether a reasonable person in his or her position would foresee the danger. *Hoffner, supra*; *Lugo, supra* at 523-524.

The alleged danger at issue here is the two-inch discontinuity in the sidewalk. The question, then, is whether an average user with ordinary intelligence would have been able to discover the discontinuity in the sidewalk and the risk presented by that condition upon casual inspection. Michigan courts have consistently found that conditions such as

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uneven pavement and sidewalks are common, everyday occurrences that are generally assumed to be apparent and expected conditions, readily observable upon casual inspection by an average user with ordinary intelligence. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 621; 537 NW2d 185, 191 (1995); *Weakley v City of Dearborn Heights*, 240 Mich App 382, 612 NW2d 428 (2000); *Wicker v House of Liquor & Wine, Inc,* (Unpub, COA No. 206306, June 11, 1999) (attached as **Exhibit J**).

In *Wicker*, the Court rejected a plaintiff's claims asserting a premises liability action after the plaintiff tripped on an uneven sidewalk. *Wicker* at *3. The plaintiff argued that the open and obvious doctrine only applied to the duty to warn and not to the duty to maintain, inspect and repair. *Id.* at *5. However, the Court rejected the plaintiff's argument, stating that the "open and obvious doctrine concerns the duty element of a negligence action, regardless of the nature of any alleged breach." *Id.* at *5-*6. In reaching its decision to apply the open and obvious doctrine, the Court relied upon a review of photographs of the sidewalk, which suggested nothing "unusual about the condition of the sidewalk that rendered it unreasonably dangerous despite its open and obvious nature." *Id.* at *5.

Additionally, the *Wicker Court* found the photographs presented in that case showed there was nothing unusual about the condition of the sidewalk that rendered it unreasonably dangerous despite its open and obvious nature. The two concrete slabs appeared neither cracked nor uneven, except where they met. The Court found a person walking down any sidewalk must expect to encounter irregularities of this sort. Thus, this sidewalk did not present any unusual circumstances suggesting the possibility of

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unreasonable dangerousness. See also *Ricevuto v Washtenaw Ave Bookstore*, (Unpub, COA No. 290033, August 17, 2010) (uneven sidewalk was objectively observable, even if plaintiff was not looking where she was walking) (attached as **Exhibit K**); *Nettle v Kimco-Clawson* 143 Inc., (Unpub, COA No. 260494, June 12, 2005)("A small, unnoticeable rise in elevation between two slabs of concrete on a generally imperfect walkway is not an unusual or dangerous condition that would trigger liability.") (**Exhibit L**).

In this case, there exists no genuine issue of material fact that Plaintiff's claim is barred by application of the open and obvious danger doctrine. While Plaintiff testified that she was not looking at the ground as she approached the store, there exists no genuine issue of material fact that the sidewalk discontinuity was there to be seen. The photographs of the sidewalk evidence this and Plaintiff admitted that she was able to clearly see the discontinuity. (**Exhibit C**, pages 10, 14-15, 17, 21-22; **Exhibit D**, photographs) Given this evidence, the circuit court properly concluded that the condition upon which Plaintiff fell was open and obvious as a matter of law.

B. No Special Aspects Existed.

Having established that the alleged condition was open and obvious, it is still necessary to determine whether any special aspects of the condition existed which remove this case from the application of the open and obvious danger doctrine. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995), the Supreme Court held that, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable

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precautions to protect invitees from that risk. Special aspects were defined as "something unusual about the character, location, or surrounding conditions" that make the risk of harm unreasonable. *Id*, at 614. The *Lugo* Court recognized two scenarios under which a landowner owes a duty to protect invitees from open an obvious dangers: (1) where the danger is "effectively unavoidable" or (2) where the danger poses an unreasonably high risk of severe harm. *Lugo, supra* at 518-519. See also, *Hoffner, supra* at 462, where the Supreme Court held that an icy sidewalk was not unreasonably dangerous nor effectively unavoidable because the plaintiff was not forced to confront the hazard.

Here, there exists no genuine issue of material fact that special aspects did not exist so as to impose a duty on the City of Oak Park despite the open and obvious nature of the sidewalk discontinuity. The discontinuity was not effectively unavoidable as there exists no question that Plaintiff could have easily stepped around it. (**Exhibit D**, photographs). Moreover, it is clear under Michigan law that falling a few feet to the ground is not unreasonably dangerous, even if that fall causes significant injury. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002); *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 410; 864 NW2d 591 (2014). Given that the sidewalk discontinuity was neither effectively unavoidable nor unreasonably dangerous, the circuit court properly concluded that Plaintiff could not impose liability on the City of Oak Park and properly dismissing Plaintiff's complaint.

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RELIEF REQUESTED

Defendant-Appellee, City of Oak Park, respectfully requests that this Court affirm the circuit court's September 6, 2018 order granting the City's motion to dismiss Plaintiff's Complaint.

GARAN LUCOW MILLER, P.C.
Attorneys for Defendant-Appellee

/s/ Caryn A. Ford
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Dated: March 21, 2018
1378668

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LIST OF EXHIBITS

Exhibit A	Order Granting Defendant's Motion to Dismiss, dated September 6, 2017
Exhibit B	Complaint
Exhibit C	Deposition of Jennifer Buhl
Exhibit D	Photographs
Exhibit E	Defendant's Renewed Motion to Dismiss and/or for Summary Disposition
Exhibit F	Plaintiff's Response to Defendant's Renewed Motion for Summary Disposition
Exhibit G	Defendant's Reply to Plaintiff's Response to Defendant's Renewed Motion to Dismiss
Exhibit H	Hearing Transcript, dated August 23, 2017
Exhibit I	Public Act 419 (2016)
Exhibit J	*Wicker v House of Liquor & Wine, Inc,* (Unpub, COA No. 206306, June 11, 1999)
Exhibit K	*Ricevuto v Washtenaw Ave Bookstore*, (Unpub, COA No. 290033, August 17, 2010)
Exhibit L	*Nettle v Kimco-Clawson* 143 Inc., (Unpub, COA No. 260494, June 12, 2015)

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

JENNIFER BUHL,

Plaintiff-Appellant,

v.

CITY OF OAK PARK,

Defendant-Appellee.

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 the foregoing **DEFENDANT-APPELLEE, CITY OF OAK PARK'S BRIEF ON APPEAL – ORAL ARGUMENT REQUESTED**, with all attachments, and this **PROOF OF SERVICE** were served as indicated below.

Date of Service: March 21, 2018

Signature: /s/ Susan M. Westphal

VIA TRUEFILING E-SERVICE Christopher J. Schneider (P74457) Attorney for Plaintiff-Appellant 45 Ottawa Avenue, S.W., Suite 1100 Grand Rapids, MI 49503 schneiderc@millerjohnson.com	

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EXHIBIT 1A

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

JENNIFER BUHL,

Plaintiff,

v.

CITY OF OAK PARK,

Defendant.

Case No 17-157097-NI
Judge Phyllis McMillen

Matthew Edward Bedikian (P75312)
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John J. Gillooly (P41948)
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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;

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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)
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/s/John J. Gillooly
John J. Gillooly (P41948)
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EXHIBIT 1B

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/Pages/efiling.

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

JENNIFER BUHL,

Plaintiff,

v.

CITY OF OAK PARK,

Defendant.

Case No. 2017-_____-NI

Hon.
2017-157097-NI
JUDGE PHYLLIS MCMILLEN

_____/

MICHIGAN ADVOCACY CENTER, PLLC
By: Matthew Edward Bedikian (P75312)
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Southfield, MI 48075
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matt@miadvocacycenter.com

_____/

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in this complaint.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Jennifer Buhl, (hereinafter referred to as "Plaintiff") by and through her attorneys, MICHIGAN ADVOCACY CENTER, PLLC., by Matthew Edward Bedikian, submits this Complaint and Demand for Jury Trial.

COMMON ALLEGATIONS

1. Plaintiff is a resident of Oakland County, Michigan.
2. The Defendant, the city of Oak Park, is a governmental municipality in the state of Michigan.
3. The amount in controversy exceeds $25,000.

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4. Governmental immunity does not apply because:

   a. MCL 691.1402a establishes Plaintiff's cause of action, with notice having been served on Defendant on June 28, 2016, in accordance with MCL 691.1404, and

   b. The facts of this case constitute a defective sidewalk and nuisance per se, created and maintained by Defendant.

5. The sidewalk in question runs parallel to Nine Mile Road. in the City of Oak Park, Oakland County Michigan and is under the exclusive jurisdiction and direct control of the Defendant City of Oak Park.

6. At approximately 4:30 pm, Plaintiff sustained injuries when she tripped over a sidewalk located right out front of 8580 W. Nine Mile Rd., Oak Park, MI 48237. The sidewalk had a vertical discontinuity defect of more than two inches.

7. The condition of the sidewalk has deteriorated over time and was severely in need of maintenance, repairs and resurfacing, or reconstruction.

8. The Defendant had actual and constructive notice of this defect 30 days prior to the Plaintiff's fall.

9. All relevant times, Defendant had a duty created by MCL 691.1402a to maintain the sidewalk in a reasonable repair and in a condition so that it was reasonably safe and fit for public travel.

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10. Defendant's duties include, but are not limited to, the following:

a. to periodically inspect roadways under its jurisdiction to discover possible dangers, defects, deterioration, or damage.

b. To promptly and correctly repair, resurface, reconstruct, and otherwise correct, repair, and maintain imperfections or other hazardous conditions that it knows or should have known exist on sidewalks under its jurisdiction it knows or should have known exist on roadways un

c. to take all reasonable precautions to protect pedestrians who use sidewalks under its jurisdiction from dangers that are foreseeable and that would render any sidewalk unsafe or not reasonably fit for public travel

11. Defendant breached its statutory duties by committing the following acts and omissions:

a. failing to periodically inspect the sidewalk in question to discover possible dangers, defects, deteriotion, or damage.

b. failing in general to repair and maintain the sidewalk in a condition that was reasonably safe and fit for travel by the public.

12. As a proximate cause of Defendant's breach of its duties, Plaintiff was severally injured in the accident that occurred and has suffered grievous and painful injuries.

13. As a direct an proximate result of the Defendant's negligence, Plaintiff suffered the following serious injuries and damages:

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a. fracturing of the left ankle;

b. physical pain and suffering;

c. loss of social, household, and recreational activities;

d. mental anguish;

e. medical expenses past, present, and future;

f. out of pocket incident related expenses;

g. wage loss or actual future loss of earnings;

h. and other damages, injuries, and consequences related to the accident and that develop during the course of discovery.

WHEREFORE, Plaintiff asks the court to award damages against Defendant in whatever amount Plaintiff is found to be entitled to in excess of $25,000, plus interest, costs, and attorney fees.

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian

Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
2000 Town Center, Suite 1900
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JURY DEMAND

Plaintiff demands a trial by jury.

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian
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EXHIBIT 1C

Jennifer Buhl v.
City of Oak Park

Jennifer Buhl
June 20, 2017

Judy Jettke & Associates
Court Reporting & Video

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Min-U-Script® with Word Index

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

JENNIFER BUHL,

Plaintiff,

Case No:17-157097-NI
Hon. Phyllis McMillen

-vs-

CITY OF OAK PARK,

Defendant.

DEPOSITION OF JENNIFER BUHL

Taken by the Defendant on the 20th day of June 2017, at the Law Office of Michigan Advocacy Center, 2000 Town Center, Suite 1900, Southfield, Michigan at 2:10 p.m.

APPEARANCES:

For the Plaintiff: MR. MATTHEW E. BEDIKIAN (P75312)
Michigan Advocacy Center PLLC
2000 Town Center
Suite 1900
Southfield, Michigan 48075
248-957-0456

For the Defendant: MR. JOHN J. GILLOOLY (P41948)
MR. THOMAS D. BEINDIT (P81133)
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313-446-5501

REPORTED BY: Amy Bertin, CER 3871
Certified Electronic Recorder
586-783-0060

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JENNIFER BUHL	
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Examination by Mr. Bedikian	17
Reexamination by Mr. Gillooly	21
Reexamination by Mr. Bedikian.	22
Reexamination by Mr. Gillooly	23

* * *

EXHIBITS:		IDENTIFIED
DX#1	Photograph	04
DX#2	Photograph	04
DX#3	Photograph	04
DX#4	Photograph	04
DX#5	Photograph	04
DX#6	Complaint	04
DX#7	Photograph	04
DX#8	Photograph	04
DX#9	Photograph	04
DX#10	Photograph	17
DX#11	Photograph	17
DX#12	Photograph	17

* * *

1 Southfield, Michigan
2 Tuesday, June 20, 2017 - 2:10 p.m.
3 JENNIFER BUHL
4 HAVING BEEN CALLED BY THE DEFENDANT AND SWORN:
5 EXAMINATION
6 BY MR. GILLOOLY:
7 Q Good afternoon.
8 A Good afternoon.
9 Q My name is John Gillooly. I'm an attorney. I
10 represent the City of Oak Park.
11 A Okay.
12 Q Will you please tell us your full legal name?
13 A Jennifer Lorainne Buhl.
14 MR. GILLOOLY: Let the record reflect that this is
15 the deposition of Jennifer Lorainne Buhl taken
16 pursuant to Notice and at the order of Oakland County
17 Circuit Court Judge Phyllis McMillen.
18 BY MR. GILLOOLY:
19 Q Do you spell Lorraine, L-O-R-R-A-I-N-E?
20 A L-O-R-A-I-N-N-E.
21 Q N-N-E. Thank you.
22 Ms. Buhl, as I introduced myself, my name is John
23 Gillooly. To my right is an attorney at our firm
24 Thomas Beindit who's helping me with this case.
25 I'm here to ask you a series of questions about an

1 incident that occurred in the city of Oak Park.
2 A All right.
3 Q A couple very easy but really important ground rules.
4 I want to make sure that we're on the same page before
5 I ask any additional questions and those are these.
6 Please use words to answer my questions. Please
7 do not nod your head, shrug your shoulders or say uh-
8 uh or uh-huh because the court reporter to your left
9 and my right is literally taking down every word that
10 we say in this room until we're done. Okay?
11 A All right.
12 Q And if you don't completely understand what I'm
13 asking, if you don't understand the words I'm using,
14 if you can't hear me, if the question's confusing or
15 if you just don't get it, so to speak, you can stop me
16 as many times as you want during the deposition and
17 ask me to repeat, rephrase and I'll be more than happy
18 to do it until you understand the question. Okay?
19 A All right.
20 Q If you don't ask me to repeat or rephrase and you just
21 answer the question, I'm going to assume that you've
22 understood the question asked and that you've given me
23 a truthful and complete answer. Okay?
24 A All right.
25 (Documents marked for identification as

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1 Defendant's Deposition Exhibit Numbers 1 through
2 9.)
3 BY MR. GILLOOLY:
4 Q Good. This will not take long.
5 Ms. Buhl, where do you currently live?
6 A 24311 Ithaca, Oak Park, Michigan 48237.
7 Q And how long have you lived in the city of Oak Park?
8 A For two years now.
9 Q Have you ever had any contact with any law enforcement
10 officer from the city of Oak Park for any reason?
11 A No.
12 Q Any plans on moving from the Ithaca Street address?
13 A Yes.
14 Q Where do you plan on moving?
15 A I'm not sure yet. We're actually looking for a bigger
16 house.
17 Q And when you say we, who's we?
18 A Me and my husband and my children.
19 Q And what's your husband's name?
20 A Scott.
21 Q And what are your -- how many children do you have?
22 A I have six children.
23 Q Are they all with Scott?
24 A Yes.
25 Q I want to ask you about an incident that occurred on a

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1 sidewalk, so to speak, in the city of Oak Park. And
2 did you -- were you involved in a personal injury
3 occurrence on Nine Mile Road in Oak Park?
4 A Yes.
5 Q Was it in front of a store?
6 A Yes.
7 Q What was the name of the store that the incident
8 incurred in front of?
9 A I believe it's called Trend Express.
10 Q T-R-E-N-D Express?
11 A Yes.
12 Q And what kind of store is that?
13 A A party store.
14 Q And is it located, if you know, at 8580 West Nine Mile
15 Road?
16 A I do not know the exact address.
17 Q You had been there before?
18 A Yes.
19 Q When did the incident that forms the basis of this
20 lawsuit occur? Give me the month, the day and then
21 the year, if you know.
22 A May 4th and it was last year.
23 Q May 4th, 2016?
24 A Yes.
25 Q And you had been to that store before that time;

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1 correct?
2 A Correct. Yes.
3 Q You had been there many times before; correct?
4 A Yes.
5 Q On May 4, 2016, did you go to the store at about 4:30
6 in the afternoon that day?
7 A Around about that time. Correct.
8 Q And did your husband pull up to the front entranceway
9 of the store off of Nine Mile Road?
10 A Yes.
11 Q And did you get out of the passenger side of the car?
12 A Yes.
13 Q Did he pull his car up to the curb?
14 A Yeah. All the way up.
15 Q So did you have to step into the street in order to
16 get out of the car?
17 A Actually, it was so close that I just got off, right
18 off on to the curb. I could walk right on to the curb.
19 Q So you walked right up on to the curb and the
20 sidewalk, so to speak?
21 A Correct.
22 Q Did anyone else get out of the car with you?
23 A My husband did not right away but he did after.
24 Q Okay. After you fell?
25 A After I fell.

Page 8

1 Q When you first got out of the car, did anyone else get
2 out of the car with you?
3 A No.
4 Q You had gotten out of the car in front of that store
5 numerous times before in the same location; correct?
6 A Not in the same location. I parked on the side of the
7 building.
8 Q Had you ever gotten out of the car in that location
9 before?
10 A He's never parked there so, no.
11 Q Had you ever used the front doors of that store to get
12 in the store?
13 A Just the side door, always the side door. This was
14 the first time we used the front.
15 Q So that's the first time ever you used the front door?
16 A Yeah. I believe so. Yes.
17 Q You believe so.
18 You had been there within three days of this
19 incident before. Did you go to that store at least
20 once or twice a week, would you say that's fair?
21 A Not really. It was just like a once in a while thing.
22 We have a store closer to our house, so we don't
23 really go there too much.
24 Q When you first got out of the car, who was blocking
25 your view of the sidewalk?

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1 A Nobody was blocking the view of the sidewalk.
2 Q Were there any animals blocking your view of the
3 sidewalk?
4 A There was no animals.
5 Q Any fixtures blocking your view of the sidewalk?
6 A There was just debris, like there's debris.
7 Q What kind of debris was out there that day?
8 A Like cigarette butts, you know, paper, typical city
9 stuff on the sidewalk.
10 Q But there was nothing blocking your view of the
11 sidewalk going into the store, was there?
12 A No. No. It was raining, it was kind of darker on the
13 darker end so that would have been only --
14 Q Oh. It was raining?
15 A It was raining.
16 Q And did you review the Complaint that you filed before
17 it was filed in Oakland County Circuit Court? I'm
18 going to show you what's been marked as Deposition
19 Exhibit 6.
20 A Okay.
21 Q Have you ever seen that before?
22 A No. I've never seen this paper.
23 Q Okay. Hand it back to me.
24 I'm going to read you one of the paragraphs and
25 just so you know I'm reading accurately I'm going to

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1 read upside down in front of you. But it's paragraph
2 seven. And you state, "The condition of the sidewalk
3 has deteriorated over time and was severely in need of
4 maintenance, repairs and resurfacing or
5 reconstruction."
6 Did I read that correctly?
7 A There was a crack in the sidewalk.
8 Q I didn't ask you that. Did I read that correctly?
9 That "The condition of the sidewalk has deteriorated
10 over time and was severely in need of maintenance,
11 repairs and resurfacing or reconstruction."
12 Did I read that correctly?
13 A You read that correctly. Yes.
14 Q How did you know that at that point in time? How did
15 you know that it had been deteriorating over time?
16 A I seen a crack in the sidewalk, there's a big crack in
17 the sidewalk.
18 Q So had seen that before your fall?
19 A Yes. Yes.
20 Q So you knew that there was a condition with regard to
21 the sidewalk before you fell that day?
22 A Yes. I didn't see the dip but I seen the crack in the
23 sidewalk.
24 Q And the crack of the sidewalk as I'm going to show you
25 in Deposition Exhibit 1, one of the cracks goes very

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1 close to the dip; correct?
2 A Yes. Correct.
3 Q Does that photograph depict the area of the fall
4 accurately on the day you fell? That's a photograph
5 that was attached by your attorney to his brief.
6 A Correct.
7 Q So that photograph accurately depicts the area of your
8 fall on May 4, 2016?
9 A Correct.
10 Q Was there anything whatsoever blocking your view of
11 that area of concrete on May 4, 2016, anything?
12 A Just cigarette butts. I mean, things like that. I
13 mean, there's a couple that were there.
14 Q There were cigarette butts blocking your view of this?
15 A I mean, it wasn't blocking. It was obviously, I could
16 see the crack in the sidewalk but there were cigarette
17 butts around there in the area.
18 Q And tell me what you reviewed. I don't want to know
19 what you talked about with your attorney today but
20 what did you physically look at if you prepared for
21 your deposition with your attorney? Did you look at
22 anything? Did you look at some pictures today?
23 A He showed me pictures.
24 Q Yeah. And was this one of the pictures he showed you,
25 Deposition Exhibit 1?

Page 12

1 A I believe so.
2 Q Okay. And I'm going to show you another one because
3 you keep mentioning cigarette butts. I'm going to
4 show you what's been marked, I'm sorry, as Deposition
5 Exhibit 9. That's another photograph that was taken
6 by your attorney or at the request of your attorney.
7 Have you seen that picture before?
8 A No.
9 Q Do you wear glasses?
10 A Yes.
11 Q Were you wearing your glasses on the date of the
12 incident?
13 A Yes.
14 Q What do you wear glasses for?
15 A I have astigmatism.
16 Q Describe your health at the time of the incident.
17 Were you in good health?
18 A Yes.
19 Q Were you taking any medications that day that would
20 affect your ability to walk?
21 A No.
22 Q Can you describe the weather conditions at the time of
23 the incident?
24 A It was raining.
25 Q Can you describe the types of shoes that you wore?

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1 A I had tennis shoes on.
2 Q Were you carrying anything with you at the time?
3 A No.
4 Q Were you on the phone at the time of the incident?
5 A No.
6 Q Did you have a cell phone with you at the time of the
7 incident?
8 A No.
9 Q The Complaint -- strike that.
10 I want to show you what's been marked as
11 Deposition Exhibit 1. There's a vehicle, and this is
12 a photograph that was supplied by your attorneys in a
13 brief. I don't want to suggest that this is your
14 vehicle or someone's but do you know whose vehicle
15 this is depicted in Exhibit 1?
16 A No, I do not.
17 Q Is this the approximate area where your husband's
18 vehicle was parked on May 4, 2016 when he dropped you
19 off in front of the party store?
20 A Yeah. It might have been up further a little bit.
21 Q Up further and maybe a little closer to the curb cut
22 area to allow you to get out right on to the curb?
23 A Maybe just a touch.
24 Q So when you open the door to get out, did you look
25 where you were going?

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1 A Yes. I was going into the store.
2 Q And did you look down at the condition of the sidewalk
3 where you were walking while you walked?
4 A For a quick second. But, obviously, I pay attention
5 to where I'm going.
6 Q Okay. Good.
7 So as you looked down for a quick second at the
8 sidewalk as soon as you got out of the car, what did
9 you see?
10 A The sidewalk. I didn't, wasn't really paying
11 attention. I mean, I seen farther up that there was a
12 crack, obviously, but didn't – just was walking into
13 the store from then on.
14 Q So you did see the crack shortly after you got out of
15 the car; correct?
16 A Yes. Yes.
17 Q And did you step over the crack?
18 A I did walk over it but I didn't know there was that
19 dip.
20 Q And what do you mean when you say that there was a
21 dip?
22 A It was a dip. I mean, where I fell the dip, my foot,
23 like it flipped over and it kind of twisted into that.
24 Q You rolled your ankle on it?
25 A Yes. Yes.

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1 Q So is the dip depicted in that picture in Exhibit 1
2 anywhere?
3 A Yes. It's like right through here.
4 Q I'm sorry. Okay. Where your thumb is. Put an X
5 where you believe the dip is using my blue pen,
6 please. And you can circle it if you like.
7 A Like right around about that. I mean, I'm not perfect
8 but.
9 Q So generally speaking this is the dip where the
10 cigarette butts are that caused you to fall?
11 A Somewhere right around that area, yes.
12 Q And you were walking from the street over the dip as
13 you describe it, so to speak; correct?
14 A Yes.
15 Q And you said you saw the crack as you got out of the
16 car and stepped --
17 A Yes.
18 Q -- over it. Why didn't you see the dip?
19 A It wasn't really visible to me. I mean, I was just
20 kind of paying attention to the store and it was
21 raining. I was trying to get into the store.
22 Q Was it not visible to you because you weren't looking
23 at it?
24 A I didn't look at it. Yeah. I wasn't looking at it
25 closely.

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1 Q Okay. Fair enough.
2 And that's why it wasn't visible to you?
3 A Yes.
4 Q I'm going to show you what's been marked as Deposition
5 Exhibits 3 and 4 and 5.
6 A Okay.
7 Q Can you tell me if those also depict the area where
8 you fell?
9 A I believe it was, I'm not sure how the angle of the
10 road is, but right around this area.
11 Q The same general area?
12 A Yes.
13 Q Yes.
14 So those photographs look like the area where you
15 fell?
16 A Yes. I believe from the angle that it looks like,
17 yes.
18 Q Had you seen that dip before, ma'am?
19 A Ever?
20 Q Yes.
21 A No.
22 Q Do you know how long that dip had been there?
23 A No.
24 Q Do you know who created that dip?
25 A I have no idea.

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1 Q And by referring to the dip, you're referring to the
2 difference in height between the two slabs of concrete
3 that's shown in your attorney's photo Deposition
4 Exhibit 9; correct?
5 A Correct.
6 Q Were you wearing sunglasses at all that day?
7 A No. It was raining.
8 Q Was there anyone in front of you impeding your vision
9 at all to this specific area?
10 A No.
11 Q None whatsoever?
12 A No.
13 Q So if you had looked down at this area you would have
14 been able to see it; correct?
15 A Correct. I was walking just to the party store.
16 Q Okay.
17 MR. GILLOOLY: Thank you. I have no further
18 questions at this time. Thank you very much.
19 (Documents marked for identification as
20 Defendant's Deposition Exhibit Numbers 10, 11 and
21 12.)
22 EXAMINATION
23 BY MR. BEDIKIAN:
24 Q Ms. Buhl, I'm going to show you what is marked as
25 Exhibit 10. Would you agree with me that this is the

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1 same picture that the defense attorney had provided
2 you in Exhibit 1 but in color?
3 A Yes.
4 Q And I'm going to ask you on Exhibit 10 to circle the
5 same area where you fell.
6 A Okay. Yeah. This looks different.
7 Q Yeah. I mean, essentially the same, just in color.
8 A Okay.
9 MR. GILLOOLY: And for the record just tell us if
10 you're looking at the other picture if you can't,
11 okay, for the site.
12 THE WITNESS: It was somewhere, like somewhere
13 around this area.
14 BY MR. BEDIKIAN:
15 Q Okay. Yeah. Just circle. It's that area. Okay. So
16 it's similar.
17 A Around that area. Sorry. I don't have my glasses on
18 today, my kids broke them.
19 Q And it's, according to your testimony, I'm correct in
20 indicating that your husband pulled up to the curb?
21 A Yes.
22 Q Off of Nine Mile Road; is that correct?
23 A Correct. Correct.
24 Q And when you exited the vehicle, the first thing you
25 noticed was you noticed a crack in the sidewalk?

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1 A Correct.
2 Q And that you did not notice that there was a dip on
3 the other side of that sidewalk?
4 A I did not see the dip at that time.
5 Q And you did not trip on the crack?
6 A No.
7 Q I am showing you what is marked as Exhibit 11.
8 A Okay.
9 Q This is the view that you would have had from getting
10 out of the car to Trend Express; is that correct?
11 A Correct.
12 Q And in this view, can you circle the sidewalk where
13 the accident occurred?
14 That's where you fell but the --
15 A Yes.
16 Q Can you make a bigger circle around the piece of
17 concrete where you first stepped on and noticed the
18 crack?
19 A Oh. Okay. Where it got --
20 Q Yeah. Just a big circle around it.
21 A Oh. Okay. Yeah. That's right there. Yeah. It's
22 hard to see. I'm sorry.
23 Q Yeah. It's okay.
24 A It's like this is the road and this is -- yes.
25 Q So this is your view of the Trend Express from the

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1 vehicle?
2 A Correct. Correct.
3 Q And this picture is not completely accurate because on
4 the day that you were exiting the vehicle and going to
5 the Trend Express it was raining?
6 A M'hm.
7 Q So this picture in terms of this area where the
8 sidewalk is, there was no sunlight?
9 A No. There was no sunlight.
10 Q So it was kind of dark, similar to the bottom portions
11 of this picture where the tree is shaded?
12 A Correct. It was very --
13 MR. GILLOOLY: I'm sorry. I'm just going to
14 object to the leading nature of the questions. I
15 apologize.
16 BY MR. BEDIKIAN:
17 Q And here is a picture of that same sidewalk. Is that
18 the sidewalk that we've been talking about today?
19 A Yes.
20 Q Do you feel that this is a closer picture or a zoomed
21 in picture of --
22 A Yes. Yes. It actually helps better.
23 Q And again, on this particular picture, can you -- can
24 you circle where you had fallen?
25 A Where I had fallen. Through this area right here.

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1 Q And in this particular picture, are you able to see
2 the crack in the sidewalk?
3 A In this particular picture, not quite. Not really
4 well.
5 Q And is it because there is that shadow?
6 A There's a shadow. Yes.
7 Q Okay. All right.
8 MR. BEDIKIAN: I don't believe I have any further
9 questions.
10 MR. GILLOOLY: I have just a couple.
11 REEXAMINATION
12 BY MR. GILLOOLY:
13 Q I'm going to refer you to Deposition Exhibit 11. If
14 you look, this picture was obviously taken from some
15 feet away from the area where you fell; correct?
16 A M'hm.
17 Q Yes?
18 Somebody was standing several feet away when they
19 took that picture?
20 A Okay. Yes. It's not where the car would be. Yeah.
21 Okay.
22 Q Correct.
23 But looking at the place and the mechanism that
24 caused you to fall, okay, you can see in that picture
25 that the sidewalk angles up, can't you, ma'am?

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1 A In this picture, yes. It's bright.
2 Q Pardon me?
3 A It's brighter. Yeah.
4 Q And you can see that portion of the sidewalk even
5 though you were walking down it, you can see that it's
6 going up even in that picture; correct, from a
7 distance away?
8 A From a little bit. Yeah.
9 Q Yes? Okay
10 A Yes.
11 Q Okay. Thank you.
12 And you can see it in Deposition Exhibit 12 as
13 well; correct? You can see that piece of the sidewalk
14 that's higher than the other pieces of the sidewalk
15 that caused you to fall?
16 A That's funny. Because when it's closer you can't see
17 it as well. I mean, to me, I don't know. To me, you
18 can't see it as well when it's closer.
19 Q But you can still see it; correct?
20 A Some. Yes.
21 Q Yes. Thank you.
22 MR. GILLOOLY: I have no further questions.
23 REEXAMINATION
24 BY MR. BEDIKIAN:
25 Q And then just a quick follow up. On Exhibit 12 you

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1 indicated that it was difficult for you to see the dip
2 in this particular exhibit?
3 A Yes.
4 Q And presumably in this picture there's more light on
5 that area than there was the date that the injury
6 occurred; correct?
7 A Yes. It was raining, it was darker.
8 REEXAMINATION
9 BY MR. GILLOOLY:
10 Q Who took these pictures, do you know, 11 and 12? Did
11 you or your husband take those by chance?
12 A I'm not positive. I'm not positive.
13 Q Do you know who may have? Well, what's your best
14 guess? I don't want you to guess but what's your best
15 educated guess on who took those pictures?
16 A I'm guessing. I mean, I took a couple pictures but
17 I'm not sure if those were the zooms or not. So it
18 was either me or my lawyer.
19 Q You took pictures of the area where you fell; correct?
20 A My husband did. Yes.
21 Q Oh, your husband did, too?
22 A Yes. My husband. I didn't. My foot was broke.
23 Q Oh. Wait. This is really important to me. A minute
24 ago you said that I took some pictures; right --
25 A I didn't.

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1 Q Let me finish.
2 A I'm sorry.
3 Q A minute or so ago you said that I took some pictures
4 and my attorney took some pictures. I want to know,
5 ma'am, Ms. Buhl, whether you personally took any
6 pictures?
7 A I did not.
8 Q So when you said early that I took some pictures you
9 were mistaken?
10 A Yes. I was mistaken. I'm sorry.
11 Q Your husband took the pictures?
12 A Yes.
13 Q Okay. And how many did he take?
14 A He might have took three.
15 Q Did he take them on his phone?
16 A Yes.
17 Q Does he still have that phone?
18 A I believe so. I'm not sure --
19 Q Tell him not to destroy any pictures he takes, that's
20 there's a hold on it and they're evidence in this
21 case. Would you be so kind to do that?
22 A Yes.
23 Q And he can give them to your lawyer and then we can
24 all do whatever we have to.
25 A All right.

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1 Q Okay.
2 MR. GILLOOLY: Thank you very much for coming in
3 today.
4 THE WITNESS: Yes. Thank you.
5 MR. BEDIKIAN: Thank you.
6 THE WITNESS: Thank you.
7 (Deposition concluded at 2:32 p.m.)
8 - - -
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CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I certify that this transcript, consisting of 26 pages, is a complete, true, and correct record of the testimony of JENNIFER BUHL, held in this case on June 20th, 2017.

I also certify that prior to taking this deposition JENNIFER BUHL, was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party nor financially interested in the action.

Amy Bertin, CER-3871

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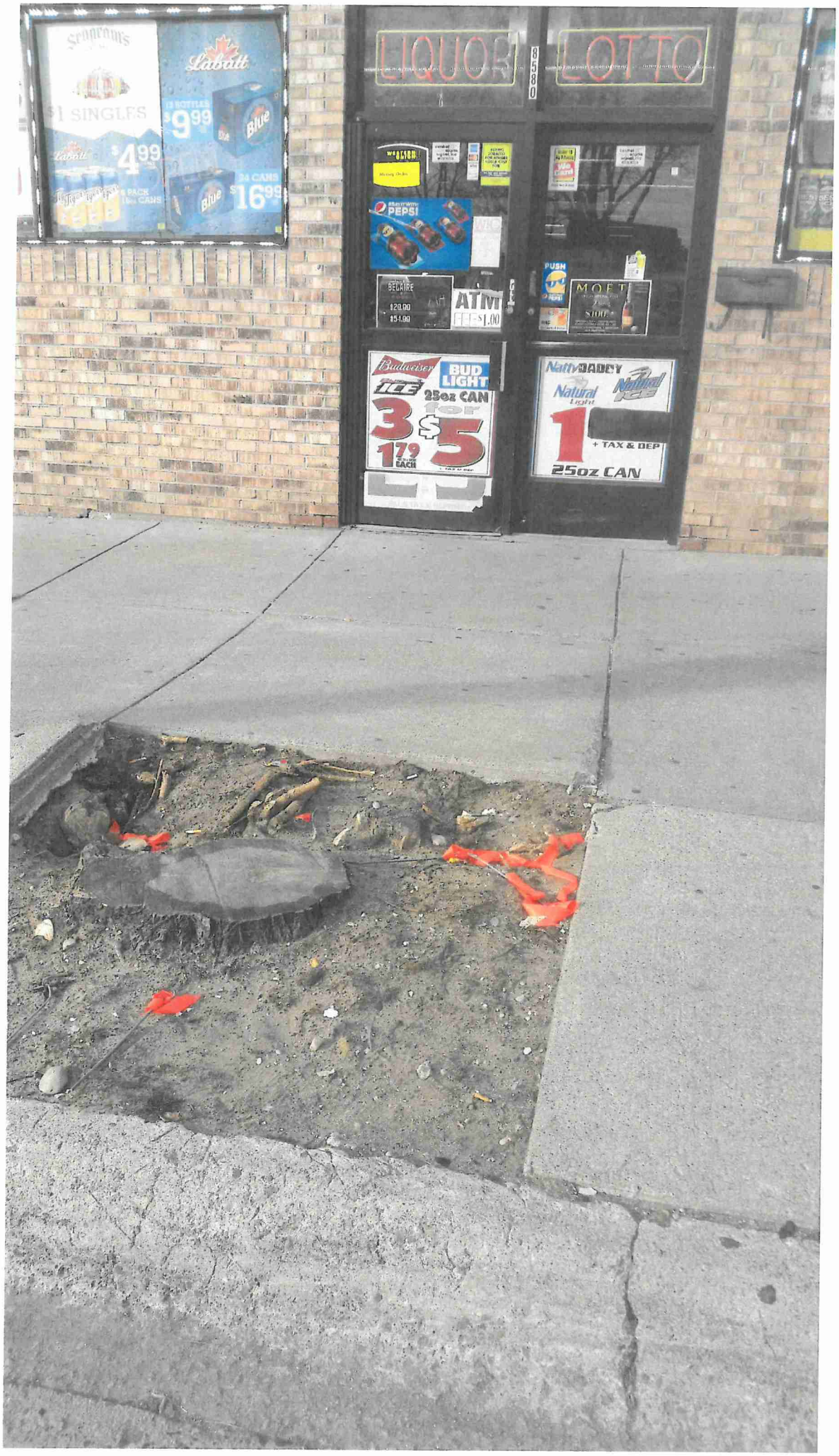

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EXHIBIT 1E

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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.

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NOTICE OF HEARING

TO: All Counsel of Record

PLEASE TAKE NOTICE that Defendant's Renewed Motion to Dismiss in the above-captioned matter will be brought on for hearing before the Honorable Phyllis McMillen, on **Wednesday**, the **23rd** day of **August, 2017**, at **10:00 a.m.**, or as soon thereafter as same may be heard.

Respectfully Submitted:

GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly
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Dated: July 10, 2017

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DEFENDANT, CITY OF OAK PARK'S RENEWED MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION

NOW COMES Defendant, CITY OF OAK PARK, by and through its attorneys, GARAN LUCOW MILLER, P.C., and in support of its renewed motion to dismiss and/or for summary disposition filed pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) states as follows:

1. This premises liability lawsuit arises from an incident, which allegedly occurred on May 3, 2016 (unspecified in Complaint), when Plaintiff, Jennifer Buhl ("Plaintiff"), claims to have suffered injuries as a result of a trip-and-fall on a sidewalk under the exclusive jurisdiction and control of Defendant, City of Oak Park ("Defendant").

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2. Plaintiff's Complaint alleges that she fell while walking on the sidewalk due to a "vertical discontinuity defect of more than two inches" running parallel to Nine Mile Road in the City of Oak Park. (**Exhibit A** - Complaint).

3. Plaintiff's Complaint alleges Defendant owed her a duty to "maintain the sidewalk in a reasonable repair and in a condition so that it was reasonably safe and fit for public travel" and breached such duty by committing the "following acts and omissions": (a) failing to periodically inspect the sidewalk in question to discover possible dangers, defects, deterioration, or damage; and (b) failing in general to repair and maintain the sidewalk in a condition that was reasonably safe and fit for travel by the public. (**Exhibit A**, ¶¶ 9, 11).

4. On or about February 22, 2017, Defendant filed a motion to dismiss as its first responsive pleading. This motion was filed pursuant to MCR 2.116(C)(8) and (10) and was based upon the same arguments advanced herein. The Court denied Defendant's prior motion to dismiss due to factual questions regarding its open and obvious defense. During oral arguments, this Court ordered Plaintiff's deposition to be conducted for the *sole purpose* of addressing these factual questions regarding Defendant's open and obvious defense.

5. Pursuant to this Court's Order, Plaintiff's deposition was conducted on June 22, 2017. (**Exhibit B** – Deposition of Jennifer Buhl). As such, Defendant now files a renewed motion to dismiss and/or for summary disposition of Plaintiff's claims as she cannot prove the four elements necessary to support her claim of negligence on the part of Defendant. *Kennedy v Great Atl & Pac Tea Co*, 274 Mich App 710, 712–713; 737 NW2d 179 (2007).

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6. A possessor of land is not an absolute insurer of the safety of an invitee. *Anderson v Wiegand*, 223 Mich App 549, 554, 567 NW2d 452 (1997). Generally, an owner of land owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516, 629 NW2d 384 (2001).

7. Indeed, there is an overriding public policy that people should take reasonable care for their own safety and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 616–617, 537 NW2d 185 (1995); *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693-94, 822 NW2d 254, 258-59 (2012).

8. Public Act 419 (2016) allows the City of Oak Park to assert a defense that the alleged defective condition was open and obvious and thereby excluded from the landowner's duty to an invitee. (**Exhibit C** - Public Act 419 (2016)).

9. Photographs of the area at issue clearly show a defect in the sidewalk that is easily observable to any ordinary person. (**Exhibit D** – Photographs). Plaintiff confirmed that this was how the sidewalk looked on the date at issue. (**Exhibit B** – Buhl Dep., pg. 11).

10. As more fully discussed in the brief attached hereto and incorporated herein, Defendant is entitled to summary disposition because there is no genuine issue of material fact that there was no duty owed to Plaintiff in this case where the alleged condition was open and obvious to an ordinary person and no special aspects of the condition existed which would remove this case from the application of the open and

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obvious doctrine. Public Act 419 (2016)(**Exhibit C** - Public Act 419 (2016)); *Novotney v Burger King Corp, (On Remand)*, 198 Mich App 470; 499 NW2d 379 (1993); *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).

11. Additionally, as more fully discussed in the brief attached hereto and incorporated herein, Defendant is also entitled to dismissal of Plaintiff's Complaint as Plaintiff has failed to state a claim upon which relief can be granted as Plaintiff has failed to specific the specific date of loss in her Complaint. (**Exhibit A** – Complaint).

12. On June 30, 2017 concurrence was sought from Plaintiff and Co-Defendant's counsel for the relief sought herein. However, at the time of filing, concurrence from Plaintiff has not been obtained.

WHEREFORE, Defendant, CITY OF OAK PARK, respectfully requests that this Honorable Court enter an Order granting its motion to dismiss, dismissing Plaintiff's complaint in its entirety.

Respectfully submitted,

/s/John J. Gillooly
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BRIEF IN SUPPORT OF DEFENDANT, CITY OF OAK PARK'S RENEWED MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION

Plaintiff, Jennifer Buhl ("Plaintiff") filed this premises liability action against Defendant, City of Oak Park ("Defendant") for a trip-and-fall that allegedly occurred on a sidewalk running parallel to Nine Mile Road in the City of Oak Park. Specifically, Plaintiff contends that she "sustained injuries when she tripped over a sidewalk" due to a "vertical discontinuity defect of more than two inches. Defendant now moves for summary disposition on the basis that Plaintiff's Complaint is improperly pled and that Defendant cannot be held liable for Plaintiff's alleged injuries where the presence of any defect was open and obvious and no special aspects existed to remove it from the open and obvious doctrine.

STATEMENT OF FACTS

This premises liability lawsuit arises from an incident which allegedly occurred on a sidewalk located in front of 8580 W. Nine Mile Rd., Oak Park, MI 48237. Plaintiff

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claims to have suffered injuries in that area when she "tripped over a sidewalk." This fall appears to be credited to a "vertical discontinuity defect of more than two inches" on the sidewalk. Plaintiff's Complaint fails to provide a date when she allegedly sustained injuries after tripping over the sidewalk in the City of Oak Park. (**Exhibit A** – Complaint).

On the date at issue, Plaintiff provides that her husband dropped her off at the curb in front of Trend Express. (**Exhibit B** – Buhl Dep., pg. 18-19). She had been to this store many times before. (**Exhibit B** – Buhl Dep., pg. 7). When she exited the vehicle, she noticed a defect in the sidewalk. (**Exhibit B** – Buhl Dep., pg. 10, 14-15). Nothing was blocking her view. (**Exhibit B** – Buhl Dep., pg. 11, 17). However, instead of looking down, she was "paying attention to the store" and continued to walk forward without watching her step. (**Exhibit B** – Buhl Dep., pg. 15, 17). At that point, she alleges that she tripped and was injured as a result. (**Exhibit B** – Buhl Dep., pg. 7).

Photographs of the area where Plaintiff claims to have fallen demonstrate a defect in the sidewalk that is several feet wide. (**Exhibit D** - Photographs). This area is composed entirely of dirt and a tree stump. (**Exhibit D** - Photographs). As such, it differs starkly in appearance from the surrounding patches of sidewalk. (**Exhibit D** - Photographs). There are no apparent barriers to pedestrians observing the area at issue while walking on the sidewalk. (**Exhibit D** - Photographs). 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. (**Exhibit B** – Buhl Dep., pg. 16).

STANDARD OF REVIEW

Defendants seek dismissal of Plaintiff's Complaint pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) and. Pursuant to the Michigan Supreme Court's decision in *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), a motion under

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MCR 2.116(C)(8) tests the legal sufficiency of the Complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id*, (citing *Wade v Dep't of Corrections*, 439 Mich 158, 162, 483 NW2d 26 (1992)). A motion under MCR 2.116(C)(8) may be granted where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*

A motion brought pursuant to MCR 2.116(C)(10) tests whether there are genuine issues of material fact regarding the claim. A motion brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." In resolving such a motion, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." If the evidence fails to establish a genuine issue regarding any material fact, the movant is entitled to judgment as a matter of law. *Bank of Am., NA v First Am. Title Ins. Co.,* 499 Mich 74, 85, 878 NW2d 816, 821, 2016 Mich LEXIS 660, *11 (Mich 2016). When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

ARGUMENT

I. DEFENDANT IS ENTITLED TO DISMISSAL OF PLAINTIFF'S COMPLAINT WHERE PLAINTIFF HAS FAILED TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

Plaintiff filed her Complaint in this case alleging that Defendant's negligence in failing to inspect and failing in general to repair and maintain the sidewalk in question caused her serious injuries and damages. However, Plaintiff failed to plead essential information in her Complaint in order to make this claim. In particular, Plaintiff has failed to provide a date when she allegedly suffered her injuries. The Complaint only provides

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a vague assertion that the injury occurred "[a]t approximately 4:30 p.m." with no further details regarding the exact time and date of her alleged trip and fall.

This factual omission means Plaintiff's Complaint has insufficiently pled a cause of action in this case. MCR 2.111(B)(1) provides that a complaint must state the "facts . . . on which the pleader relies in stating the cause of action, with the specific allegations necessary to reasonably inform the adverse party of the nature of the claims the adverse party is called on to defend." This means that the Complaint "must provide reasonable notice to opposing parties," *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). As the Michigan Supreme Court explained in *Dacon*, while the rule is designed to avoid the need for "extreme formalism," it also prohibits "ambiguous and uninformative pleading," which "leave[s] a defendant to guess upon what grounds plaintiff believes recovery is justified." *Id.* Thus, "[a] mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 592; 683 NW2d 233 (2004).

Plaintiff's Complaint may recite *some* of the information necessary for Defendant to access Plaintiff's claims, but the omission of the date of the incident at issue in this case is crucial. It makes it impossible for Defendant to accurately assess and defend against Plaintiff's claims in this case. Not only will it be impossible for Defendant to investigate any relevant materials and/or witnesses, but it will also be impossible to assess whether any statute of limitations apply to Plaintiff's claim. As far as Defendant is aware, Plaintiff's claim may already be barred. This failure to plead mandates the entry of an order of dismissal pursuant to MCR 2.116 (C)(8).

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II. DEFENDANT IS ENTITLED TO DISMISSAL OF PLAINTIFF'S COMPLAINT WHERE THE CONDITION UPON WHICH PLAINTIFF CLAIMS TO HAVE FALLEN WAS OPEN AND OBVIOUS, AND NO SPECIAL ASPECTS EXISTED WHICH WOULD REMOVE THIS CASE FROM THE APPLICATION OF THE OPEN AND OBVIOUS DANGER DOCTRINE.

As a governmental agency, the City of Oak Park is entitled to the statutory governmental immunity provided by the Legislature in MCL 691.1407(1), which provides:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

This language has been recognized to be the "broadest possible language," subject to only a few narrowly drawn statutory exceptions. *Ross v Consumers Power (On Rehearing),* 420 Mich 567, 618 (1984); *Yono v Department of Transportation*, 499 Mich 636, 641 (2016). One of those narrowly drawn exceptions is the "sidewalk exception" on which Plaintiff has necessarily relied to avoid the immunity otherwise available.

The sidewalk exception provides that municipal corporations maintain sidewalks "in reasonable repair." MCL 691.1402a. A municipal corporation that has a duty to maintain a sidewalk is "presumed to have maintained the sidewalk in reasonable repair." MCL 691.1402a(3). Such a presumption can only be rebutted if Plaintiff can show *both* of the following: (a) A vertical discontinuity defect of 2 inches or more in the sidewalk; and (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity." *Id.* A municipal corporation is also permitted to use any other defense available to it. Pursuant to Public Act 419 (2016), which

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amended MCL 691.1402a and took immediate effect on December 31, 2016, Defendant can now assert the open and obvious doctrine as a defense against such claims. (**Exhibit C** - Public Act 419 (2016)).

A. The Condition Was Open and Obvious.

It is well established in Michigan case law that a landowner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). This duty does not generally encompass the removal of open and obvious dangers. *Id*. Open and obvious dangers exist where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them. *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp, (On Remand)*, 198 Mich App 470; 499 NW2d 379 (1993). The **test is objective so that a court must look not to whether Plaintiff should have known that the condition was hazardous**, but whether a reasonable person in his or her position would foresee the danger. *Id*.

In the present case, Plaintiff has failed to plead in any way why the alleged sidewalk defect is not subject to the open and obvious doctrine. This is especially notable because Plaintiff has pled that the "sidewalk had a vertical discontinuity defect of more than two inches." (**Exhibit A** – Complaint). Plaintiff's own statement demonstrates that this was an open and obvious condition, which could easily be seen by an average user upon casual inspection - including Plaintiff.

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Plaintiff also reflected the open and obvious nature of this alleged sidewalk defect during her deposition. Not only did she confirm the photographs that were attached to Defendant's prior motion to dismiss, but she also testified that she noticed a defect when she was stepping out of her husband's vehicle. (**Exhibit B** – Buhl Dep., pg. 10, 14-15). In fact, she testified multiple times in her deposition that a defect could be seen in the photographs provided by Plaintiff and Defendant's counsel. (**Exhibit B** – Buhl Dep., pg. 21-22).

Michigan Courts have found that conditions such as uneven pavement and sidewalks are common, everyday occurrences that are generally assumed to be apparent and expected conditions, readily observable upon casual inspection by an average user with ordinary intelligence. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 621; 537 NW2d 185, 191 (1995); *Weakley v City of Dearborn Heights*, 240 Mich App 382, 612 NW2d 428, 2000 Mich App LEXIS 68 (Mich Ct App 2000); *Wicker v House of Liquor & Wine, Inc,*1999 Mich App LEXIS 611, 1999 WL 33441232 (Mich Ct App June 11, 1999). "**[T]o prevent application of the open and obvious danger doctrine to a typical and obvious condition, the condition must be 'effectively unavoidable' or 'unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.'**" *Kennedy v Great Atl. & Pac. Tea Co.*, 274 Mich App 710, 716, 737 NW2d 179 (Mich Ct App 2007) (emphasis added).

Addressing a similar claim, the Michigan Supreme Court in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 621; 537 NW2d 185, 191 (1995), stated:

> We hold that the plaintiff has failed to establish anything unusual about the step that would take it out of the rule of Garret and Boyle. Because the plaintiff has not presented any facts that the step posed an unreasonable risk of harm, the trial court properly granted summary disposition.

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In the *Wicker* case, the Court rejected a plaintiff's claims asserting a premises liability action after the plaintiff tripped on an uneven sidewalk. *Wicker* at *3. The plaintiff argued that the open and obvious doctrine only applied to the duty to warn and not to the duty to maintain, inspect and repair. *Id.* at *5. However, the Court spurned the plaintiff's argument, providing that the "open and obvious doctrine concerns the duty element of a negligence action, regardless of the nature of any alleged breach." *Id.* at *5-*6. In reaching its decision to apply the open and obvious doctrine, the Court relied upon a review of photographs of the sidewalk, which suggested nothing "unusual about the condition of the sidewalk that rendered it unreasonably dangerous despite its open and obvious nature." *Id.* at *5.

Additionally, the *Wicker Court* found the photographs presented in that case showed there was nothing unusual about the condition of the sidewalk that rendered it unreasonably dangerous despite its open and obvious nature. The two concrete slabs appeared neither cracked nor uneven, except where they met. The Court found a person walking down any sidewalk must expect to encounter irregularities of this sort. Thus, this sidewalk did not present any unusual circumstances suggesting the possibility of unreasonable dangerousness sufficient to warrant presenting the standard-of-care inquiry to the trier of fact. See also *Ricevuto v Washtenaw Ave Bookstore*, (Unpub, COA No. 290033, 8/17/10); *Nettle v Kimco-Clawson* 143 Inc., (Unpub, COA No. 260494, 6/12/05)("A small, unnoticeable rise in elevation between two slabs of concrete on a generally imperfect walkway is not an unusual or dangerous condition that would trigger liability.")(**Exhibit E**).

In *Brooks v Bruce Campbell Dodge* (Unpub, COA No. 293039, 9/23/10)(**Exhibit E**), the Court reiterated what is clearly the law in this area while reaching its decision:

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> Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from a dangerous condition on its land that poses an unreasonable risk of harm. *Lugo v Ameritech Corp,* 464 Mich 512, 516; 629 NW2d 384 (2001). Under the open and obvious doctrine, however, where the invitee knows of the danger or **where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee** unless harm should be anticipated despite the invitee's awareness of the condition. *Id.*; *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995); [*3] *Novotney v Burger King Corp* (On Remand), 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

Id. at *2-*3 (emphasis added).

In *Novotney*, the Michigan Supreme Court addressed the open and obvious nature of a handicap ramp upon which plaintiff tripped and fell. The Court concluded defendants had no legal duty to warn plaintiff of the handicap access ramp where the dangers posed by that ramp were so obvious that the plaintiff might reasonably be expected to discover them. The Court noted that plaintiff's allegations were only that she did not discover the nature of the handicap access ramp and that she would have been more likely to discover the ramp had warning signs been posted or had the ramp been painted a contrasting color. The Court affirmed the analysis that whether a danger is open and obvious does not revolve around whether steps could have been taken to make the danger more open or more obvious. Rather, the equation involved is whether the danger, as presented, is open and obvious. The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger? With respect to an inclined handicap access ramp, the *Novotney Court* found it was reasonable to so conclude.

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As a result, the *Novotney Court* found it was not relevant whether plaintiff actually saw the handicap ramp. Rather, it was necessary for plaintiff to produce evidence sufficient to establish that an ordinary user, upon casual inspection, could not have discovered the existence of the inclined handicap access ramp, thereby creating a genuine issue of material fact.

In the present case, Plaintiff alleges that she "tripped over a sidewalk" due to a "vertical discontinuity defect of more than two inches" on the sidewalk." As in *Novotney*, Plaintiff cannot produce evidence sufficient to establish that an ordinary user, upon casual inspection, could not have discovered the existence of this defect. Not only do the photographs of the area where Plaintiff fell show the condition was clearly visible, but she also testified that a defect was visible when reviewing the photographs. (**Exhibit B** – Buhl Dep., pg. 21-22; **Exhibit D** - Photographs). In fact, she even testified that she saw a defect on the sidewalk prior to her fall, but was "paying attention to the store" and continued to walk forward without watching her step. (**Exhibit B** – Buhl Dep., pg. 15, 17). As such, there is little denying that the defect would have been easily visible to a casual observer.

Under *Novotney*, the question is not how noticeable the condition was to the plaintiff, but whether it was noticeable to the ordinary user upon casual inspection. In this case, the pictures clearly show it was. The mere fact that Plaintiff did not notice the condition is irrelevant. Whether the condition could have been made more noticeable is also not a factor to be considered when answering whether the condition was open and obvious as a matter of law. As in *Novotney*, Plaintiff's only claim here appears to be that she fell and apparently did not notice the defect at issue. Where an ordinary user upon casual inspection could have discovered the existence of the condition, there is no

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genuine issue of material fact that the condition was open and obvious as a matter of law. See also *Malec v Livonia Mall Merchants Ass'n, Inc,* (Unpub, COA No. 292989, 10/14/10)(**Exhibit E**).

In a case nearly identical to the present case, *Burlak v Lautrec Ltd*, (Unpub, COA No. 290616, 6/15/10)(**Exhibit E**), plaintiff tripped and fell over a concrete crack in a roadway while walking to get his mail. The crack raised the concrete slab approximately two inches off the roadway. The Court of Appeals found that, in looking at the record in the light most favorable to plaintiff, there was no genuine issue of material fact that the uneven concrete crack in the roadway was open and obvious. Plaintiff admitted that he could see the uneven concrete crack. The Court found it was a typical uneven concrete crack in the middle of the roadway, and there was nothing unusual or different about the uneven crack that would cause a reasonable person not to expect it. A reasonable person would have been able to see the uneven concrete crack, and, indeed, plaintiff did. Thus, it was open and obvious. In the same way here, a defect like the one shown in the photographs is a common, ordinary condition to be found in a roadway in Michigan and there was nothing unusual or different about this condition that would cause a reasonable person not to expect it.

As in *Bertrand*, *Wicker*, *Ricevuto* and *Nettle*, Plaintiff has pled nothing unusual about the sidewalk's condition other than the fact that it was a "vertical discontinuity defect of more than two inches". Plaintiff also testified that she had previously gone to the same store and apparently had no trouble using the sidewalk. (**Exhibit B** – Buhl Dep., pg. 7). Pictures also show this defect could be easily seen, even in limited lighting. Thus, Plaintiff fails to prove the condition posed an unreasonable risk

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of harm or was, in any way, a dangerous condition. As such, summary disposition in favor of Defendant is proper.

B. No Special Aspects Existed.

Having established that the condition was open and obvious, it is still necessary to determine whether any special aspects of the condition existed. The Michigan Supreme Court, in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), held that, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Bertrand, supra* at 611. Special aspects were defined as "something unusual about the character, location, or surrounding conditions" that make the risk of harm unreasonable. *Id,* at 614.

The Michigan Supreme Court addressed the matter further in *Lugo, supra*. There, it held that, if a danger is deemed open and obvious,

> the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

Lugo, supra at 517. The *Lugo Court*, in further defining "special aspects," held that the special aspects that serve to remove the condition from the open and obvious danger doctrine are those that give rise to a uniquely high likelihood of harm or severity of harm

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if the risk is not avoided. *Id* at 519.

The *Lugo Court* set forth several illustrations of special aspects such as an unguarded 30-foot deep pit in the middle of a parking lot. While the condition is open and obvious, and perhaps avoidable, the situation would present such a substantial risk of death or severe harm to one who fell in the pit that it would be unreasonably dangerous to maintain the condition. A second illustration was that of a commercial building with only one exit for the general public where the floor is completely covered in standing water. The *Lugo Court* stated that, while the condition is open and obvious, a customer wishing to exit the store *must* leave the store through the water so that the condition is effectively unavoidable. *Id* at 518.[1] The Court further stated that liability would not be imposed merely because a particular open and obvious condition has some potential for severe harm. *Id* at 518, n.2.

In this case, neither the character of nor the location of the alleged defect were "special aspects" of the condition which would remove this case from the application of the open and obvious danger doctrine. The nature or character of the sidewalk defect did not give rise to a uniquely high likelihood of harm or severity of harm—the area is composed entirely of a small drop to an area filled with dirt. Additionally, the defect was not unavoidable. Photographs of the scene clearly show that Plaintiff could have walked around the alleged defect. (**Exhibit D** – Photographs).

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[1] The *Lugo Court* further stated, in footnote, that in considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect," it would be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. *Lugo, supra* at 519, fn 2.

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The Court's decision in *Brooks* (**Exhibit E**) is instructive. In *Brooks,* a plaintiff brought a claim against a defendant predicated upon a slip and fall accident involving a puddle of water in a parking lot. *Brooks* at *1. Not only did the Court find that this danger was open and obvious, but it also declined to find that it should be deemed to have special aspects. *Id.* at *5. The Court held that "[t]he risk of falling a few feet to the floor does not render a condition unreasonably dangerous." *Id.* at *5. See also *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002); *Carpenter v Anderson* (Unpub, COA No. 291155, 7/1/10)(**Exhibit E**). Similarly, in this case, the risk of Plaintiff falling a few feet to the ground does not render this defect unreasonably dangerous.

Finally, the sidewalk defect was not an effectively unavoidable condition. As is clearly evidenced by the attached photographs, Plaintiff could have taken a different route when she was walking on the sidewalk at issue. (**Exhibit D** – Photographs). There is also no submitted evidence showing that any other pedestrians had trouble walking on the sidewalk. In this case, Plaintiff simply failed to pay attention to where she was walking and so encountered an open and obvious condition and tripped upon it. The condition was wholly avoidable, as evidenced by the attached photographs. (**Exhibit D** – Photographs). Thus, no special aspects exist in this case which would remove the case from the application of the open and obvious danger doctrine.

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CONCLUSION

For the reasons discussed above, there exists no genuine issue of material fact that Plaintiff has failed to state a claim on which relief may be granted, and that the defect on the sidewalk was open and obvious and no special aspects existed to impose a duty on Defendant despite the open and obvious nature of the condition.

WHEREFORE, Defendant, CITY OF OAK PARK, respectfully requests that this Honorable Court grant its motion and enter an order dismissing Plaintiff's Complaint in its entirety.

Respectfully submitted,

/s/John J. Gillooly
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Dated: July 10, 2017

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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
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John J. Gillooly (P41948)
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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Monica Parent, being first duly sworn, deposes and says that she is employed by GARAN LUCOW MILLER, P.C., and that on the 10th day of July, 2017, she served by electronic filing the foregoing paper with the Clerk of the Court using the Wiznet E-File & Serve system which will send notification of such filing to the following:

Matthew Edward Bedikian, Esq.
matt@miadvocacycenter.com

/s/Monica Parent

#1345850

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

JENNIFER BUHL,

Plaintiff,

v.

CITY OF OAK PARK,

Defendant.

Case No. 2017-_____-NI

Hon.
2017-157097-NI
JUDGE PHYLLIS MCMILLEN

_____/

MICHIGAN ADVOCACY CENTER, PLLC
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There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in this complaint.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Jennifer Buhl, (hereinafter referred to as "Plaintiff") by and through her attorneys, MICHIGAN ADVOCACY CENTER, PLLC., by Matthew Edward Bedikian, submits this Complaint and Demand for Jury Trial.

COMMON ALLEGATIONS

1. Plaintiff is a resident of Oakland County, Michigan.
2. The Defendant, the city of Oak Park, is a governmental municipality in the state of Michigan.
3. The amount in controversy exceeds $25,000.

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4. Governmental immunity does not apply because:

   a. MCL 691.1402a establishes Plaintiff's cause of action, with notice having been served on Defendant on June 28, 2016, in accordance with MCL 691.1404, and

   b. The facts of this case constitute a defective sidewalk and nuisance per se, created and maintained by Defendant.

5. The sidewalk in question runs parallel to Nine Mile Road. in the City of Oak Park, Oakland County Michigan and is under the exclusive jurisdiction and direct control of the Defendant City of Oak Park.

6. At approximately 4:30 pm, Plaintiff sustained injuries when she tripped over a sidewalk located right out front of 8580 W. Nine Mile Rd., Oak Park, MI 48237. The sidewalk had a vertical discontinuity defect of more than two inches.

7. The condition of the sidewalk has deteriorated over time and was severely in need of maintenance, repairs and resurfacing, or reconstruction.

8. The Defendant had actual and constructive notice of this defect 30 days prior to the Plaintiff's fall.

9. All relevant times, Defendant had a duty created by MCL 691.1402a to maintain the sidewalk in a reasonable repair and in a condition so that it was reasonably safe and fit for public travel.

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10. Defendant's duties include, but are not limited to, the following:

a. to periodically inspect roadways under its jurisdiction to discover possible dangers, defects, deterioration, or damage.

b. To promptly and correctly repair, resurface, reconstruct, and otherwise correct, repair, and maintain imperfections or other hazardous conditions that it knows or should have known exist on sidewalks under its jurisdiction it knows or should have known exist on roadways un

c. to take all reasonable precautions to protect pedestrians who use sidewalks under its jurisdiction from dangers that are foreseeable and that would render any sidewalk unsafe or not reasonably fit for public travel

11. Defendant breached its statutory duties by committing the following acts and omissions:

a. failing to periodically inspect the sidewalk in question to discover possible dangers, defects, deteriotion, or damage.

b. failing in general to repair and maintain the sidewalk in a condition that was reasonably safe and fit for travel by the public.

12. As a proximate cause of Defendant's breach of its duties, Plaintiff was severally injured in the accident that occurred and has suffered grievous and painful injuries.

13. As a direct an proximate result of the Defendant's negligence, Plaintiff suffered the following serious injuries and damages:

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a. fracturing of the left ankle;

b. physical pain and suffering;

c. loss of social, household, and recreational activities;

d. mental anguish;

e. medical expenses past, present, and future;

f. out of pocket incident related expenses;

g. wage loss or actual future loss of earnings;

h. and other damages, injuries, and consequences related to the accident and that develop during the course of discovery.

WHEREFORE, Plaintiff asks the court to award damages against Defendant in whatever amount Plaintiff is found to be entitled to in excess of $25,000, plus interest, costs, and attorney fees.

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian

Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
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JURY DEMAND

Plaintiff demands a trial by jury.

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian

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Jennifer Buhl v.
City of Oak Park

Jennifer Buhl
June 20, 2017

Judy Jettke & Associates
Court Reporting & Video

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

JENNIFER BUHL,

Plaintiff,

Case No:17-157097-NI
Hon. Phyllis McMillen

-vs-

CITY OF OAK PARK,

Defendant.
_____/

DEPOSITION OF JENNIFER BUHL

Taken by the Defendant on the 20th day of June 2017, at the Law Office of Michigan Advocacy Center, 2000 Town Center, Suite 1900, Southfield, Michigan at 2:10 p.m.

APPEARANCES:

For the Plaintiff: MR. MATTHEW E. BEDIKIAN (P75312)
Michigan Advocacy Center PLLC
2000 Town Center
Suite 1900
Southfield, Michigan 48075
248-957-0456

For the Defendant: MR. JOHN J. GILLOOLY (P41948)
MR. THOMAS D. BEINDIT (P81133)
Garan Lucow Miller
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Detroit, Michigan 48207
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REPORTED BY: Amy Bertin, CER 3871
Certified Electronic Recorder
586-783-0060

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* * *

EXHIBITS:		IDENTIFIED
DX#1	Photograph	04
DX#2	Photograph	04
DX#3	Photograph	04
DX#4	Photograph	04
DX#5	Photograph	04
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* * *

1 Southfield, Michigan
2 Tuesday, June 20, 2017 - 2:10 p.m.
3 JENNIFER BUHL
4 HAVING BEEN CALLED BY THE DEFENDANT AND SWORN:
5 EXAMINATION
6 BY MR. GILLOOLY:
7 Q Good afternoon.
8 A Good afternoon.
9 Q My name is John Gillooly. I'm an attorney. I
10 represent the City of Oak Park.
11 A Okay.
12 Q Will you please tell us your full legal name?
13 A Jennifer Lorainne Buhl.
14 MR. GILLOOLY: Let the record reflect that this is
15 the deposition of Jennifer Lorainne Buhl taken
16 pursuant to Notice and at the order of Oakland County
17 Circuit Court Judge Phyllis McMillen.
18 BY MR. GILLOOLY:
19 Q Do you spell Lorraine, L-O-R-R-A-I-N-E?
20 A L-O-R-A-I-N-N-E.
21 Q N-N-E. Thank you.
22 Ms. Buhl, as I introduced myself, my name is John
23 Gillooly. To my right is an attorney at our firm
24 Thomas Beindit who's helping me with this case.
25 I'm here to ask you a series of questions about an

1 incident that occurred in the city of Oak Park.
2 A All right.
3 Q A couple very easy but really important ground rules.
4 I want to make sure that we're on the same page before
5 I ask any additional questions and those are these.
6 Please use words to answer my questions. Please
7 do not nod your head, shrug your shoulders or say uh-
8 uh or uh-huh because the court reporter to your left
9 and my right is literally taking down every word that
10 we say in this room until we're done. Okay?
11 A All right.
12 Q And if you don't completely understand what I'm
13 asking, if you don't understand the words I'm using,
14 if you can't hear me, if the question's confusing or
15 if you just don't get it, so to speak, you can stop me
16 as many times as you want during the deposition and
17 ask me to repeat, rephrase and I'll be more than happy
18 to do it until you understand the question. Okay?
19 A All right.
20 Q If you don't ask me to repeat or rephrase and you just
21 answer the question, I'm going to assume that you've
22 understood the question asked and that you've given me
23 a truthful and complete answer. Okay?
24 A All right.
25 (Documents marked for identification as

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1 Defendant's Deposition Exhibit Numbers 1 through
2 9.)
3 BY MR. GILLOOLY:
4 Q Good. This will not take long.
5 Ms. Buhl, where do you currently live?
6 A 24311 Ithaca, Oak Park, Michigan 48237.
7 Q And how long have you lived in the city of Oak Park?
8 A For two years now.
9 Q Have you ever had any contact with any law enforcement
10 officer from the city of Oak Park for any reason?
11 A No.
12 Q Any plans on moving from the Ithaca Street address?
13 A Yes.
14 Q Where do you plan on moving?
15 A I'm not sure yet. We're actually looking for a bigger
16 house.
17 Q And when you say we, who's we?
18 A Me and my husband and my children.
19 Q And what's your husband's name?
20 A Scott.
21 Q And what are your -- how many children do you have?
22 A I have six children.
23 Q Are they all with Scott?
24 A Yes.
25 Q I want to ask you about an incident that occurred on a

Page 6

1 sidewalk, so to speak, in the city of Oak Park. And
2 did you -- were you involved in a personal injury
3 occurrence on Nine Mile Road in Oak Park?
4 A Yes.
5 Q Was it in front of a store?
6 A Yes.
7 Q What was the name of the store that the incident
8 incurred in front of?
9 A I believe it's called Trend Express.
10 Q T-R-E-N-D Express?
11 A Yes.
12 Q And what kind of store is that?
13 A A party store.
14 Q And is it located, if you know, at 8580 West Nine Mile
15 Road?
16 A I do not know the exact address.
17 Q You had been there before?
18 A Yes.
19 Q When did the incident that forms the basis of this
20 lawsuit occur? Give me the month, the day and then
21 the year, if you know.
22 A May 4th and it was last year.
23 Q May 4th, 2016?
24 A Yes.
25 Q And you had been to that store before that time;

Page 7

1 correct?
2 A Correct. Yes.
3 Q You had been there many times before; correct?
4 A Yes.
5 Q On May 4, 2016, did you go to the store at about 4:30
6 in the afternoon that day?
7 A Around about that time. Correct.
8 Q And did your husband pull up to the front entranceway
9 of the store off of Nine Mile Road?
10 A Yes.
11 Q And did you get out of the passenger side of the car?
12 A Yes.
13 Q Did he pull his car up to the curb?
14 A Yeah. All the way up.
15 Q So did you have to step into the street in order to
16 get out of the car?
17 A Actually, it was so close that I just got off, right
18 off on to the curb. I could walk right on to the curb.
19 Q So you walked right up on to the curb and the
20 sidewalk, so to speak?
21 A Correct.
22 Q Did anyone else get out of the car with you?
23 A My husband did not right away but he did after.
24 Q Okay. After you fell?
25 A After I fell.

Page 8

1 Q When you first got out of the car, did anyone else get
2 out of the car with you?
3 A No.
4 Q You had gotten out of the car in front of that store
5 numerous times before in the same location; correct?
6 A Not in the same location. I parked on the side of the
7 building.
8 Q Had you ever gotten out of the car in that location
9 before?
10 A He's never parked there so, no.
11 Q Had you ever used the front doors of that store to get
12 in the store?
13 A Just the side door, always the side door. This was
14 the first time we used the front.
15 Q So that's the first time ever you used the front door?
16 A Yeah. I believe so. Yes.
17 Q You believe so.
18 You had been there within three days of this
19 incident before. Did you go to that store at least
20 once or twice a week, would you say that's fair?
21 A Not really. It was just like a once in a while thing.
22 We have a store closer to our house, so we don't
23 really go there too much.
24 Q When you first got out of the car, who was blocking
25 your view of the sidewalk?

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1 A Nobody was blocking the view of the sidewalk.
2 Q Were there any animals blocking your view of the
3 sidewalk?
4 A There was no animals.
5 Q Any fixtures blocking your view of the sidewalk?
6 A There was just debris, like there's debris.
7 Q What kind of debris was out there that day?
8 A Like cigarette butts, you know, paper, typical city
9 stuff on the sidewalk.
10 Q But there was nothing blocking your view of the
11 sidewalk going into the store, was there?
12 A No. No. It was raining, it was kind of darker on the
13 darker end so that would have been only --
14 Q Oh. It was raining?
15 A It was raining.
16 Q And did you review the Complaint that you filed before
17 it was filed in Oakland County Circuit Court? I'm
18 going to show you what's been marked as Deposition
19 Exhibit 6.
20 A Okay.
21 Q Have you ever seen that before?
22 A No. I've never seen this paper.
23 Q Okay. Hand it back to me.
24 I'm going to read you one of the paragraphs and
25 just so you know I'm reading accurately I'm going to

Page 10

1 read upside down in front of you. But it's paragraph
2 seven. And you state, "The condition of the sidewalk
3 has deteriorated over time and was severely in need of
4 maintenance, repairs and resurfacing or
5 reconstruction."
6 Did I read that correctly?
7 A There was a crack in the sidewalk.
8 Q I didn't ask you that. Did I read that correctly?
9 That "The condition of the sidewalk has deteriorated
10 over time and was severely in need of maintenance,
11 repairs and resurfacing or reconstruction."
12 Did I read that correctly?
13 A You read that correctly. Yes.
14 Q How did you know that at that point in time? How did
15 you know that it had been deteriorating over time?
16 A I seen a crack in the sidewalk, there's a big crack in
17 the sidewalk.
18 Q So had seen that before your fall?
19 A Yes. Yes.
20 Q So you knew that there was a condition with regard to
21 the sidewalk before you fell that day?
22 A Yes. I didn't see the dip but I seen the crack in the
23 sidewalk.
24 Q And the crack of the sidewalk as I'm going to show you
25 in Deposition Exhibit 1, one of the cracks goes very

Page 11

1 close to the dip; correct?
2 A Yes. Correct.
3 Q Does that photograph depict the area of the fall
4 accurately on the day you fell? That's a photograph
5 that was attached by your attorney to his brief.
6 A Correct.
7 Q So that photograph accurately depicts the area of your
8 fall on May 4, 2016?
9 A Correct.
10 Q Was there anything whatsoever blocking your view of
11 that area of concrete on May 4, 2016, anything?
12 A Just cigarette butts. I mean, things like that. I
13 mean, there's a couple that were there.
14 Q There were cigarette butts blocking your view of this?
15 A I mean, it wasn't blocking. It was obviously, I could
16 see the crack in the sidewalk but there were cigarette
17 butts around there in the area.
18 Q And tell me what you reviewed. I don't want to know
19 what you talked about with your attorney today but
20 what did you physically look at if you prepared for
21 your deposition with your attorney? Did you look at
22 anything? Did you look at some pictures today?
23 A He showed me pictures.
24 Q Yeah. And was this one of the pictures he showed you,
25 Deposition Exhibit 1?

Page 12

1 A I believe so.
2 Q Okay. And I'm going to show you another one because
3 you keep mentioning cigarette butts. I'm going to
4 show you what's been marked, I'm sorry, as Deposition
5 Exhibit 9. That's another photograph that was taken
6 by your attorney or at the request of your attorney.
7 Have you seen that picture before?
8 A No.
9 Q Do you wear glasses?
10 A Yes.
11 Q Were you wearing your glasses on the date of the
12 incident?
13 A Yes.
14 Q What do you wear glasses for?
15 A I have astigmatism.
16 Q Describe your health at the time of the incident.
17 Were you in good health?
18 A Yes.
19 Q Were you taking any medications that day that would
20 affect your ability to walk?
21 A No.
22 Q Can you describe the weather conditions at the time of
23 the incident?
24 A It was raining.
25 Q Can you describe the types of shoes that you wore?

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1 A I had tennis shoes on.
2 Q Were you carrying anything with you at the time?
3 A No.
4 Q Were you on the phone at the time of the incident?
5 A No.
6 Q Did you have a cell phone with you at the time of the
7 incident?
8 A No.
9 Q The Complaint -- strike that.
10 I want to show you what's been marked as
11 Deposition Exhibit 1. There's a vehicle, and this is
12 a photograph that was supplied by your attorneys in a
13 brief. I don't want to suggest that this is your
14 vehicle or someone's but do you know whose vehicle
15 this is depicted in Exhibit 1?
16 A No, I do not.
17 Q Is this the approximate area where your husband's
18 vehicle was parked on May 4, 2016 when he dropped you
19 off in front of the party store?
20 A Yeah. It might have been up further a little bit.
21 Q Up further and maybe a little closer to the curb cut
22 area to allow you to get out right on to the curb?
23 A Maybe just a touch.
24 Q So when you open the door to get out, did you look
25 where you were going?

Page 14

1 A Yes. I was going into the store.
2 Q And did you look down at the condition of the sidewalk
3 where you were walking while you walked?
4 A For a quick second. But, obviously, I pay attention
5 to where I'm going.
6 Q Okay. Good.
7 So as you looked down for a quick second at the
8 sidewalk as soon as you got out of the car, what did
9 you see?
10 A The sidewalk. I didn't, wasn't really paying
11 attention. I mean, I seen farther up that there was a
12 crack, obviously, but didn't -- just was walking into
13 the store from then on.
14 Q So you did see the crack shortly after you got out of
15 the car; correct?
16 A Yes. Yes.
17 Q And did you step over the crack?
18 A I did walk over it but I didn't know there was that
19 dip.
20 Q And what do you mean when you say that there was a
21 dip?
22 A It was a dip. I mean, where I fell the dip, my foot,
23 like it flipped over and it kind of twisted into that.
24 Q You rolled your ankle on it?
25 A Yes. Yes.

Page 15

1 Q So is the dip depicted in that picture in Exhibit 1
2 anywhere?
3 A Yes. It's like right through here.
4 Q I'm sorry. Okay. Where your thumb is. Put an X
5 where you believe the dip is using my blue pen,
6 please. And you can circle it if you like.
7 A Like right around about that. I mean, I'm not perfect
8 but.
9 Q So generally speaking this is the dip where the
10 cigarette butts are that caused you to fall?
11 A Somewhere right around that area, yes.
12 Q And you were walking from the street over the dip as
13 you describe it, so to speak; correct?
14 A Yes.
15 Q And you said you saw the crack as you got out of the
16 car and stepped --
17 A Yes.
18 Q -- over it. Why didn't you see the dip?
19 A It wasn't really visible to me. I mean, I was just
20 kind of paying attention to the store and it was
21 raining. I was trying to get into the store.
22 Q Was it not visible to you because you weren't looking
23 at it?
24 A I didn't look at it. Yeah. I wasn't looking at it
25 closely.

Page 16

1 Q Okay. Fair enough.
2 And that's why it wasn't visible to you?
3 A Yes.
4 Q I'm going to show you what's been marked as Deposition
5 Exhibits 3 and 4 and 5.
6 A Okay.
7 Q Can you tell me if those also depict the area where
8 you fell?
9 A I believe it was, I'm not sure how the angle of the
10 road is, but right around this area.
11 Q The same general area?
12 A Yes.
13 Q Yes.
14 So those photographs look like the area where you
15 fell?
16 A Yes. I believe from the angle that it looks like,
17 yes.
18 Q Had you seen that dip before, ma'am?
19 A Ever?
20 Q Yes.
21 A No.
22 Q Do you know how long that dip had been there?
23 A No.
24 Q Do you know who created that dip?
25 A I have no idea.

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1 Q And by referring to the dip, you're referring to the
2 difference in height between the two slabs of concrete
3 that's shown in your attorney's photo Deposition
4 Exhibit 9; correct?
5 A Correct.
6 Q Were you wearing sunglasses at all that day?
7 A No. It was raining.
8 Q Was there anyone in front of you impeding your vision
9 at all to this specific area?
10 A No.
11 Q None whatsoever?
12 A No.
13 Q So if you had looked down at this area you would have
14 been able to see it; correct?
15 A Correct. I was walking just to the party store.
16 Q Okay.
17 MR. GILLOOLY: Thank you. I have no further
18 questions at this time. Thank you very much.
19 (Documents marked for identification as
20 Defendant's Deposition Exhibit Numbers 10, 11 and
21 12.)
22 EXAMINATION
23 BY MR. BEDIKIAN:
24 Q Ms. Buhl, I'm going to show you what is marked as
25 Exhibit 10. Would you agree with me that this is the

Page 18

1 same picture that the defense attorney had provided
2 you in Exhibit 1 but in color?
3 A Yes.
4 Q And I'm going to ask you on Exhibit 10 to circle the
5 same area where you fell.
6 A Okay. Yeah. This looks different.
7 Q Yeah. I mean, essentially the same, just in color.
8 A Okay.
9 MR. GILLOOLY: And for the record just tell us if
10 you're looking at the other picture if you can't,
11 okay, for the site.
12 THE WITNESS: It was somewhere, like somewhere
13 around this area.
14 BY MR. BEDIKIAN:
15 Q Okay. Yeah. Just circle. It's that area. Okay. So
16 it's similar.
17 A Around that area. Sorry. I don't have my glasses on
18 today, my kids broke them.
19 Q And it's, according to your testimony, I'm correct in
20 indicating that your husband pulled up to the curb?
21 A Yes.
22 Q Off of Nine Mile Road; is that correct?
23 A Correct. Correct.
24 Q And when you exited the vehicle, the first thing you
25 noticed was you noticed a crack in the sidewalk?

Page 19

1 A Correct.
2 Q And that you did not notice that there was a dip on
3 the other side of that sidewalk?
4 A I did not see the dip at that time.
5 Q And you did not trip on the crack?
6 A No.
7 Q I am showing you what is marked as Exhibit 11.
8 A Okay.
9 Q This is the view that you would have had from getting
10 out of the car to Trend Express; is that correct?
11 A Correct.
12 Q And in this view, can you circle the sidewalk where
13 the accident occurred?
14 That's where you fell but the --
15 A Yes.
16 Q Can you make a bigger circle around the piece of
17 concrete where you first stepped on and noticed the
18 crack?
19 A Oh. Okay. Where it got --
20 Q Yeah. Just a big circle around it.
21 A Oh. Okay. Yeah. That's right there. Yeah. It's
22 hard to see. I'm sorry.
23 Q Yeah. It's okay.
24 A It's like this is the road and this is -- yes.
25 Q So this is your view of the Trend Express from the

Page 20

1 vehicle?
2 A Correct. Correct.
3 Q And this picture is not completely accurate because on
4 the day that you were exiting the vehicle and going to
5 the Trend Express it was raining?
6 A M'hm.
7 Q So this picture in terms of this area where the
8 sidewalk is, there was no sunlight?
9 A No. There was no sunlight.
10 Q So it was kind of dark, similar to the bottom portions
11 of this picture where the tree is shaded?
12 A Correct. It was very --
13 MR. GILLOOLY: I'm sorry. I'm just going to
14 object to the leading nature of the questions. I
15 apologize.
16 BY MR. BEDIKIAN:
17 Q And here is a picture of that same sidewalk. Is that
18 the sidewalk that we've been talking about today?
19 A Yes.
20 Q Do you feel that this is a closer picture or a zoomed
21 in picture of --
22 A Yes. Yes. It actually helps better.
23 Q And again, on this particular picture, can you -- can
24 you circle where you had fallen?
25 A Where I had fallen. Through this area right here.

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1 Q And in this particular picture, are you able to see
2 the crack in the sidewalk?
3 A In this particular picture, not quite. Not really
4 well.
5 Q And is it because there is that shadow?
6 A There's a shadow. Yes.
7 Q Okay. All right.
8 MR. BEDIKIAN: I don't believe I have any further
9 questions.
10 MR. GILLOOLY: I have just a couple.
11 REEXAMINATION
12 BY MR. GILLOOLY:
13 Q I'm going to refer you to Deposition Exhibit 11. If
14 you look, this picture was obviously taken from some
15 feet away from the area where you fell; correct?
16 A M'hm.
17 Q Yes?
18 Somebody was standing several feet away when they
19 took that picture?
20 A Okay. Yes. It's not where the car would be. Yeah.
21 Okay.
22 Q Correct.
23 But looking at the place and the mechanism that
24 caused you to fall, okay, you can see in that picture
25 that the sidewalk angles up, can't you, ma'am?

Page 22

1 A In this picture, yes. It's bright.
2 Q Pardon me?
3 A It's brighter. Yeah.
4 Q And you can see that portion of the sidewalk even
5 though you were walking down it, you can see that it's
6 going up even in that picture; correct, from a
7 distance away?
8 A From a little bit. Yeah.
9 Q Yes? Okay
10 A Yes.
11 Q Okay. Thank you.
12 And you can see it in Deposition Exhibit 12 as
13 well; correct? You can see that piece of the sidewalk
14 that's higher than the other pieces of the sidewalk
15 that caused you to fall?
16 A That's funny. Because when it's closer you can't see
17 it as well. I mean, to me, I don't know. To me, you
18 can't see it as well when it's closer.
19 Q But you can still see it; correct?
20 A Some. Yes.
21 Q Yes. Thank you.
22 MR. GILLOOLY: I have no further questions.
23 REEXAMINATION
24 BY MR. BEDIKIAN:
25 Q And then just a quick follow up. On Exhibit 12 you

Page 23

1 indicated that it was difficult for you to see the dip
2 in this particular exhibit?
3 A Yes.
4 Q And presumably in this picture there's more light on
5 that area than there was the date that the injury
6 occurred; correct?
7 A Yes. It was raining, it was darker.
8 REEXAMINATION
9 BY MR. GILLOOLY:
10 Q Who took these pictures, do you know, 11 and 12? Did
11 you or your husband take those by chance?
12 A I'm not positive. I'm not positive.
13 Q Do you know who may have? Well, what's your best
14 guess? I don't want you to guess but what's your best
15 educated guess on who took those pictures?
16 A I'm guessing. I mean, I took a couple pictures but
17 I'm not sure if those were the zooms or not. So it
18 was either me or my lawyer.
19 Q You took pictures of the area where you fell; correct?
20 A My husband did. Yes.
21 Q Oh, your husband did, too?
22 A Yes. My husband. I didn't. My foot was broke.
23 Q Oh. Wait. This is really important to me. A minute
24 ago you said that I took some pictures; right --
25 A I didn't.

Page 24

1 Q Let me finish.
2 A I'm sorry.
3 Q A minute or so ago you said that I took some pictures
4 and my attorney took some pictures. I want to know,
5 ma'am, Ms. Buhl, whether you personally took any
6 pictures?
7 A I did not.
8 Q So when you said early that I took some pictures you
9 were mistaken?
10 A Yes. I was mistaken. I'm sorry.
11 Q Your husband took the pictures?
12 A Yes.
13 Q Okay. And how many did he take?
14 A He might have took three.
15 Q Did he take them on his phone?
16 A Yes.
17 Q Does he still have that phone?
18 A I believe so. I'm not sure --
19 Q Tell him not to destroy any pictures he takes, that's
20 there's a hold on it and they're evidence in this
21 case. Would you be so kind to do that?
22 A Yes.
23 Q And he can give them to your lawyer and then we can
24 all do whatever we have to.
25 A All right.

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1 Q Okay.
2 MR. GILLOOLY: Thank you very much for coming in
3 today.
4 THE WITNESS: Yes. Thank you.
5 MR. BEDIKIAN: Thank you.
6 THE WITNESS: Thank you.
7 (Deposition concluded at 2:32 p.m.)
8 - - -
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CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I certify that this transcript, consisting of 26 pages, is a complete, true, and correct record of the testimony of JENNIFER BUHL, held in this case on June 20th, 2017.

I also certify that prior to taking this deposition JENNIFER BUHL, was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party nor financially interested in the action.

_____ _____

Amy Bertin, CER-3871

JUDY JETTKE & ASSOCIATES
309 S. Gratiot
Suite 2
Mount Clemens, Michigan 48043

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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.

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EXHIBIT C

This act is ordered to take immediate effect.

Clerk of the House of Representatives

Secretary of the Senate

Approved .....

Governor

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EXHIBIT D

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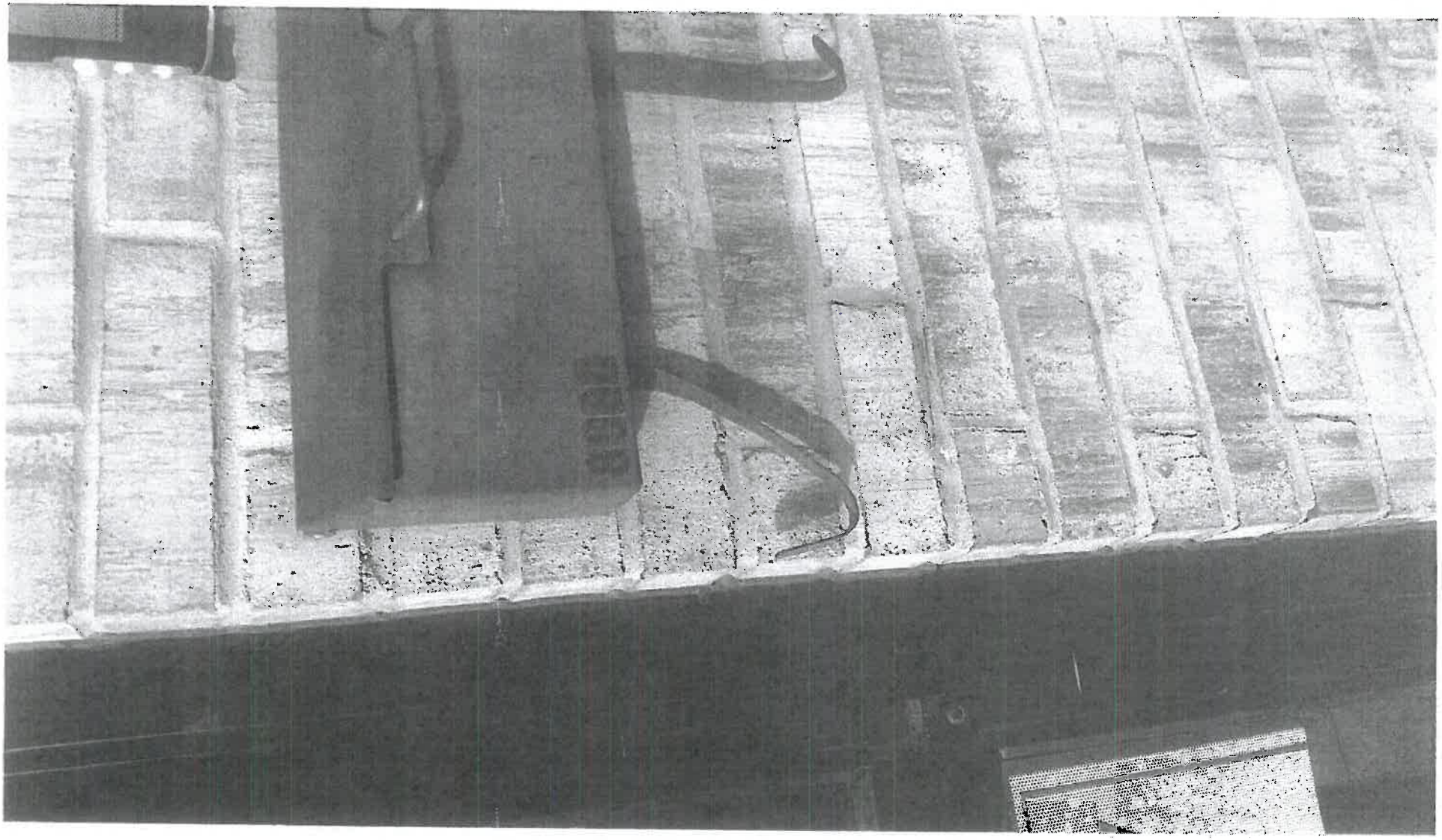

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As of: June 30, 2017 1:11 PM Z

Brooks v. Bruce Campbell Dodge

Court of Appeals of Michigan

September 23, 2010, Decided

No. 293039

Reporter
2010 Mich. App. LEXIS 1775 *; 2010 WL 3719228

JACQUELINE BROOKS, Plaintiff-Appellee, v BRUCE CAMPBELL DODGE, INC., Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Wayne Circuit Court. LC No. 08-116907-NO.

Core Terms

puddle, summary disposition, service area, invitee, hazard, inspection, stepping, severe

Judges: Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

Opinion

PER CURIAM.

Defendant appeals by leave granted the circuit court's order denying its motion for summary disposition under *MCR 2.116(C)(10)* [1] in this slip and fall action. We reverse. This appeal has been decided without oral argument pursuant to *MCR 7.214(E)*.

Plaintiff sustained injuries after she slipped and fell in a puddle of water while getting out of her SUV in the service area of defendant's automobile dealership. On appeal, defendant argues that the trial court erred by denying its motion for summary disposition because there is no genuine issue of material fact that (1) the puddle of water was open and obvious and (2) no special aspects existed to render the condition unreasonably dangerous. We agree with both contentions.

This Court reviews decisions on motions for summary disposition de novo. *Latham v Barton Malow Co, 480 Mich 105, 111; 746 NW2d 868 (2008)*. Summary disposition under *MCR 2.116(C)(10)* [*2] is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc, 466 Mich 453, 461; 646 NW2d 455 (2002)*. In reviewing the trial court's decision, "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.*

Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from a dangerous condition on its land that poses an unreasonable risk of harm. *Lugo v Ameritech Corp, 464 Mich 512, 516; 629 NW2d 384 (2001)*. Under the open and obvious doctrine, however, where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition. *Id.; Riddle v McLouth Steel Prods Corp, 440 Mich 85, 96; 485 NW2d 676 (1992)*. A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church, 210 Mich App 261, 264; 532 NW2d 882 (1995)*; [*3] *Novotney v Burger King Corp (On Remand), 198 Mich App 470, 474-475; 499 NW2d 379 (1993)*.

[1] Although defendant moved for summary disposition under both ***MCR 2.116(C)(8)*** and ***(C)(10)***, defendant challenges on appeal the circuit court's denial of summary disposition under subrule (C)(10) only.

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In Lugo, 464 Mich at 518, the Michigan Supreme Court characterized standing water as presenting such a clear open and obvious risk that the Court did not discuss its reasoning for such a conclusion. The alleged dangerous condition here, a puddle in the service area of defendant's automobile dealership, presents a similarly clear-cut case. First, the presence of a liquid puddle in the service area at a car dealership is neither unusual nor unforeseeable. Second, if casual inspection is to mean anything, it must at a minimum mean looking at one's surroundings, even if momentarily. Plaintiff concedes that she did not look at the floor when she stepped down from her SUV, meaning that she did not inspect at all. A reasonably prudent person would have looked before stepping out of the vehicle, and considering the size of the puddle - approximately two small buckets of water -- in doing so, would have easily discovered the condition. Therefore, there is no question of fact that the condition was open and obvious.

Plaintiff asserts that the condition was not open and obvious because defendant's employee [*4] instructed her to park directly on the hazard and because the puddle was in an area that was almost impossible to see from an SUV. These arguments are unpersuasive. Even when viewed in the light most favorable to plaintiff, nothing in the record suggests that the employee instructed her to park in a particular spot in the service area or directly over the hazard. Rather, plaintiff testified that the employee merely told her to pull her vehicle into the service area. Moreover, no evidence demonstrates that plaintiff would not have seen the puddle, even from the height of her SUV, had she looked down. It is undisputed that plaintiff never looked at the floor in the service area. Thus, plaintiff did not casually inspect the area and the condition would have been obvious to a reasonable person who did engage in casual inspection.

Defendant also argues that the puddle was free from any special aspect that gave rise to a duty to protect against the open and obvious risk. The Michigan Supreme Court addressed the special aspects doctrine at length in Lugo, 464 Mich at 516-520. The doctrine provides that where "special aspects of a condition make even an open and obvious risk unreasonably dangerous, [*5] the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." Id. at 517. To constitute a special aspect sufficient to remove a condition from the open and obvious danger doctrine, the condition must pose a particularly severe risk of harm or be effectively unavoidable. Id. at 517-519. The illustrative examples that the Court provided of special aspects include: (1) an unguarded, 30-foot deep pit in a parking lot that creates a risk of particularly severe harm, and (2) a commercial building with one exit where water has completely flooded the floor, making the hazard unavoidable. Id. at 518.

Here, the puddle did not pose such a severe risk of harm that the condition should be deemed to have special aspects. The risk of falling a few feet to the floor does not render a condition unreasonably dangerous. As mentioned in Lugo, 464 Mich at 520, "[u]sing a common pothole as an example, . . . [u]nlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." Moreover, the fact that a plaintiff in fact suffered severe harm does not justify a retrospective [*6] conclusion that the condition presented a special aspect. Id. at 518 n 2. Rather, a court is to assess a given risk *a priori* -- i.e., before the incident occurred. *Id.* Likewise, the condition was not unavoidable. Considering the size of the puddle, had plaintiff looked before stepping, she could have easily avoided the hazard, either by walking around it, stepping over it, or moving her vehicle a few feet. Therefore, there is no question of fact that no special aspect existed to impose a duty on defendant despite the condition being open and obvious.

Plaintiff, in arguing to the contrary, again asserts that defendant's employee instructed her to park directly on the hazard and that the puddle was impossible to see from the height of her SUV. According to plaintiff, not only did such circumstances make the danger not readily apparent, but they also made it effectively unavoidable. These arguments are again without merit. As previously discussed, the record does not support plaintiff's claim that the employee instructed her to park directly on the hazard. Further, even assuming that plaintiff could not see the puddle from her SUV while sitting upright, she could have peered sideways outside [*7] the vehicle before stepping down.

Viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact that the condition was open and obvious and that no special aspects existed to render the condition unreasonably dangerous. Accordingly, the trial court erred in denying defendant's motion for summary disposition under *MCR 2.116(C)(10)*.

We reverse. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello

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/s/ Kathleen Jansen

/s/ Richard A. Bandstra

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Carpenter v. Anderson

Court of Appeals of Michigan

July 1, 2010, Decided

No. 291155

Reporter
2010 Mich. App. LEXIS 1808 *; 2010 WL 2630280

JAMES CARPENTER, Plaintiff-Appellant, v COATIS ANDERSON, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Saginaw Circuit Court. LC No. 07-065357-NO

Disposition: Affirmed.

Core Terms

landing, invitee, rug, licensee, premises, trial court, summary disposition, players, unavoidable, basement, moisture, door, stepped, church, stairs, floor, vinyl

Judges: Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

Opinion

PER CURIAM.

In this premises liability case, plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Plaintiff filed suit alleging that on December 16, 2005, he went to defendant's home as a visitor. Plaintiff alleged that after entering the premises he slipped on an invisible liquid on the landing and fell down stairs, sustaining a serious and permanent injury to his shoulder. Plaintiff alleged that defendant negligently failed to maintain his premises in a reasonably safe condition and failed to warn of the unsafe condition of the premises.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), [1] arguing that at all relevant times he had no actual or constructive notice of any defect on his premises, and that any defect that did exist was open and obvious and presented no special aspects that would make it unreasonably dangerous notwithstanding its open and obvious nature. Defendant indicated that on the day plaintiff fell, numerous persons, [*2] including plaintiff, had gathered at defendant's residence for a card game; no one reported the presence of liquid on the landing, and no one other than plaintiff had difficulty walking on the landing or the stairs.

The trial court granted defendant's motion for summary disposition. The trial court declined to decide whether plaintiff was a licensee or an invitee on defendant's premises on the ground that the case could be resolved without making that determination. [2] The trial court found as a matter of law that the hazard giving rise to plaintiff's injuries was open and obvious, and presented no special aspects that made it unreasonably dangerous notwithstanding its open and obvious nature.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition because a genuine issue of material fact existed as to whether the liquid on defendant's landing was open and obvious. We disagree.

We review the trial court's decision on a motion for summary disposition de novo. In reviewing [*3] a motion brought pursuant to MCR 2.116(C)(10), we must review the record evidence and all reasonable inferences

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[1] Subsequently, defendant proceeded under MCR 2.116(C)(10), only.

[2] The trial court noted that were it forced to decide the issue, it would determine that plaintiff was a licensee.

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drawn therefrom in a light most favorable to the nonmoving party, and decide whether a genuine issue of material fact exists. Trepanier v Nat'l Amusements, Inc. 250 Mich. App. 578, 582-583; 649 N.W.2d 754 (2002).

Plaintiff was a social guest at defendant's home. A social guest is a licensee. Stitt v Holland Abundant Life Fellowship, 462 Mich. 591, 596; 614 N.W.2d 88 (2000). [3] A premises owner has a duty to warn an adult licensee of a hidden danger of which the owner knows or has reason to know, if that hidden danger poses an unreasonable risk of harm and the licensee does not know or have reason to know of the danger. A premises owner also has a duty to refrain from wanton and willful misconduct. A premises owner does not owe a licensee a duty of inspection, and has no obligation to prepare the premises for the licensee. Id.

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. Bertrand v Alan Ford, Inc. 449 Mich. 606, 612; 537 NW2d 185 (1995). **[*5]** 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 danger upon casual inspection. Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 474-475; 499 N.W.2d 379 (1993).

The facts of this case, viewed in a light most favorable to plaintiff, showed that plaintiff walked through a thin layer of snow to reach defendant's door, and when admitted to defendant's residence, stepped inside and onto a landing that was covered in vinyl. We conclude that the trial court correctly found that the danger of falling on a vinyl floor while wearing shoes that were wet was open and obvious. Plaintiff, who had lived in Michigan for more than 35 years at the time of the accident, knew or should have known of the danger of stepping onto a vinyl floor--i.e., that water could have accumulated on the floor and that he, himself, could have tracked moisture into the home. The danger of stepping on a vinyl floor during the winter is well known to adults who live in Michigan; therefore, we hold that defendant had no duty to warn plaintiff of the condition. The fact that plaintiff did not observe any **[*6]** of the moisture that was on the landing is irrelevant to the issue of whether the condition was open and obvious. As the *Novotney* Court stated:

> [T]he analysis whether a danger is open and obvious does not revolve around whether steps could have been taken to make the danger more open or obvious. Rather, the equation involved is whether the danger, as presented, is open and obvious. The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? [Novotney, 198 Mich. App. at 474-475.]

We conclude that, with respect to water on a vinyl surface during the winter, it is reasonable to expect that plaintiff, as a licensee, would have discovered the danger. Nor can we conclude that there were any special aspects making the condition unreasonably dangerous or effectively unavoidable despite its open and obvious nature. See Lugo v Ameritech Corp, Inc, 464 Mich. 512, 517-519; 629 N.W.2d 384 (2001). The trial court correctly granted defendant's motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen

/s/ Pat M. Donofrio

Dissent by: SHAPIRO

Dissent

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[3] We cannot conclude that plaintiff in the instant case is analogous to the plaintiff in Manning v Bishop of Marquette, 345 Mich. 130; 76 N.W.2d 75 (1956). In *Manning*, the plaintiff had been playing bingo at a church. Id. at 132. After the bingo game concluded, **[*4]** while the plaintiff was leaving the church property, she was injured when she stepped in a hole and fell to the ground. *Id.* The *Manning* Court held that the plaintiff had been on the church property as an invitee, id. at 137, presumably because she had been at the church for a solely commercial purpose, Stitt, 462 Mich. at 601-602 (describing the facts of *Manning* and observing that the plaintiff in that case had been "on church premises ... for a commercial purpose"). In contrast to the plaintiff in *Manning*, however, plaintiff in the present case specifically testified at his deposition that, in addition to going to defendant's house to play cards, he also "went by [defendant's house] to visit with him." Accordingly, plaintiff admits that he was not on defendant's premises for solely commercial purposes, and that he was actually there as a social guest. Because plaintiff was not on defendant's premises for an essential commercial purpose or in furtherance of defendant's own "commercial business interests," he was merely a licensee. Stitt, 462 Mich. at 604.

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SHAPIRO, J. (*dissenting*).

I respectfully dissent.

First, although I agree with the majority **[*7]** that if plaintiff is a licensee the trial court properly granted summary disposition, I disagree with their decision to make that conclusion. The majority notes that the trial court would have concluded that plaintiff was a licensee and then makes its own conclusion that plaintiff was, in fact, a licensee. The fact is, this is not a decision for the trial court or this Court, but for a jury. "As a general rule, if there is evidence from which invitee status might be inferred, it is a question for the jury." *Stitt v Holland Abundant Life Fellowship, 462 Mich. 591, 595; 614 N.W.2d 88 (2000)*. An invitee is either a public invitee or business visitor, with a business visitor being "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id. at 602*. Under the facts of this case, there is sufficient evidence to indicate that plaintiff may have been an invitee.

Plaintiff went to defendant's residence to participate in a weekly "poker party" held in the basement of defendant's home. The poker games would start on Friday evening and would run until Saturday evening or even Sunday morning. The table **[*8]** only seated seven people, but over the course of the weekend as many as 20 people would participate. Although the players knew one another, this was not a typical, occasional, friendly game. The doorman was paid to make sure no one entered who was not known to the participants. As part of his compensation, the doorman was allowed to sell beer and soda to the participants and retain a profit. According to the doorman and another witness, a percentage of the pots was set aside and split between the host and one of the players. Thus, although the poker game was not a legal business, the host had a significant economic interest in the game. Given that our Supreme Court has held that bingo attendees are invitees, even if the game was illegal, *Manning v Bishop of Marquette, 345 Mich 130; 76 N.W.2d 75 (1956)*, I believe there is more than sufficient evidence for a jury to conclude that plaintiff was an invitee.

Second, although I agree that under *Janson v Sajewski Funeral Home, Inc, 486 Mich. 934; 782 N.W.2d 201 (2010)*, the hazard in this case was open and obvious, I disagree with the trial court's determination that there were no special aspects that made it unreasonably **[*9]** dangerous notwithstanding its open and obvious nature. Again, I believe there is a fact question for the jury as to whether the moisture was unavoidable, creating a special aspect.

Plaintiff alleged that he entered through the side door, which was the designated entrance players were to use because it opened directly to the stairs going down to the basement. To go inside, a player had to step onto the landing inside the door and then proceed to the stairs into the basement. Plaintiff testified that the landing was linoleum floor with no rug or mat to absorb water and that he slipped on something wet which he did not see and does not know what it was. Defendant testified that he did have a rug in place on the landing and the doorman testified that the moisture had built up on the landing that evening, but that a rug was present to make it safe. Several other witnesses testified they remembered a rug, and one witness other than plaintiff testified that there was no rug.

In this case, there was no testimony that the moisture could be avoided. Indeed, the side door was the only entryway available to players and, even if they had used a different entrance, players still had to cross the **[*10]** moisture-covered landing [1] in order to reach the stairs to the basement. Thus, one could not reach the basement without traversing the moisture-covered landing. Such facts are similar to the illustration of special aspects in *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 518; 629 N.W.2d 384 (2001)* of "a commercial building with only one exit for the general public where the floor is covered with standing water. In other words, the open and obvious condition is effectively unavoidable." Here, there was only one possible way for players to enter the basement and that was by walking across the landing, making plaintiff's encounter with the liquid potentially unavoidable. [2]

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[1] There may be a fact question as to whether the moisture was of a quality and amount that was avoidable. However, such a factual dispute has to be resolved by the jury.

[2] Although this Court decided a somewhat similar issue to the contrary in *Joyce v Rubin, 249 Mich App 231, 642 N.W.2d 360 (2002)*, I find the facts distinguishable. In *Joyce*, the plaintiff was removing her personal belongings from her former employer's home when she fell on the slippery sidewalk leading to the front door. *Id. at 233*. The plaintiff alleged that **[*11]** the slippery sidewalk was unavoidable. *Id. at 242*. This Court disagreed, concluding that the plaintiff could have "simply removed her personal items another day or advised [the homeowner] that, if [she] did not allow [the plaintiff] to use the garage door, [the plaintiff] would have to move another day." *Id.* The facts here are substantially different. The player could not elect to come a different day, as the poker games

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Finally, there are factual disputes over whether a rug was present in the landing and whether a rug would have made an invitee safer than no rug. If a rug would not have made invitees safer, then whether a rug was present is irrelevant. However, if a rug would have made an invitee [*12] safer, then a jury must resolve the discrepancies between the various witnesses as to whether a rug was present on the landing.

Given that there are factual issues that require jury resolution as to plaintiff's status as an invitee, the unavoidability of the water on the landing, whether a rug would make invitees safer, and whether a rug was present, I believe that the trial court erred in granting summary disposition and that the majority errs by affirming it.

Accordingly, I would reverse the trial court's grant of summary disposition and remand for a jury trial to (1) determine whether plaintiff was a licensee or invitee; and if plaintiff was an invitee, (2) determine whether the moisture was unavoidable, (3) whether a rug was necessary to keep an invitee safe, and (4) whether a rug was provided.

/s/ Douglas B. Shapiro

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only occurred on specific days. Furthermore, the record indicates that plaintiff was specifically contacted and requested to come--he did not simply decide to show up. Finally, as previously noted, even the use of a different entrance would not have permitted plaintiff to avoid the landing, as the landing was the only way to reach the staircase to the basement. Accordingly, this Court's determination in *Joyce* is not dispositive of the issue of whether special aspects existed in the present case.

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Burlak v. Lautrec

Court of Appeals of Michigan

June 15, 2010, Decided

No. 290616

Reporter
2010 Mich. App. LEXIS 1096 *; 2010 WL 2384929

FRANK BURLAK, Plaintiff-Appellant, v LAUTREC LTD., THORNBERRY APARTMENTS, L.L.C., and THORNBERRY APARTMENTS OPERATING, L.L.C., Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Oakland Circuit Court. LC No. 08-089182-NO.

Core Terms

roadway, premises, crack, concrete, uneven, concrete slab, common area, walking, material fact, driving, genuine, parties, lease

Judges: Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

Opinion

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff tripped and fell over a concrete crack that raised the concrete slab approximately two inches off the roadway. On appeal, plaintiff argues that the trial court should not have granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) because a genuine issue of material fact exists regarding whether the uneven concrete crack was open and obvious and whether special aspects existed. We disagree.

This Court reviews the grant or denial of a motion for summary disposition de novo. Latham v Barton Malow Co, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. A court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* Additionally, this Court considers only that evidence which was properly presented to the trial court in deciding the motion. Pena v Ingham County Rd Comm'n, 255 Mich App 299, 310; 660 NW2d 351 (2003). [*2] Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." Latham, 480 Mich at 111. A genuine issue regarding a material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." Allison v AEW Capital Mgmt, 481 Mich 419, 425; 751 NW2d 8 (2008).

In a premises liability action, the plaintiff must prove that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty caused the plaintiff's injuries; and (4) the plaintiff suffered damages. Kennedy v Great Atlantic & Pacific Tea Co, 274 Mich App 710, 712; 737 NW2d 179 (2007). In general, a premises possessor owes a duty of reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. Lugo v Ameritech Corp, 464 Mich 512, 516; 629 NW2d 384 (2001). But, this duty does not generally encompass removal of dangers that are open and obvious. *Id.*

The test for whether a hazard is "open and obvious" is objective. Corey v Davenport College of Business, 251 Mich App 1, 5; 649 NW2d 392 (2002). [*3] "The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection?" Novotney v Burger King Corp (On Remand), 198 Mich App 470,

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475; 499 NW2d 379 (1993). This means the test is not whether a particular plaintiff should have known the condition was hazardous, but whether a reasonable person in the plaintiff's position would have foreseen the danger. Kennedy, 274 Mich App at 713. Michigan courts have generally held that accidents involving commonly occurring defects, such as differing floor levels and steps, are not actionable unless there is something unusual about the uneven floor or steps. Bertrand v Alan Ford, Inc, 449 Mich 606, 614-615; 537 NW2d 185 (1995).

In looking at the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether the uneven concrete crack in the roadway was open and obvious. Plaintiff admitted that he could see the uneven concrete crack, and he walked by this location at least one hundred times to get his mail from the apartment mailbox. This accident occurred in the middle of the afternoon, and plaintiff stated nothing distracted [*4] him while he was walking to his mailbox. This was a typical uneven concrete crack in the middle of the roadway, and there was nothing unusual or different about this uneven crack that would cause a reasonable person not to expect it. A reasonable person would have been able to see the uneven concrete crack, and, indeed, plaintiff did. It was open and obvious.

Furthermore, special aspects regarding the uneven concrete crack did not exist to preclude the application of the open and obvious doctrine. The special aspects of a risk must be more than merely imaginable or based only on a plaintiff's own idiosyncrasies. Id. at 518 n 2.

In looking at the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether special aspects existed regarding the uneven concrete crack in the roadway. Because plaintiff could have chosen to walk around the uneven concrete crack or watched where he stepped, the uneven concrete crack was not effectively unavoidable. Therefore, the record provided does not raise a question of fact regarding whether the uneven concrete crack was open and obvious, or whether special aspects existed.

Plaintiff further argues that the [*5] statutory duty imposed by MCL 554.139 precludes the application of the open and obvious doctrine in this case. We disagree. Although not properly preserved below, this issue involves statutory interpretation that is a question of law. Auto-Owners Ins Co v Dep't of Treasury, 226 Mich App 618, 621; 575 NW2d 770 (1997). This Court may review questions of law if the facts necessary for resolution of the issue are presented. Laurel Woods Apts v Roumayah, 274 Mich App 631, 640; 734 NW2d 217 (2007). Questions of law are reviewed de novo on appeal. Allison, 481 Mich at 424.

MCL 554.139 provides:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
> (a) That the premises and all common areas are fit for the use intended by the parties.
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

A defendant cannot use the open and obvious doctrine [*6] to avoid liability when he has a statutory duty pursuant to MCL 554.139(1)(a) or (b) to maintain the premises. Allison, 481 Mich at 425 n 2. These statutory duties that arise from the existence of the lease are in addition to the common law duty. Id. at 425. Because a breach of MCL 554.139 would be considered a breach of the lease, any remedy for the breach of the lease terms pursuant to MCL 554.139 would be a contract remedy. Allison, 481 Mich at 425-426. Thus, MCL 554.139 does not preclude the common law duties of a premises owner, but rather, provides additional protection for tenants.

MCL 554.139(1)(a) imposes a duty on the landlord to ensure that "the premises and all common areas are fit for the use intended by the parties." Defendants admit that the private roadway at issue in this case was designed to be both a sidewalk for tenants and a roadway for driving vehicles. Further, defendants admit that the roadway constitutes a "common area" for the purposes of determining duty under MCL 554.139(1)(a). Thus, the only remaining question is whether the roadway in this case was fit for the use intended by the parties. The intended use of a sidewalk is for walking, and, employing a similar [*7] logic, the intended use of a roadway is for driving a vehicle. See Benton v Dart Properties, Inc, 270 Mich App 437, 444; 715 NW2d 335 (2006). The roadway at issue here runs from east to west, and consists of two concrete slabs that lay parallel to each other in sections. Together, these sectional concrete slabs form a typical looking concrete roadway.

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The photographs reveal that the uneven concrete crack in the roadway is in the middle of the roadway, where the concrete slabs meet. In looking at the photographs, it appears that the uneven concrete crack has been formed from the deterioration of a small portion of the edge of the concrete slabs, which also resulted in an approximately two-inch variance between the concrete slabs. However, the overall surface of the roadway appears to be in good repair, with no major cracks or potholes, so, it is suitable for both walking and driving. Because tenants are able to both walk and drive on the concrete slabs forming the roadway, it is fit for its intended use. Thus, defendants have not breached their duty to plaintiff under *MCL 554.139(1)(a)*.

MCL 554.139(1)(b) imposes a duty on the landlord "[t]o keep the premises in reasonable repair . . **[*8]** . ." Our Supreme Court has distinguished "the premises" from "all common areas" and held that *MCL 554.139(1)(b)* applies only to the former. See *Allison, 481 Mich at 431-432*. "Premises" is defined as "'a tract of land including its buildings' or 'a building or part of a building together with its grounds or other appurtenances[.]'" *Id. at 432*, quoting *Random House Webster's College Dictionary* (1997). The *Allison* Court found that parking lots are not part of the premises, but rather, only a "common area." *Id. at 435*. Likewise, a roadway used for walking and driving is not part of the premises because it is a common area of the property that the landlord retains control of and is shared by two or more of the tenants. *Id. at 427*. Because *MCL 554.139(1)(b)* only imposes a duty on landlords to keep the premises in reasonable repair, and not the common areas, it is inapplicable to the roadway in this case. *Allison, 481 Mich at 435*. Thus, defendants had no duty to plaintiff pursuant to *MCL 554.139(1)(b)*. We conclude the record does not raise a material question of fact regarding whether defendants' breached the duties imposed by *MCL 554.139*.

We affirm. As the prevailing parties, defendants may **[*9]** tax costs pursuant to *MCR 7.219*.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis

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As of: February 22, 2017 9:01 AM EST

Malec v. Livonia Mall Merchs. Ass'n

Court of Appeals of Michigan

October 14, 2010, Decided

No. 292989

Reporter
2010 Mich. App. LEXIS 1952 *; 2010 WL 4026095

MARY MALEC, Plaintiff-Appellant, v LIVONIA MALL MERCHANTS ASSOCIATION, INC., d/b/a LIVONIA MALL, LIVONIA MALL MANAGEMENT, L.L.C, d/b/a LIVONIA MALL, and LIVONIA MALL, L.L.C, d/b/a LIVONIA MALL, Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Wayne Circuit Court. LC No. 07-709691-NO.

Core Terms

depression, parking lot, invitee, pothole, severe, argues, unreasonable danger, premises, deep, summary disposition, optical illusion, feet, pit

Judges: Before: ZAHRA, P.J., and TALBOT and METER, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition. We affirm.

This action arises out of injuries sustained by plaintiff when she fell in the parking lot of Livonia Mall over a depression in the asphalt that was at least 15 feet long, seven inches wide and three to four inches deep. The depression ran between two telephones poles and had apparently been excavated and then refilled to some extent with asphalt. On appeal, she argues that this defect was not open and obvious. We disagree.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." Allen v Bloomfield Hills Sch Dist, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. Corley v Detroit Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews "a motion under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable [*2] to the nonmoving party." Latham v Barton Malow Co, 480 Mich 105, 111; 746 NW2d 868 (2008). Moreover, the Court considers only "what was properly presented to the trial court before its decision on the motion." Pena v Ingham County Rd Comm'n, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." Latham, 480 Mich at 111.

"In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiffs injuries, and (4) that the plaintiff suffered damages." Kennedy v Great Atl & Pac Tea Co, 274 Mich App 710, 712; 737 NW2d 179 (2007). Different standards of care are owed depending on plaintiff's relationship to the land. O'Donnell v Garasic, 259 Mich App 569, 573; 676 NW2d 213 (2003). In this case, plaintiff was a business invitee:

> An 'invitee' is 'a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has [*3] been used to prepare the premises, and make [it] safe for [the invitee's] reception.' . . . . The Court of Appeals correctly recognized that invitee status is commonly afforded to persons entering upon the property of

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another for business purposes. [Stitt v Holland Abundant Life Fellowship, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

However, this standard has limits. "A premises possessor is generally not required to protect an invitee from open and obvious dangers." Kennedy, 274 Mich App at 713. The test for open and obvious is an objective one:

> The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]" Because the test is objective, this Court looks not to whether a particular plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his or her position would have foreseen the danger. [*Id.*, citing Novotney v Burger King Corp (On Remand), 198 Mich App 470, 475; 499 NW2d 379 (1993).]

Plaintiff argues that under this objective test, the depression was not open and obvious. She argues that because of **[*4]** an optical illusion effect, the depression appeared to be a grey line on the cement. Further, the objective nature of this optical illusion is evidenced by the testimony of her son, John Malec, who also saw the depression, but believed it to be a grey line. Plaintiff also argues that because John, a reasonable person, also did not see the depression, and because Dr. Terence W. Campbell opined that the generic person would not have seen the depression, it is not open and obvious under the objective test. We disagree.

Under the objective test, the parking lot depression was open and obvious. In Lugo v Ameritech Corp, 464 Mich 512; 629 NW2d 384 (2001), the Court held that a pothole in a parking lot, "is open and obvious and, thus, cannot form the basis of liability against a premises possessor. The condition does not involve an especially high likelihood of injury. Indeed, an 'ordinarily prudent' person, would typically be able to see the pothole and avoid it." Id. at 520. Though, in this case, the defect was a "depression," and not a pothole, per se, the two are similar. Indeed, regardless of cause, both are merely imperfections in pavement, a typical occurrence. Moreover, this depression **[*5]** was at least 15 feet long, seven inches wide, and three to four inches deep, quite a sizable depression, perhaps more easily recognized than a pothole.

Likewise, in Kennedy, the plaintiff fell after stepping on crushed grapes on the floor of a grocery store. The Court held, "[the] plaintiffs own deposition testimony establishes that he would have noticed the potentially hazardous condition had he been paying attention. The plaintiff failed to raise a genuine issue of fact concerning whether the grape residue on which he slipped was open and obvious." Kennedy, 274 Mich App at 714. Similarly, in this case, plaintiff testified that the depression "blended in with the parking lot." After plaintiff fell, she looked around to see what she had tripped on, and "noticed that there was a big--you know, in the pavement, it looked like somebody was digging for something, you know."

Thus, as in *Kennedy*, although plaintiff did not see the defect before sustaining an injury, the defect was ultimately discoverable. "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless **[*6]** he should anticipate the harm despite knowledge of it on behalf of the invitee." Riddle v McLouth Steel Prods Corp, 440 Mich 85, 96; 485 NW2d 676 (1992). A defendant does not owe a duty to an invitee when the defect was unnoticed, but not undiscoverable. "[I]f the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." Bertrand v Alan Ford, Inc, 449 Mich 606, 611; 537 NW2d 185 (1995). As the pothole was open and obvious in *Lugo*, and the grapes were open and obvious in *Kennedy*, so too is the depression at issue here.

Though plaintiff argues, "Dr. Campbell's affidavit states that any generic person unfamiliar with the area would have been stricken by the same optical illusion [as struck plaintiff]," this is not what Dr. Campbell actually stated. In his affidavit, Dr. Campbell concluded, "[t]he manner in which figure and ground merged imperceptivity with each other amounted to an optical illusion for *Ms. Malec*." (Emphasis added.) In *Novotney*, the plaintiff slipped and fell **[*7]** on an unmarked change in elevation on a parking lot surface. Novotney, 198 Mich App at 475-476. At the trial, a safety expert testified that the change should have been marked with paint. Id. at 475. However, the Court held, "the question is . . . whether the ramp was noticeable in its existing condition. Nowhere in his affidavit does the expert opine that the ramp was not noticeable by the ordinary user." Id. at 475-476. Likewise, here, plaintiff misstates the

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content of Dr. Campbell's affidavit. Rather, his affidavit only supports plaintiff's testimony that she herself did not see the depression, and not that the depression could not be seen.

Plaintiff also cites Bialick v Megan Mary, Inc, 286 Mich App 359; 780 NW2d 599 (2009), arguing that, under *Bialick*, plaintiff's perception that the depression was not open and obvious must be given weight when determining whether the open and obvious doctrine applies. However, that case does not benefit plaintiff. In *Bialick*, the plaintiff slipped and fell on an unmarked pool of water in a gas station convenience store. Id., at 360. The defendant argued, and the trial court found, that "wet tiles on a misty day are open and obvious." Id., at 361 n 1. **[*8]** This Court held that there was a genuine question of fact regarding whether the wet floor was open and obvious, and rejected the idea that the drizzly weather outside should have served as a warning to the plaintiff. Id., at 364. Further, in a footnote, the Court stated that while the open and obvious test is objective, the observations made by the plaintiff "are relevant to the court's determination whether there was a hazard." Id. at 364 n 2.

The trial court's ruling in this case does not contradict *Bialick*. Indeed, the trial court did consider the observations and testimony of plaintiff, her son, and Dr. Campbell: "[T]he Court accepts that the depression amounted to an optical illusion for [plaintiff]. However, the test to determine whether a danger is open and obvious is an objective test that is unrelated to the actual perceptions of a particular plaintiff." The court's decision to consider, but ultimately not be swayed by, the testimony of plaintiff is not evidence that her testimony was ignored, or that the open and obvious test was improperly applied.

Plaintiff next argues that the open and obvious doctrine should not apply because special aspects rendered the trench unreasonably **[*9]** dangerous. We disagree.

In the event that a defect is open and obvious, there may still be premises liability if the defect is unreasonably dangerous due to "special aspects" "that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." Lugo, 464 Mich at 517-518. In *Lugo*, the Court cited standing water near the only exit of a building, or a 30-foot pit in a parking lot as examples of defects having "special aspects." The standing water has special aspects, and is unreasonably dangerous, because it represents an unavoidable defect, and the 30-foot pit because, though open and obvious, it represents a significant risk of death or severe injury. *Id.* "In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." Id. at 518-519.

Plaintiff argues that the depression in the parking lot had special aspects rendering it unreasonably dangerous. Plaintiff contends that the depression was both unavoidable, as it was allegedly over 100 feet long, and severely dangerous, as evidenced by the injuries **[*10]** she sustained. She also notes that these special aspects are compounded and foreseeable because customers often carry packages in the parking lot. We disagree.

First, the depression was not unavoidable. Indeed, the plaintiff did not see the depression while entering the store because she took a different route. Plaintiff testified, "[w]hen we came back out [of the store], we took another route, because we went out that door, and we came back the side door." Further, plaintiff's son testified that he did not walk over the depression while entering the store, because on the way out, "[they] were exiting the store at another exit." Therefore, not only was the depression avoidable to customers using the parking lot generally, but also to customers parked in the place where plaintiff's car had been.

Second, the depression did not represent significant risk of death or injury. In a footnote, the *Lugo* Court advised, "[i]t would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm." Lugo, 464 Mich at 519. Rather, **[*11]** the defect must contain "special aspects" causing it to be unreasonably dangerous, independent of plaintiff's particular circumstances. In addition, the *Lugo* Court made clear that its example of a 30-foot pit in a parking lot is unreasonably dangerous not because it is a pit, but because it is 30 feet deep:

> However, typical open and obvious dangers (such as ordinary potholes in a parking lot) do not get [sic] rise to these special aspects. Using a common pothole as an example, the condition is open and obvious and, thus, cannot form the basis of liability against a premises possessor. The condition does not involve an especially high likelihood of injury. Indeed, an "ordinarily prudent" person . . . would typically be able to see the pothole and avoid it.

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> Further, there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury. [*Id. at 520*.]

Thus, even if carrying packages, an ordinarily prudent shopper could detect the depression upon casual examination of the parking lot. In this case, the depression was three to four inches deep, not 30 feet deep, and is **[*12]** therefore more like a pothole than a deep pit. Typical imperfections and potholes in parking lots do not present severe risks of harm. Consequently, this depression does not have special aspects.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael J. Talbot

/s/ Patrick M. Meter

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NETTLE v. KIMCO-CLAWSON 143, INC.

Court of Appeals of Michigan

June 12, 2005, Decided

No. 260494

Reporter
2005 Mich. App. LEXIS 1672 *

SANDRA NETTLE, Plaintiff-Appellant, v KIMCO-CLAWSON 143, INC., Defendant-Appellee.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Oakland Circuit Court. LC No. 2004-056308-NO.

Disposition: Affirmed.

Core Terms

trial court, premises, summary disposition, concrete, sidewalk, insured, slabs, unreasonable danger, plaintiff's claim, genuine issue of material fact, documentary evidence, impose liability, insurance policy, pay damages, deposition, asserting, possessor, coverage, differed, elevated, expenses, pavement, pictures, invitee, argues, hidden, uneven

Judges: Before: Cooper, P.J., and Hood and R.S. Gribbs *, JJ.

Opinion

PER CURIAM.

In this premises liability case, plaintiff Sandra Nettle appeals as of right from the circuit court's orders granting defendant Kimco-Clawson 143, Inc. summary disposition. We affirm. This case is being decided without oral argument pursuant to *MCR 7.214(E)*.

Plaintiff was shopping at a strip mall owned by defendant when she tripped and fell on a sidewalk on the premises. Plaintiff alleged that she caught her toe between two slabs of concrete which differed in height by approximately one-quarter of an inch. The trial court dismissed plaintiff's negligence claim, finding that the condition of the sidewalk was open and obvious and that no special aspects rendered the sidewalk unreasonably dangerous. The trial court also dismissed plaintiff's claim seeking reimbursement [*2] from defendant, pursuant to its insurance policy.

This Court reviews a trial court's determination regarding a motion for summary disposition de novo. [1] A motion under *MCR 2.116(C)(10)* tests the factual support of a plaintiff's claim. [2] [*3] "In reviewing a motion for summary disposition brought under *MCR 2.116(C)(10)*, we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." [3] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. [4]

---

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] *MacDonald v PKT, Inc, 464 Mich 322, 332; 628 NW2d 33 (2001)*.

[2] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc, 238 Mich. App. 394, 397; 605 N.W.2d 685 (1999)*. The trial court did not specify the subrule upon which its grant of summary disposition was based. However, as the trial court relied on the documentary evidence submitted, we treat the motion as one under *MCR 2.116(C)(10)*.

[3] *Singer v American States Ins, 245 Mich. App. 370, 374; 631 N.W.2d 34 (2001)*.

[4] *MacDonald, supra at 332*.

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I. Open and Obvious Defect

Plaintiff argues that the trial court erred in concluding that the irregularity in the pavement was an open and obvious condition. We disagree.

> "The general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk."
>
> A special aspect exists when the danger, although open and obvious, is unavoidable or imposes a "uniquely high likelihood of harm or severity of harm." Pursuant to *Lugo* [*v Ameritech Corp*], a court must "focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff" or other idiosyncratic factors related to the particular plaintiff. [5]

[*4] Plaintiff asserts that the uneven condition of the two slabs of concrete was a hidden danger. Plaintiff points to the deposition testimony of defendant's agents asserting that they repeatedly failed to discover the elevated concrete despite continuous inspections of the property. Based on this evidence, plaintiff arguably created a question of fact that this condition was not open and obvious.

However, plaintiff has not established that, even if the condition was hidden, the sidewalk was so dangerous as to impose liability. This Court and the Michigan Supreme Court have found that differing surface levels, such as steps and uneven pavement, "are 'not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous.'" [6] The pictures submitted into evidence show that there are noticeable gaps between the slabs and there are several cracks in the concrete. A review of these pictures clearly shows that none of these conditions appear dangerous in any way. A small, unnoticeable rise in elevation between two slabs of concrete on a generally imperfect walkway is not an unusual or dangerous condition that would trigger liability. **[*5]** Accordingly, the trial court properly dismissed plaintiff's claim.

II. Insurance

Plaintiff argues that defendant's insurance policy obliged defendant to cover her medical expenses from the fall. We disagree. Defendant was insured under a policy entitled "*Liability* Policy." The policy provides for the payment of medical expenses for a "bodily injury" arising "out of premises or operations for which [defendant is] afforded bodily injury *liability* coverage." Such coverage is available when "the insured becomes legally obligated to pay [damages] by reason of *liability* imposed by law or assumed under an insured contract." The trial court properly determined that defendant was not liable for the plaintiff's **[*6]** injury. Furthermore, plaintiff has not alleged that defendant assumed a contractual duty to pay damages to her. Accordingly, the trial court properly determined that defendant had no duty to pay damages to plaintiff simply because it was insured.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

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[5] *Bragan v Symanzik, 263 Mich. App. 324, 331-332; N.W.2d (2004)*, quoting *Lugo v Ameritech Corp, 464 Mich. 512, 517-519, 523-524; 629 N.W.2d 384 (2001)*.

[6] *Weakly v Dearborn Hgts, 240 Mich. App. 382, 385; 612 N.W.2d 428 (2000)*, remanded on other grounds ***463 Mich. 980 (2001)***, quoting *Bertrand v Alan Ford, Inc, 449 Mich. 606, 614; 537 N.W.2d 185 (1995)* (emphasis in original).

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EXHIBIT 1F

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

JENNIFER BUHL,

Plaintiff,

v.

CITY OF OAK PARK,

Defendant.

Case No. 2017-157097-NI
Hon. Judge Phyllis McMillen

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PLAINTIFF, JENNIFER BUHL'S, RESPONSE TO DEFENDANT'S RENEWED MOTION FOR SUMMARY DISPOSITION

NOW COMES Plaintiff, Jennifer Buhl, through her attorney, Michigan Advocacy Center, PLLC by Matthew Bedikian, and in response to Defendant's Motion for Summary Disposition, states:

1. Plaintiff admits that this case stems from a slip and fall that occurred on the Defendant's exclusively controlled sidewalk.

2. Plaintiff admits her complaint alleges general negligence that Defendant's sidewalk contain a vertical discontinuity, as well as alleging violation of the Defendant's statutory duty to keep its sidewalks in reasonable repair and in a condition reasonably safe and fit for travel pursuant to MCL 691.1402(a).

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3. Plaintiff admits that Defendant recites its averments accurately.

4. Plaintiff denies the Defendant's assertion that the condition was open and obvious.

5. Plaintiff denies Defendant's assertion that Plaintiff cannot prove the elements of her claim. Plaintiff possesses pictures showing a vertical discontinuity of more than 2 inches, which rebuts the presumption that Defendant maintained the sidewalk in reasonable repair. Additionally, Plaintiff has medical records to support her injuries were proximately caused by the Defendant's failure to maintain the sidewalk in reasonable repair and safe and fit for travel. Further, discovery has not yet begun on this matter and Plaintiff should be able to conduct discovery.

6. Plaintiff admits in part and denies in part. The Defendant is not required to take extraordinary measures to warn or keep people safe. The Defendant has a statutory duty to maintain the sidewalk in reasonable repair, which it did not.

7. Plaintiff admits.

8. Plaintiff denies. Public Act 419 (2016) did not go into effect until January 4, 2017. That law does not have retroactive effect and does not bar Plaintiff's claims as her injuries were sustained in May of 2016.

9. Plaintiff denies. Defendant's pictures do not show the sidewalk as it existed on the date of the accident. (See Exhibit 1 – Picture of Road from September of 2016). Further, Defendant misleads this Honorable Court by attaching pictures that were not marked by Plaintiff at her Deposition. Defendant's pictures differ from Plaintiff's pictures in that in 2016 the large tree in that area was still standing. Defendant must have cut down the tree to

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assist in the repair of the sidewalk, or to limit the root system underneath the sidewalk which undoubtedly caused the sidewalk to crack and rise in certain areas.

10. Plaintiff denies. Defendant cannot assert the open and obvious defense as it has violated a statutory duty. [T]he "open and obvious" defense is inapplicable here, because plaintiff's negligence theory involves the violation of defendant's statutory duty. *Walker v City of Flint*, 213 Mich App 18, 22; 539 NW2d 535 (1995).

11. Plaintiff denies. Michigan is a notice pleading state and Plaintiff need not plead with particularity. In Michigan the primary function of a pleading 'is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.' *Thomai v MIBA Hydramechanica Corp*, 303 Mich.App. 196, 212; 842 N.W.2d 417 (2013), rev'd on other grounds by 496 Mich. 854 (2014), quoting *Stanke v State Farm Mut Auto Ins Co*, 200 Mich.App. 307, 317; 503 N.W.2d 758 (1993). Therefore, a complaint need only contain a statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.] *Kincaid v Cardwell*, 300 Mich.App. 513, 529; 834 N.W.2d 122 (2013), quoting MCR 2.111(B)(1) (alteration in original). If this Honorable Court is not satisfied with Plaintiff's pleadings, then Plaintiff is happy to amend her complaint in order to comply with the Court's ruling.

12. Admit.

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WHEREFORE, for the above-stated reasons, Plaintiff respectfully requests that the Defendant's motion for summary disposition be denied.

Dated: August 2, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
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Southfield, MI 48075
248-957-0456
matt@miadvocacycenter.com

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

JENNIFER BUHL,

Plaintiff,

v.

CITY OF OAK PARK,

Defendant.

Case No. 2017-157097-NI
Hon. Judge Phyllis McMillen

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BRIEF IN SUPPORT

STANDARD OF REVIEW UNDER MCR 2.116(C)10.

Defendant's motion relies upon MCR 2.116(C)(10). A trial court may grant summary disposition under this rule only when the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). All affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties must be viewed in a light most favorable to the party opposing the motion. *Id.* A nonmoving party must set forth specific facts showing that a genuine issue of material fact exists. *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party,

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leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003)(citations omitted).

In the instant case, Plaintiff submits that summary disposition of Plaintiff's negligence claim is not appropriate where the "open and obvious" doctrine is not available to Defendant, since Defendant violated its statutory under MCL 691.1402(a). Further, summary disposition is not appropriate where, at the very least, reasonable minds could differ as to whether the sidewalk at issue was in reasonable repair.

STATEMENT OF FACTS

Defendant, City of Oak Park, maintains exclusive jurisdiction over the sidewalk adjacent to Nine Mile Road in Oak Park, MI where the incident occurred. On May 4, 2017 Plaintiff, Jennifer Buhl, got out of her husband's car off Nine Mile Road and was attempting to walk across the sidewalk adjacent to Nine Mile Road in order to enter Trend Express Market located at 8580 W. Nine Mile Rd. Oak Park, MI 48237. As she exited the car and approached the market, Plaintiff tripped and fell on the uneven sidewalk. (Exhibit 1 – Picture of the Trend Express and Sidewalk in Controversy dated September 2016).

Defendant in its statement of facts misleads this Honorable Court on several occasions. Defendant asserts that Plaintiff indicated she had been to this store many times. However, Defendant failed to include that Plaintiff testified she had always used the side entrance to the trend express and never the entrance directly off nine-mile rd. (Exhibit 2 – Deposition of J. Buhl, page 8 lines 4 through 16). In fact, Plaintiff first used the front entrance to Trend

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Express on the date the accident occurred. (Exhibit 2 – Deposition of J. Buhl, page 8 lines 4 through 16).

Defendant next indicates when Plaintiff exited the vehicle she noticed a defect in the sidewalk. Plaintiff indicated that she noticed the crack in the cement block, but did not notice the dip at the end of the cement block, which is where she indicated she fell. (Exhibit 2 – Deposition of J. Buhl, page 10 lines 16 through 23).

Defendant next intimates that Plaintiff was not paying attention to sidewalk and did not watch her step as she moved towards the store. Plaintiff clearly testifies that as she exited the vehicle she looked down and noticed the crack in the sidewalk. Because it was raining and dark out as she moved towards the store, she did not see the dip at the end of the cement block and tripped as she stepped on the dip. (Exhibit 2 – Deposition of J. Buhl, page 14 lines 7 through 25 and page 15, lines 15-21).

Defendant next indicates photos of the area attached as exhibits in its motion is an accurate depiction of the sidewalk as it existed that day. Exhibit 1 attached in Plaintiff's response shows the area as it existed in May of 2016 with the exception that on the date the accident occurred, it was raining and the area around the sidewalk and tree was dark. (Exhibit 2 – Deposition of J. Buhl, page 20 lines 3 through 11). Defendant's attached exhibits do not even properly show the correct angle of Plaintiff's view of the sidewalk as she exited her husband's vehicle prior to her fall. (See Exhibit 3 – Picture of Sidewalk from Plaintiff's Perspective.)

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The fall was witnessed by Plaintiff's husband, who was waiting in the car. Plaintiff went home and iced her ankle, but the swelling and pain would not subside so she went to the Emergency Room for treatment. At the ER, she was diagnosed with an ankle fracture. EMS records not attached to the instant motion response reflect that Plaintiff was experiencing pain and swelling in the left ankle.

Plaintiff was seen at Beaumont's emergency center where she was treated and released after a physician evaluation to determine whether there was a fracture. Plaintiff followed up with Dr. Kevin Grant, an orthopedic surgeon, and underwent a closed reduction and casting at that time. Pursuant to MCL 691.1404, Plaintiff's counsel sent notice of the injury to the City on June 28, 2016. The City denied liability, thus giving rise to Plaintiff's complaint.

ARGUMENT

1. PLAINTIFF'S COMPLAINT SATISFIES MI NOTICE PLEADING RULES

Michigan is a notice pleading state and Plaintiff need not plead with particularity. In Michigan the primary function of a pleading 'is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.' *Thomai v MIBA Hydramechanica Corp*, 303 Mich.App. 196, 212; 842 N.W.2d 417 (2013), rev'd on other grounds by 496 Mich. 854 (2014), quoting *Stanke v State Farm Mut Auto Ins Co*, 200 Mich.App. 307, 317; 503 N.W.2d 758 (1993). Therefore, a complaint need only contain a statement of the facts, without repetition, on which the pleader relies in stating the cause of

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action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.] *Kincaid v Cardwell*, 300 Mich.App. 513, 529; 834 N.W.2d 122 (2013), quoting MCR 2.111(B)(1) (alteration in original).

Plaintiff's complaint contains facts that state Plaintiff's cause of action and reasonably informs the Defendant of the nature of Plaintiff's claim. The omission of the incident date itself should not act as a bar or critical omission that would deny Plaintiff her day in court. Further, the complaint itself states that Plaintiff sent proper notice to Defendant on June 28, 2016.

Plaintiff does understand that the omission of an incident date changes Defendant's defenses. Had this incident occurred after January 4, 2017 when Public Act No. 419 took effect, Defendant would have available the open and obvious defense. Since this incident took place on May 4, 2016 the act has no effect on Plaintiff's claims.

If this Honorable Court is not satisfied with Plaintiff's pleadings, then Plaintiff is happy to amend her complaint in order to comply with the Court's ruling and/or amend the complaint to include the incident date.

2. PUBLIC ACT 419 (2016) IS NOT RETROACTIVE AND DEFENDANT CANNOT ASSERT DEFENSES CONTAINED IN THE ACT.

In in *Sufi v City of Detroit*, unpublished COA op docket no. 312053 decided 2/17/15 (attached as Exhibit 4), the Court held that the 2012 amendment to MCL 691.1402a concerning the presumption of maintenance was not retroactively applicable. At slip op page 6 the Court explained that statutes are normally given prospective effect unless the Legislature has demonstrated a contrary intent:

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> As defendant seems to recognize, the amended version of MCL 691.1402a is inapplicable to plaintiff's claims because 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. (emphasis added)

Public Act 419 of 2016 amended MCL 691.1402a to grant the Open and Obvious defense to municipalities. Because the 2016 amendment was ordered to take immediate effect and "omit[s] any reference to retroactivity," it would appear that the 2016 amendment, like the 2012 amendment, is prospectively applicable only. And while the Court of Appeal's decision in *Sufi* was not published and binding as precedent, it is a persuasive ruling showing that an amendment does not apply when a claimant is injured prior to the amendment and the amendment does not specifically indicate it is retroactive. Further, *Moraccini v City of Sterling Heights*, 296 Mich App 387, 389; 822 NW2d 799 (2012) is still good case law. The Court stated that "[M]CL 691.1402a was amended by 2012 PA 50, effective March 13, 2012. The amended version of the statute, which limits its application solely to 'a sidewalk ... installed adjacent to a municipal, county, or state highway,' ***is not applicable here, considering the effective date of the amendment and the earlier date of the incident.***

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In *Macklis v Farm Bureau General Ins Co*, unpublished COA op docket no. 330957 decided 4/25/17 (attached as Exhibit 5), the Court of Appeals held that the statutory amendment did not apply since Plaintiff's claim vested prior to the amendment even though Plaintiff's complaint was filed after the effective date of the amendment. The case involved Personal Injury Protection claims arising out of a January 2014 motor vehicle accident. The Michigan Assigned Claims Plans sought summary disposition arguing plaintiff's claim failed as a matter of law under the current text of No-Fault Act § 3113(a) as amended by 2014 PA 489 effective January 13, 2015. The trial court agreed, reasoning that the post-amendment statute applied because plaintiff had filed suit after the amendment's effective date.

The Court of Appeals reversed. At slip op page 3 the Court of Appeals held a statute operates prospectively from its enactment date unless the Legislature has indicated an intent for retroactive application:

> 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, [footnote omitted] 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 NW2d 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 NW2d 193 (2013). However, ***a statute that affects or creates a substantive right is not remedial and therefore not retroactive absent a clear***

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> ***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). (emphasis added)

And at slip op page 4 the Court held that because the 2014 amendment to § 3113(a) decreased the rights of those otherwise entitled to PIP benefits, the amendment was prospectively applicable only, *i.e.*, it applies only to those injured after its effective date:

> 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 ADTransport Express, Inc*, 486 Mich 50, 58; 782 NW2d 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 NW2d 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.*** (emphasis added)

Plaintiff's "claims accrued" when she was injured, rather than on the date Plaintiff filed suit. Accordingly, the amended statute that became effective after Plaintiff's date of injury is inapplicable.

3. THE DEFENDANT FAILED TO KEEP THE SIDEWALK IN REASONABLE REPAIR PURSUANT TO MCL 691.1402(A). THEREFORE, DEFENDANT CANNOT USE THE OPEN AND OBVIOUS DEFENSE TO DEFEND AGAINST PLAINTIFF'S CLAIMS.

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440 Mich 85, 96; 485 NW2d 676 (1992). An invitee is reasonably expected to discover a condition if "an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. "This is an objective standard, calling for an examination of 'the objective nature of the condition of the premises at issue.'" *Id.* at 461, quoting Lugo, 464 Mich at 523-524.

Plaintiff testified that the dip in the cement slab was not readily visible to her. Based on her view of the cement slab as she approached from her vehicle she could see the crack in the cement, but not the dip at the end of the cement slab. She testified that it was her first time using the front entrance to the Trend Express and that her view was blocked by debris. Further, it was dark and raining that day. An ordinary person when trying to enter a store when it is raining and dark will not spend more than a few seconds to scan the area they are traversing; rather, they will look to reach their inside destination quickly.

"A party seeking summary disposition on the grounds that a condition was open and obvious, and thus no duty was owed to the injured plaintiff in a slip and fall action, has the initial burden to show that the allegedly hazardous condition was in fact open and obvious." See Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). Defendant has not satisfied this burden. Defendant shows pictures of the area that are not representative of the area as it existed in May of 2016, when the incident occurred. Further, the pictures supplied by Defendant do not depict the exact angle that Plaintiff was looking when she exited her husband's vehicle. The photos are general photos of the area as it exists now. Clearly when looking at the cement slab from the entrance of Trend Express to nine-mile road, one can see the dip. However, that is not the angle the Plaintiff saw when she proceed

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to cross the sidewalk.

In *Price v Kroger Co of Michigan*, 284 Mich App 496 (2009), *lv den* 485 Mich 1015 (2009), plaintiff tripped over a one-inch wire protruding from a metal basket at ankle height. The trial court granted SD on Open and Obvious grounds, but the Court of Appeals majority reversed and remanded. At pages 501-502 the Court reasoned that the wire's small size, its location near the floor and the basket's bulk presented a factual issue as to whether a casual inspection would have revealed the wire:

> We conclude that plaintiffs produced "sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the one-inch-long, ankle-level wire. *Novotney* [*v Burger King Corp (On Remand)*, 198 Mich App 470 (1993)], *supra* at 475.The evidence of record establishes that neither plaintiff Terri Price nor defendant knew that a wire protruded from the bin until after plaintiff fell. ***Given the extremely small size of the offending barb and its location immediately adjacent to the wire bin at ankle level, we reject the circuit court's conclusion that, as a matter of law, plaintiff should have discovered it "upon casual inspection" of the bin.*** 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 Ridge's failure to detect the anomaly, notwithstanding her greater ability and opportunity to examine the bin before placing it in an area of the store accessible to shoppers like plaintiff.
>
> In conclusion, because the record gives rise to a material question of fact regarding whether the danger posed by the protruding wire qualified as open and obvious, a jury must make this factual determination. (bracketed matter and emphasis added)

Like in *Price*, the testimony of Plaintiff, the conditions that existed that day, and Plaintiff's view of the dangerous condition should be enough evidence to create a genuine issue of material fact on whether an ordinary user upon casual inspection would have discovered the dip.

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WHEREFORE, for the above-stated reasons, Plaintiff respectfully requests that the Defendant's motion for summary disposition be denied.

Dated: August 2, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

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PROOF OF SERVICE

The undersigned certifies she served a copy of the foregoing document(s) with the Oakland County Circuit Court using the Court's (Efile and service) option, which will send notification of such filing to the individuals listed on the Case Service List, on **August 2, 2017.**

/s/ Diane Harrison

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Exhibit 1

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Google Maps 8580 W Nine Mile Rd

Image capture: Sep 2016 © 2017 Google United States

Oak Park, Michigan

Street View - Sep 2016

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Exhibit 2

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

JENNIFER BUHL,

Plaintiff,

Case No:17-157097-NI
Hon. Phyllis McMillen

-vs-

CITY OF OAK PARK,

Defendant.
_____/

DEPOSITION OF JENNIFER BUHL

Taken by the Defendant on the 20th day of June 2017, at the Law Office of Michigan Advocacy Center, 2000 Town Center, Suite 1900, Southfield, Michigan at 2:10 p.m.

APPEARANCES:

For the Plaintiff: MR. MATTHEW E. BEDIKIAN (P75312)
Michigan Advocacy Center PLLC
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Southfield, Michigan 48075
248-957-0456

For the Defendant: MR. JOHN J. GILLOOLY (P41948)
MR. THOMAS D. BEINDIT (P81133)
Garan Lucow Miller
1155 Brewery Park Blvd.
Suite 200
Detroit, Michigan 48207
313-446-5501

REPORTED BY: Amy Bertin, CER 3871
Certified Electronic Recorder
586-783-0060

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* * *

EXHIBITS:		IDENTIFIED
DX#1	Photograph	04
DX#2	Photograph	04
DX#3	Photograph	04
DX#4	Photograph	04
DX#5	Photograph	04
DX#6	Complaint	04
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* * *

1 Southfield, Michigan
2 Tuesday, June 20, 2017 - 2:10 p.m.
3 JENNIFER BUHL
4 HAVING BEEN CALLED BY THE DEFENDANT AND SWORN:
5 EXAMINATION
6 BY MR. GILLOOLY:
7 Q Good afternoon.
8 A Good afternoon.
9 Q My name is John Gillooly. I'm an attorney. I
10 represent the City of Oak Park.
11 A Okay.
12 Q Will you please tell us your full legal name?
13 A Jennifer Lorainne Buhl.
14 MR. GILLOOLY: Let the record reflect that this is
15 the deposition of Jennifer Lorainne Buhl taken
16 pursuant to Notice and at the order of Oakland County
17 Circuit Court Judge Phyllis McMillen.
18 BY MR. GILLOOLY:
19 Q Do you spell Lorraine, L-O-R-R-A-I-N-E?
20 A L-O-R-A-I-N-N-E.
21 Q N-N-E. Thank you.
22 Ms. Buhl, as I introduced myself, my name is John
23 Gillooly. To my right is an attorney at our firm
24 Thomas Beindit who's helping me with this case.
25 I'm here to ask you a series of questions about an

1 incident that occurred in the city of Oak Park.
2 A All right.
3 Q A couple very easy but really important ground rules.
4 I want to make sure that we're on the same page before
5 I ask any additional questions and those are these.
6 Please use words to answer my questions. Please
7 do not nod your head, shrug your shoulders or say uh-
8 uh or uh-huh because the court reporter to your left
9 and my right is literally taking down every word that
10 we say in this room until we're done. Okay?
11 A All right.
12 Q And if you don't completely understand what I'm
13 asking, if you don't understand the words I'm using,
14 if you can't hear me, if the question's confusing or
15 if you just don't get it, so to speak, you can stop me
16 as many times as you want during the deposition and
17 ask me to repeat, rephrase and I'll be more than happy
18 to do it until you understand the question. Okay?
19 A All right.
20 Q If you don't ask me to repeat or rephrase and you just
21 answer the question, I'm going to assume that you've
22 understood the question asked and that you've given me
23 a truthful and complete answer. Okay?
24 A All right.
25 (Documents marked for identification as

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1 Defendant's Deposition Exhibit Numbers 1 through
2 9.)
3 BY MR. GILLOOLY:
4 Q Good. This will not take long.
5 Ms. Buhl, where do you currently live?
6 A 24311 Ithaca, Oak Park, Michigan 48237.
7 Q And how long have you lived in the city of Oak Park?
8 A For two years now.
9 Q Have you ever had any contact with any law enforcement
10 officer from the city of Oak Park for any reason?
11 A No.
12 Q Any plans on moving from the Ithaca Street address?
13 A Yes.
14 Q Where do you plan on moving?
15 A I'm not sure yet. We're actually looking for a bigger
16 house.
17 Q And when you say we, who's we?
18 A Me and my husband and my children.
19 Q And what's your husband's name?
20 A Scott.
21 Q And what are your -- how many children do you have?
22 A I have six children.
23 Q Are they all with Scott?
24 A Yes.
25 Q I want to ask you about an incident that occurred on a

Page 6

1 sidewalk, so to speak, in the city of Oak Park. And
2 did you -- were you involved in a personal injury
3 occurrence on Nine Mile Road in Oak Park?
4 A Yes.
5 Q Was it in front of a store?
6 A Yes.
7 Q What was the name of the store that the incident
8 incurred in front of?
9 A I believe it's called Trend Express.
10 Q T-R-E-N-D Express?
11 A Yes.
12 Q And what kind of store is that?
13 A A party store.
14 Q And is it located, if you know, at 8580 West Nine Mile
15 Road?
16 A I do not know the exact address.
17 Q You had been there before?
18 A Yes.
19 Q When did the incident that forms the basis of this
20 lawsuit occur? Give me the month, the day and then
21 the year, if you know.
22 A May 4th and it was last year.
23 Q May 4th, 2016?
24 A Yes.
25 Q And you had been to that store before that time;

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1 correct?
2 A Correct. Yes.
3 Q You had been there many times before; correct?
4 A Yes.
5 Q On May 4, 2016, did you go to the store at about 4:30
6 in the afternoon that day?
7 A Around about that time. Correct.
8 Q And did your husband pull up to the front entranceway
9 of the store off of Nine Mile Road?
10 A Yes.
11 Q And did you get out of the passenger side of the car?
12 A Yes.
13 Q Did he pull his car up to the curb?
14 A Yeah. All the way up.
15 Q So did you have to step into the street in order to
16 get out of the car?
17 A Actually, it was so close that I just got off, right
18 off on to the curb. I could walk right on to the curb.
19 Q So you walked right up on to the curb and the
20 sidewalk, so to speak?
21 A Correct.
22 Q Did anyone else get out of the car with you?
23 A My husband did not right away but he did after.
24 Q Okay. After you fell?
25 A After I fell.

Page 8

1 Q When you first got out of the car, did anyone else get
2 out of the car with you?
3 A No.
4 Q You had gotten out of the car in front of that store
5 numerous times before in the same location; correct?
6 A Not in the same location. I parked on the side of the
7 building.
8 Q Had you ever gotten out of the car in that location
9 before?
10 A He's never parked there so, no.
11 Q Had you ever used the front doors of that store to get
12 in the store?
13 A Just the side door, always the side door. This was
14 the first time we used the front.
15 Q So that's the first time ever you used the front door?
16 A Yeah. I believe so. Yes.
17 Q You believe so.
18 You had been there within three days of this
19 incident before. Did you go to that store at least
20 once or twice a week, would you say that's fair?
21 A Not really. It was just like a once in a while thing.
22 We have a store closer to our house, so we don't
23 really go there too much.
24 Q When you first got out of the car, who was blocking
25 your view of the sidewalk?

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1 A Nobody was blocking the view of the sidewalk.
2 Q Were there any animals blocking your view of the
3 sidewalk?
4 A There was no animals.
5 Q Any fixtures blocking your view of the sidewalk?
6 A There was just debris, like there's debris.
7 Q What kind of debris was out there that day?
8 A Like cigarette butts, you know, paper, typical city
9 stuff on the sidewalk.
10 Q But there was nothing blocking your view of the
11 sidewalk going into the store, was there?
12 A No. No. It was raining, it was kind of darker on the
13 darker end so that would have been only --
14 Q Oh. It was raining?
15 A It was raining.
16 Q And did you review the Complaint that you filed before
17 it was filed in Oakland County Circuit Court? I'm
18 going to show you what's been marked as Deposition
19 Exhibit 6.
20 A Okay.
21 Q Have you ever seen that before?
22 A No. I've never seen this paper.
23 Q Okay. Hand it back to me.
24 I'm going to read you one of the paragraphs and
25 just so you know I'm reading accurately I'm going to

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1 read upside down in front of you. But it's paragraph
2 seven. And you state, "The condition of the sidewalk
3 has deteriorated over time and was severely in need of
4 maintenance, repairs and resurfacing or
5 reconstruction."
6 Did I read that correctly?
7 A There was a crack in the sidewalk.
8 Q I didn't ask you that. Did I read that correctly?
9 That "The condition of the sidewalk has deteriorated
10 over time and was severely in need of maintenance,
11 repairs and resurfacing or reconstruction."
12 Did I read that correctly?
13 A You read that correctly. Yes.
14 Q How did you know that at that point in time? How did
15 you know that it had been deteriorating over time?
16 A I seen a crack in the sidewalk, there's a big crack in
17 the sidewalk.
18 Q So had seen that before your fall?
19 A Yes. Yes.
20 Q So you knew that there was a condition with regard to
21 the sidewalk before you fell that day?
22 A Yes. I didn't see the dip but I seen the crack in the
23 sidewalk.
24 Q And the crack of the sidewalk as I'm going to show you
25 in Deposition Exhibit 1, one of the cracks goes very

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1 close to the dip; correct?
2 A Yes. Correct.
3 Q Does that photograph depict the area of the fall
4 accurately on the day you fell? That's a photograph
5 that was attached by your attorney to his brief.
6 A Correct.
7 Q So that photograph accurately depicts the area of your
8 fall on May 4, 2016?
9 A Correct.
10 Q Was there anything whatsoever blocking your view of
11 that area of concrete on May 4, 2016, anything?
12 A Just cigarette butts. I mean, things like that. I
13 mean, there's a couple that were there.
14 Q There were cigarette butts blocking your view of this?
15 A I mean, it wasn't blocking. It was obviously, I could
16 see the crack in the sidewalk but there were cigarette
17 butts around there in the area.
18 Q And tell me what you reviewed. I don't want to know
19 what you talked about with your attorney today but
20 what did you physically look at if you prepared for
21 your deposition with your attorney? Did you look at
22 anything? Did you look at some pictures today?
23 A He showed me pictures.
24 Q Yeah. And was this one of the pictures he showed you,
25 Deposition Exhibit 1?

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1 A I believe so.
2 Q Okay. And I'm going to show you another one because
3 you keep mentioning cigarette butts. I'm going to
4 show you what's been marked, I'm sorry, as Deposition
5 Exhibit 9. That's another photograph that was taken
6 by your attorney or at the request of your attorney.
7 Have you seen that picture before?
8 A No.
9 Q Do you wear glasses?
10 A Yes.
11 Q Were you wearing your glasses on the date of the
12 incident?
13 A Yes.
14 Q What do you wear glasses for?
15 A I have astigmatism.
16 Q Describe your health at the time of the incident.
17 Were you in good health?
18 A Yes.
19 Q Were you taking any medications that day that would
20 affect your ability to walk?
21 A No.
22 Q Can you describe the weather conditions at the time of
23 the incident?
24 A It was raining.
25 Q Can you describe the types of shoes that you wore?

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1 A I had tennis shoes on.
2 Q Were you carrying anything with you at the time?
3 A No.
4 Q Were you on the phone at the time of the incident?
5 A No.
6 Q Did you have a cell phone with you at the time of the
7 incident?
8 A No.
9 Q The Complaint -- strike that.
10 I want to show you what's been marked as
11 Deposition Exhibit 1. There's a vehicle, and this is
12 a photograph that was supplied by your attorneys in a
13 brief. I don't want to suggest that this is your
14 vehicle or someone's but do you know whose vehicle
15 this is depicted in Exhibit 1?
16 A No, I do not.
17 Q Is this the approximate area where your husband's
18 vehicle was parked on May 4, 2016 when he dropped you
19 off in front of the party store?
20 A Yeah. It might have been up further a little bit.
21 Q Up further and maybe a little closer to the curb cut
22 area to allow you to get out right on to the curb?
23 A Maybe just a touch.
24 Q So when you open the door to get out, did you look
25 where you were going?

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1 A Yes. I was going into the store.
2 Q And did you look down at the condition of the sidewalk
3 where you were walking while you walked?
4 A For a quick second. But, obviously, I pay attention
5 to where I'm going.
6 Q Okay. Good.
7 So as you looked down for a quick second at the
8 sidewalk as soon as you got out of the car, what did
9 you see?
10 A The sidewalk. I didn't, wasn't really paying
11 attention. I mean, I seen farther up that there was a
12 crack, obviously, but didn't -- just was walking into
13 the store from then on.
14 Q So you did see the crack shortly after you got out of
15 the car; correct?
16 A Yes. Yes.
17 Q And did you step over the crack?
18 A I did walk over it but I didn't know there was that
19 dip.
20 Q And what do you mean when you say that there was a
21 dip?
22 A It was a dip. I mean, where I fell the dip, my foot,
23 like it flipped over and it kind of twisted into that.
24 Q You rolled your ankle on it?
25 A Yes. Yes.

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1 Q So is the dip depicted in that picture in Exhibit 1
2 anywhere?
3 A Yes. It's like right through here.
4 Q I'm sorry. Okay. Where your thumb is. Put an X
5 where you believe the dip is using my blue pen,
6 please. And you can circle it if you like.
7 A Like right around about that. I mean, I'm not perfect
8 but.
9 Q So generally speaking this is the dip where the
10 cigarette butts are that caused you to fall?
11 A Somewhere right around that area, yes.
12 Q And you were walking from the street over the dip as
13 you describe it, so to speak; correct?
14 A Yes.
15 Q And you said you saw the crack as you got out of the
16 car and stepped --
17 A Yes.
18 Q -- over it. Why didn't you see the dip?
19 A It wasn't really visible to me. I mean, I was just
20 kind of paying attention to the store and it was
21 raining. I was trying to get into the store.
22 Q Was it not visible to you because you weren't looking
23 at it?
24 A I didn't look at it. Yeah. I wasn't looking at it
25 closely.

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1 Q Okay. Fair enough.
2 And that's why it wasn't visible to you?
3 A Yes.
4 Q I'm going to show you what's been marked as Deposition
5 Exhibits 3 and 4 and 5.
6 A Okay.
7 Q Can you tell me if those also depict the area where
8 you fell?
9 A I believe it was, I'm not sure how the angle of the
10 road is, but right around this area.
11 Q The same general area?
12 A Yes.
13 Q Yes.
14 So those photographs look like the area where you
15 fell?
16 A Yes. I believe from the angle that it looks like,
17 yes.
18 Q Had you seen that dip before, ma'am?
19 A Ever?
20 Q Yes.
21 A No.
22 Q Do you know how long that dip had been there?
23 A No.
24 Q Do you know who created that dip?
25 A I have no idea.

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1 Q And by referring to the dip, you're referring to the
2 difference in height between the two slabs of concrete
3 that's shown in your attorney's photo Deposition
4 Exhibit 9; correct?
5 A Correct.
6 Q Were you wearing sunglasses at all that day?
7 A No. It was raining.
8 Q Was there anyone in front of you impeding your vision
9 at all to this specific area?
10 A No.
11 Q None whatsoever?
12 A No.
13 Q So if you had looked down at this area you would have
14 been able to see it; correct?
15 A Correct. I was walking just to the party store.
16 Q Okay.
17 MR. GILLOOLY: Thank you. I have no further
18 questions at this time. Thank you very much.
19 (Documents marked for identification as
20 Defendant's Deposition Exhibit Numbers 10, 11 and
21 12.)
22 EXAMINATION
23 BY MR. BEDIKIAN:
24 Q Ms. Buhl, I'm going to show you what is marked as
25 Exhibit 10. Would you agree with me that this is the

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1 same picture that the defense attorney had provided
2 you in Exhibit 1 but in color?
3 A Yes.
4 Q And I'm going to ask you on Exhibit 10 to circle the
5 same area where you fell.
6 A Okay. Yeah. This looks different.
7 Q Yeah. I mean, essentially the same, just in color.
8 A Okay.
9 MR. GILLOOLY: And for the record just tell us if
10 you're looking at the other picture if you can't,
11 okay, for the site.
12 THE WITNESS: It was somewhere, like somewhere
13 around this area.
14 BY MR. BEDIKIAN:
15 Q Okay. Yeah. Just circle. It's that area. Okay. So
16 it's similar.
17 A Around that area. Sorry. I don't have my glasses on
18 today, my kids broke them.
19 Q And it's, according to your testimony, I'm correct in
20 indicating that your husband pulled up to the curb?
21 A Yes.
22 Q Off of Nine Mile Road; is that correct?
23 A Correct. Correct.
24 Q And when you exited the vehicle, the first thing you
25 noticed was you noticed a crack in the sidewalk?

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1 A Correct.
2 Q And that you did not notice that there was a dip on
3 the other side of that sidewalk?
4 A I did not see the dip at that time.
5 Q And you did not trip on the crack?
6 A No.
7 Q I am showing you what is marked as Exhibit 11.
8 A Okay.
9 Q This is the view that you would have had from getting
10 out of the car to Trend Express; is that correct?
11 A Correct.
12 Q And in this view, can you circle the sidewalk where
13 the accident occurred?
14 That's where you fell but the --
15 A Yes.
16 Q Can you make a bigger circle around the piece of
17 concrete where you first stepped on and noticed the
18 crack?
19 A Oh. Okay. Where it got --
20 Q Yeah. Just a big circle around it.
21 A Oh. Okay. Yeah. That's right there. Yeah. It's
22 hard to see. I'm sorry.
23 Q Yeah. It's okay.
24 A It's like this is the road and this is -- yes.
25 Q So this is your view of the Trend Express from the

Page 20

1 vehicle?
2 A Correct. Correct.
3 Q And this picture is not completely accurate because on
4 the day that you were exiting the vehicle and going to
5 the Trend Express it was raining?
6 A M'hm.
7 Q So this picture in terms of this area where the
8 sidewalk is, there was no sunlight?
9 A No. There was no sunlight.
10 Q So it was kind of dark, similar to the bottom portions
11 of this picture where the tree is shaded?
12 A Correct. It was very --
13 MR. GILLOOLY: I'm sorry. I'm just going to
14 object to the leading nature of the questions. I
15 apologize.
16 BY MR. BEDIKIAN:
17 Q And here is a picture of that same sidewalk. Is that
18 the sidewalk that we've been talking about today?
19 A Yes.
20 Q Do you feel that this is a closer picture or a zoomed
21 in picture of --
22 A Yes. Yes. It actually helps better.
23 Q And again, on this particular picture, can you -- can
24 you circle where you had fallen?
25 A Where I had fallen. Through this area right here.

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1 Q And in this particular picture, are you able to see
2 the crack in the sidewalk?
3 A In this particular picture, not quite. Not really
4 well.
5 Q And is it because there is that shadow?
6 A There's a shadow. Yes.
7 Q Okay. All right.
8 MR. BEDIKIAN: I don't believe I have any further
9 questions.
10 MR. GILLOOLY: I have just a couple.
11 REEXAMINATION
12 BY MR. GILLOOLY:
13 Q I'm going to refer you to Deposition Exhibit 11. If
14 you look, this picture was obviously taken from some
15 feet away from the area where you fell; correct?
16 A M'hm.
17 Q Yes?
18 Somebody was standing several feet away when they
19 took that picture?
20 A Okay. Yes. It's not where the car would be. Yeah.
21 Okay.
22 Q Correct.
23 But looking at the place and the mechanism that
24 caused you to fall, okay, you can see in that picture
25 that the sidewalk angles up, can't you, ma'am?

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1 A In this picture, yes. It's bright.
2 Q Pardon me?
3 A It's brighter. Yeah.
4 Q And you can see that portion of the sidewalk even
5 though you were walking down it, you can see that it's
6 going up even in that picture; correct, from a
7 distance away?
8 A From a little bit. Yeah.
9 Q Yes? Okay
10 A Yes.
11 Q Okay. Thank you.
12 And you can see it in Deposition Exhibit 12 as
13 well; correct? You can see that piece of the sidewalk
14 that's higher than the other pieces of the sidewalk
15 that caused you to fall?
16 A That's funny. Because when it's closer you can't see
17 it as well. I mean, to me, I don't know. To me, you
18 can't see it as well when it's closer.
19 Q But you can still see it; correct?
20 A Some. Yes.
21 Q Yes. Thank you.
22 MR. GILLOOLY: I have no further questions.
23 REEXAMINATION
24 BY MR. BEDIKIAN:
25 Q And then just a quick follow up. On Exhibit 12 you

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1 indicated that it was difficult for you to see the dip
2 in this particular exhibit?
3 A Yes.
4 Q And presumably in this picture there's more light on
5 that area than there was the date that the injury
6 occurred; correct?
7 A Yes. It was raining, it was darker.
8 REEXAMINATION
9 BY MR. GILLOOLY:
10 Q Who took these pictures, do you know, 11 and 12? Did
11 you or your husband take those by chance?
12 A I'm not positive. I'm not positive.
13 Q Do you know who may have? Well, what's your best
14 guess? I don't want you to guess but what's your best
15 educated guess on who took those pictures?
16 A I'm guessing. I mean, I took a couple pictures but
17 I'm not sure if those were the zooms or not. So it
18 was either me or my lawyer.
19 Q You took pictures of the area where you fell; correct?
20 A My husband did. Yes.
21 Q Oh, your husband did, too?
22 A Yes. My husband. I didn't. My foot was broke.
23 Q Oh. Wait. This is really important to me. A minute
24 ago you said that I took some pictures; right --
25 A I didn't.

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1 Q Let me finish.
2 A I'm sorry.
3 Q A minute or so ago you said that I took some pictures
4 and my attorney took some pictures. I want to know,
5 ma'am, Ms. Buhl, whether you personally took any
6 pictures?
7 A I did not.
8 Q So when you said early that I took some pictures you
9 were mistaken?
10 A Yes. I was mistaken. I'm sorry.
11 Q Your husband took the pictures?
12 A Yes.
13 Q Okay. And how many did he take?
14 A He might have took three.
15 Q Did he take them on his phone?
16 A Yes.
17 Q Does he still have that phone?
18 A I believe so. I'm not sure --
19 Q Tell him not to destroy any pictures he takes, that's
20 there's a hold on it and they're evidence in this
21 case. Would you be so kind to do that?
22 A Yes.
23 Q And he can give them to your lawyer and then we can
24 all do whatever we have to.
25 A All right.

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1 Q Okay.
2 MR. GILLOOLY: Thank you very much for coming in
3 today.
4 THE WITNESS: Yes. Thank you.
5 MR. BEDIKIAN: Thank you.
6 THE WITNESS: Thank you.
7 (Deposition concluded at 2:32 p.m.)
8 - - -
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CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I certify that this transcript, consisting of 26 pages, is a complete, true, and correct record of the testimony of JENNIFER BUHL, held in this case on June 20th, 2017.

I also certify that prior to taking this deposition JENNIFER BUHL, was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party nor financially interested in the action.

Amy Bertin, CER-3871

JUDY JETTKE & ASSOCIATES
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Exhibit 3

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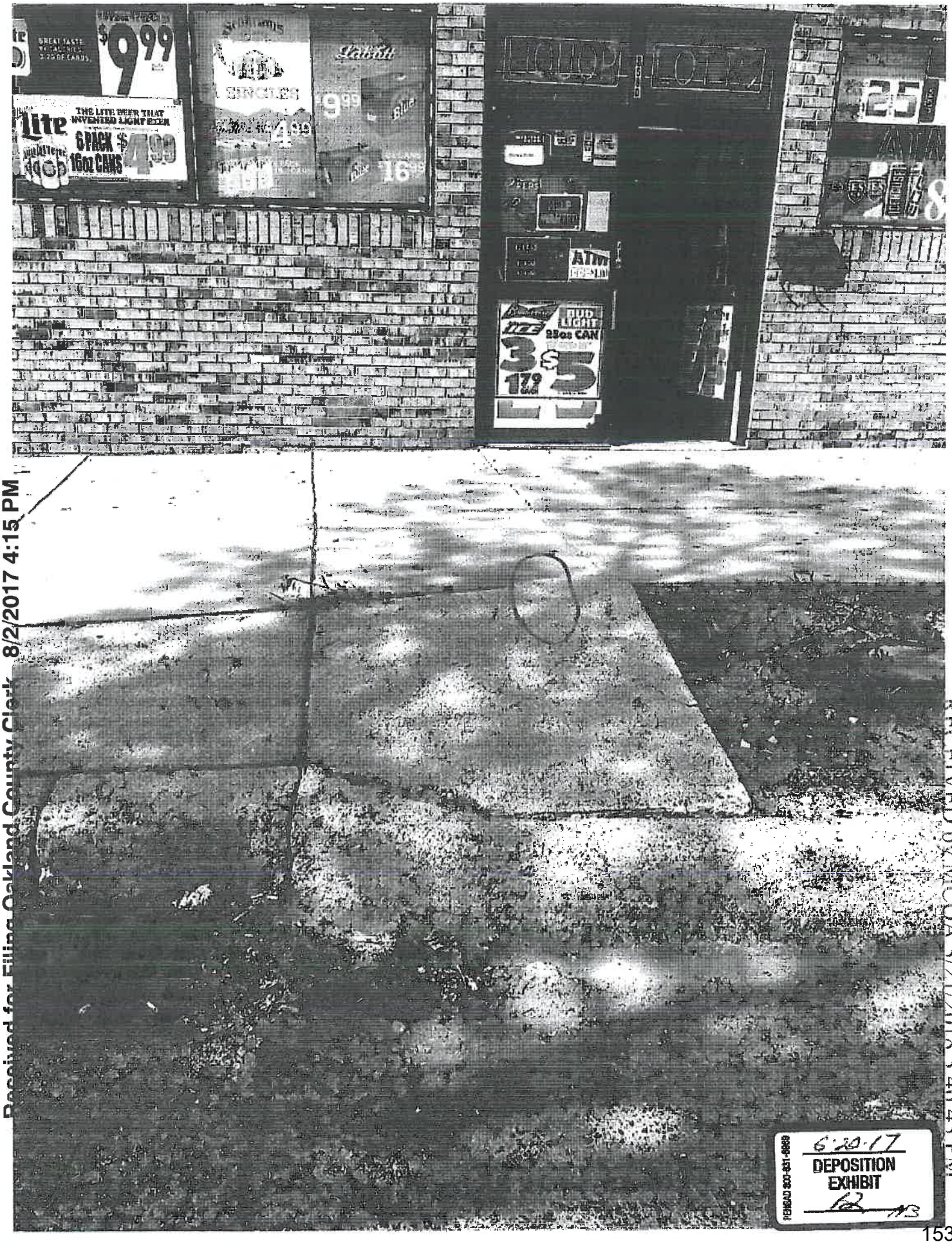

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STATE OF MICHIGAN

COURT OF APPEALS

NABIL SUFI, as Personal Representative of the Estate of ALI SUFI, Deceased,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
February 17, 2015

No. 312053
Wayne Circuit Court
LC No. 10-013454-NO

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

PER CURIAM.

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.

---

[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).

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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 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).

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

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> 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).

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[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.

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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 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

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[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) 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.

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> 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:

> (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.

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[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.

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(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 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.

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,

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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.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder

[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).

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Exhibit 5

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STATE OF MICHIGAN

COURT OF APPEALS

DAVID MACKLIS,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
April 25, 2017

No. 330957
Wayne Circuit Court
LC No. 15-000822-NF

Before: SAWYER, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

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.

---

[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).

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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, 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.
>
> 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 NW2d 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 NW2d 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 NW2d 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.*

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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 NW2d 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 NW2d 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 NW2d 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 NW2d 1 (2010). Section 3113 provided in relevant part before the amendment:

> 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.]

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:

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[2] 2014 PA 489.

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> 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 NW2d 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 NW2d 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)

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[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 NW2d 719 (1998).

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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 NW2d 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 NW2d 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 NW2d 117 (2012). 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]

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

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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

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.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Michael J. Riordan

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

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Exhibit 6

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STATE OF MICHIGAN

COURT OF APPEALS

ROBERT FOREN,

Plaintiff-Appellant,

v

CITY OF TAYLOR,

Defendant-Appellee.

UNPUBLISHED
October 23, 2014

No. 317773
Wayne Circuit Court
LC No. 12-006841-NO

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In this trip and fall action, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On July 15, 2011, at approximately 12:30 a.m., plaintiff left his house on Woodlawn Street to go for a walk around the neighborhood. After exiting his home, plaintiff began walking north on the sidewalk toward the intersection of Woodlawn and Greenlawn streets. Upon reaching the intersection, plaintiff turned left on Greenlawn and continued walking on the left-hand side of the sidewalk heading west. Plaintiff observed a woman on a bicycle who was heading east on Greenlawn while traveling on the same side of the sidewalk. To avoid colliding with the bicyclist who was coming toward him, plaintiff moved over to the right-hand side of the sidewalk.[1] As he did so, plaintiff stubbed his toe on a raised portion of the sidewalk and fell down, resulting in various injuries.[2]

[1] Plaintiff testified that he had taken walks around the neighborhood every night since his knee surgery in 2010, and he would normally walk on the left, inner side of the sidewalk (closest to the houses) because he knew the sidewalks were uneven generally in areas closest to the curb.

[2] The record evidence reflects an increasing vertical discontinuity between sidewalk slabs, moving from the left-hand side to the right-hand side of the sidewalk, presumably due to tree roots emanating from a tree located to the right of the sidewalk.

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Plaintiff initiated the instant negligence action against defendant, claiming that defendant had failed to maintain the sidewalk in reasonable repair, as required by MCL 691.1402 et seq., causing plaintiff to trip and fall. Following discovery, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not establish defendant's negligence because he could not prove that the uneven sidewalk was the proximate cause of his injuries. Rather, because plaintiff was aware of the uneven nature of the sidewalk, his own conduct of walking on that portion of the sidewalk was the sole proximate cause of his injuries. For these reasons, defendant argued, no genuine issue of material fact existed and defendant was entitled to judgment as a matter of law. MCR 2.116(C)(10).

Following a hearing, the trial court issued an order granting defendant's motion for summary disposition "for the reasons set forth in the defense brief." This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 120. When evaluating such a motion, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Id.* Summary disposition may be granted under MCR 2.116(C)(10) if, based on "the affidavits or other documentary evidence . . . there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when, after viewing the record in the light most favorable to the non-moving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. PROXIMATE CAUSE

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because genuine issues of material fact exist regarding whether the uneven sidewalk was a proximate cause of plaintiff's injuries. We agree.

Although the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, provides that governmental agencies are generally immune from tort liability when engaged in the exercise or discharge of a governmental function, such immunity is subject to certain exceptions. MCL 691.1407(1). One such exception is the highway exception. At the time of plaintiff's injury,[3] MCL 691.1402(1) set forth in relevant part:

[3] Plaintiff's cause of action accrued in 2011 when he was injured. See *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995), quoting *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150; 200 NW2d 70 (1972) (A cause of action for tortious injury accrues "when all of the elements of the cause of action have occurred and can be alleged in a proper complaint."). This Court has applied the versions of the highway exception and statute

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> Except as otherwise provided in section 2a, 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 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.

Under MCL 691.1401(e), as it then existed, a "highway" is defined as "a public highway, road, or street that is open for public travel," expressly including "sidewalks." Consequently, where the highway exception applies, a governmental agency is subject to potential liability in tort.

"To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling& Partition Co.*, 489 Mich 157, 162; 809 NW2d 553 (2001) (citing *Roulo v Auto Club of Mich*, 386 Mich 324, 328; 192 NW2d 237 (1971)).

To prove proximate cause, a plaintiff must establish both cause-in-fact and legal cause. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Cause-in-fact "requires showing that, 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.* Mere speculation or conjecture cannot establish cause-in-fact. *Id.* at 163-164. Legal cause relates to "the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Id.* Generally, a negligent defendant "is liable for all injuries . . . whether foreseeable or not, provided the damages are the legal and natural consequences . . . and might reasonably have been anticipated." *Price v High Pointe Oil Co.*, 493 Mich 238, 254-255; 828 NW2d 660 (2013). There may be more than one proximate cause of an injury. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 350 (1997).

Defendant maintains that, as a matter of law, plaintiff could not establish either cause-in-fact or legal cause. We disagree. Viewing the evidence in the light most favorable to plaintiff, genuine issues of material fact exist regarding both whether the raised sidewalk was a cause-in-fact and whether it was a legal cause of plaintiff's injuries.

Defendant first contends that the evidence is insufficient as a matter of law to establish cause-in-fact because plaintiff's fall resulted from his own conduct in avoiding the bicyclist by moving over to the uneven side of the sidewalk with knowledge of the sidewalk's condition. Defendant's theory is based on plaintiff's deposition testimony that the incident happened "so

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governing a municipal corporation's duty to repair sidewalks, MCL 691.1402a, that were in effect at the time of a plaintiff's injury. See *Moraccini v City of Sterling Heights*, 296 Mich App 387, 388 n 1; 822 NW2d 799 (2012). As discussed in Part IV of this opinion, we decline to decide at this juncture whether the 2012 amendments to relevant portions of the GTLA should apply to plaintiff's cause of action. See 2012 PA 50.

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quick" and that the bicyclist "pushed" him over and "forced" him to the right side of the sidewalk. Defendant argues that as "but for the bicyclist's presence, [plaintiff] would not have fallen." Defendant thus suggests that plaintiff cannot prove that the raised sidewalk was a cause-in-fact. Rather, according to defendant, it was plaintiff's conduct in avoiding the bicyclist that was the "but for" cause of his injuries. Relatedly, defendant argues that plaintiff's contention that he stubbed his toe on the raised sidewalk was mere speculation or conjecture.

However, "[e]vidence of causation is sufficient if the jury may conclude that, more likely than not, but for the defendant's conduct the plaintiff's injuries would not have occurred, even if other plausible theories have evidentiary support." *Wilson v Alpena County Rd Comm*, 263 Mich App 141, 150; 687 NW2d 380 (2004), aff'd 474 Mich 161 (2006). More fundamentally, defendant's argument ignores the fact that in circumstances such as those at issue in this case, there may exist more than one cause-in-fact. *Allen*, 225 Mich App at 401-402. It is conceivable that plaintiff's fall may not have occurred "but for" *either* the uneven sidewalk or plaintiff's conduct in avoiding the bicyclist. It need not be one, to the exclusion of the other.

> Therefore, a defendant cannot escape liability for its negligent conduct simply because the negligence of others may also have contributed to the injury suffered by a plaintiff. When a number of factors contribute to produce an injury, one actor's negligence will be considered a proximate cause of the harm if it was a substantial factor in producing injury. [*Id.* at 401-402.][4]

Thus, the fact that plaintiff's conduct may have been a "but-for" cause of his fall does not negate the possibility that the uneven sidewalk also may have been a "but-for" cause.

Viewing the evidence in the light most favorable to plaintiff, we hold that reasonable minds could differ regarding whether the raised sidewalk was a "but-for" cause of plaintiff's injury, and thus that a genuine issue of material fact exists. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Plaintiff testified that he was "fully aware" of the bicyclist and "saw her coming." To avoid running into the bicyclist, plaintiff moved to the right-hand side of the sidewalk, which he normally would have avoided because he knew that the sidewalk area closest to the trees and curb were generally uneven. Plaintiff also testified several

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[4] Although the caselaw sometimes uses the term "proximate" cause when discussing the possibility of multiple "but-for" causes and the application of the "substantial factor" test, it is apparent, both from the context of those cases and otherwise, that it is the "but-for" component of the overall proximate cause analysis that is being referenced. See, e.g., *Breckins v Olympia*, 316 Mich 275, 283; 25 NW2d 197 (1946) (roughness or unevenness in floor of skating rink not negated as a proximate cause of the plaintiff's injury by the act of another skater in clipping the plaintiff's skate); 65 CJS, Negligence, § 217, p 567 ("In deciding the question of cause in fact, as an element of proximate cause, when there are multiple factors that may have combined to cause injury, the court asks whether the defendant's conduct was a material element and substantial factor in bringing about the injury."; 2 Restatement Torts, 2d, Appendix (1966), § 433, p 129 (Reprinting Reporter's Note that appeared in the 1948 Supplement to the First Restatement of Torts stating that "the 'substantial factor' element deals with causation in fact").

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times that he stubbed his toe on the uneven sidewalk, which caused his fall. The evidence is thus sufficient for a fact-finder to determine that plaintiff stubbed his toe on the raised sidewalk, and that even if he would not have done so but for avoiding the bicyclist, it was the raised sidewalk that caused, or was a substantial factor in causing, his fall. This evidence is not mere speculation or impermissible conjecture. *Skinner*, 445 Mich at 163-164. Moreover, the cases that defendant cites, in arguing that plaintiff's position is speculative, are not only not binding on this Court, MCR 7.215(C)(1), MCR 7.215(J)(1), but they are wholly inapposite and distinguishable. In contrast to plaintiff in the instant case, the plaintiffs in those cases testified that they did not know what caused their falls. We conclude that plaintiff established genuine issues of material fact concerning "but-for" causation. *Id.* at 163-165.

Further, a genuine issue of material fact exists as to whether the raised sidewalk was the legal cause of plaintiff's injuries. This aspect of proximate cause "involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable." *Ridley v* Detroit, 231 Mich App 381, 389; 590 NW2d 69 (1998), rem'd 463 Mich 932 (2000). Legal cause relates to foreseeability. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001).

Defendant argues that any alleged unevenness of the sidewalk was too remote to amount to legal cause, in light of what it characterizes as plaintiff's "sudden movement upon seeing" the bicyclist. We disagree. Even if plaintiff's avoidance of the bicyclist contributed in causing his fall, that fact would not render the unevenness of the sidewalk, as a contributing cause, too remote to constitute legal cause. Rather, it is foreseeable that an individual walking on a sidewalk could trip and fall on an uneven portion of that sidewalk while attempting to navigate around an oncoming pedestrian or bicyclist. Under those circumstances, and particularly given plaintiff's unequivocal testimony that he stubbed his toe on the uneven sidewalk while moving to avoid the bicyclist, it could just as (or more) easily be argued that the uneven sidewalk rendered the avoidance of the bicyclist "too remote" for it to constitute legal cause. It could further be argued from the evidence that it was due to the unevenness of the sidewalk, and the necessity of avoiding its raised condition on the right-hand side, that plaintiff found himself in the path of the bicyclist (on the left-hand side of the sidewalk) in the first place. Consequently, we hold that a reasonable jury could find that plaintiff's injuries in tripping and falling on the raised sidewalk "were the legal and natural consequences of [defendant's failure to maintain the sidewalks in reasonable repair] and might reasonably have been anticipated." *Price v High Pointe Oil Co*, 493 Mich 238, 254-255; 828 NW2d 660 (2013).

Additionally, the fact that plaintiff was aware of the general condition of the sidewalks in his neighborhood is a question of comparative negligence that should be left to the fact-finder, as reasonable minds could differ on plaintiff's level of fault. *Zaremba Equipment Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 33; 761 NW2d 151 (2008). Similarly, the "open and obvious" defense is inapplicable here, because plaintiff's negligence theory involves the violation of defendant's statutory duty. *Walker v City of Flint*, 213 Mich App 18, 22; 539 NW2d 535 (1995). Defendant's argument that plaintiff's conduct, in avoiding the bicyclist notwithstanding his knowledge of the unevenness of the sidewalk, bars his claim essentially asks us to apply the open and obvious doctrine, albeit by another name, in contravention of our established caselaw. We decline the invitation to do so. Rather, to the extent that plaintiff's own negligence may have contributed to the accident, such liability may be apportioned by a fact-finder according to our

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comparative negligence principles. See *Rusnak v Walker*, 273 Mich App 299, 313-314; 729 NW2d 542 (2006).

The trial court erred in concluding that no genuine issues of material fact existed regarding cause-in-fact and legal cause; therefore its grant of summary disposition to defendant was improper.

IV. ALTERNATE GROUND FOR AFFIRMANCE

On appeal, defendant argues, as an alternative ground for affirming the trial court's order, that plaintiff cannot prove that defendant breached its duty to maintain the sidewalks in reasonable repair. In offering this alternative ground for affirmance, defendant argues for a retroactive application of the 2012 amendments to MCL 691.1402a. Under defendant's theory, "where the photograph [of the raised sidewalk] shows a discontinuity of exactly two inches . . . and where the record is not clear where [plaintiff] stubbed his toe," the trial court acted within its discretion in concluding, as a matter of law, that plaintiff did not rebut the statutory presumption that defendant maintained its sidewalks in reasonable repair.[5] While acknowledging that statutory amendments generally apply prospectively, defendant argues that the 2012 amendments were the "clearly intended to remedy a defect in the former version of MCL 691.1402a," such that retroactive application of the 2012 amendments is appropriate and the "current version of the statute [MCL 691.1402(a)] should control."

Plaintiff's injury occurred on July 16, 2011, and plaintiff's complaint was filed on May 5, 2012. At the time of plaintiff's injury, MCL 691.1402a provided in relevant part:

> (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.

[5] Defendant acknowledges, notwithstanding its description of how the trial court exercised its discretion, that by affirming the trial court on this alternative ground, we would be employing reasoning different than that employed by the trial court.

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(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 statute was amended in 2012 with an effective date of March 13, 2012. See 2012 PA 50. The current version of the statute reads in relevant 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.

Thus, under the previous version of MCL 691.1402a, a plaintiff may succeed on a claim for violation of the duty to maintain a sidewalk under reasonable repair, even if a vertical discontinuity is less than two inches, see *Robinson v City of Lansing*, 486 Mich 1, 12 and n 11; 782 NW2d 171 (2010), if a plaintiff can successfully rebut the statutory inference of reasonable repair. By contrast, the newer version of the statute essentially precludes recovery, absent a dangerous condition apart from mere vertical discontinuity, if the discontinuity is less than 2 inches. Further, the determination of whether what is now a presumption (rather than an inference) of reasonable repair has been rebutted is explicitly charged to the trial court as a question of law.[6]

The issue of whether plaintiff can establish defendant's breach of duty under MCL 691.1402(a), under either version of the statute, is not properly preserved for appellate review because the issue was not raised before, addressed, or decided by the trial court. *Hines v Volkswagen of America*, 265 Mich App 432, 443; 695 NW2d 84 (2005). The parties' arguments before the trial court centered on whether plaintiff could prove causation, not whether he had

[6] This Court has discussed the difference between a statutory presumption and a statutory inference with regard to MCL 691.1402a. See *Gadigan v City of Taylor*, 282 Mich App 179, 186-188; 774 NW2d 352 (2008), vacated and rem'd on other grounds 486 Mich 936 (2010). In brief, the statutory inference found in the previous statute *allows*, but does not compel, the trier of fact to find that a municipality has properly maintained its sidewalk if a discontinuity defect of less than 2 inches exists. *Id.* at 186. By contrast, a statutory presumption, unless rebutted, *requires* the trier of fact to find the presumed facts, in this case that the municipality has properly maintained its sidewalk if a discontinuity defect is less than 2 inches. *Id.* at 186-187.

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established defendant's breach of its statutory duty. Although parties may argue an alternate ground for affirmance of a trial court's ruling on summary disposition, see *McLean v Dearborn*, 302 Mich App 68, 79 n 2; 836 NW2d 916 (2013), this Court will generally disregard issue preservation requirements only if the question is one of law concerning which the necessary facts have been presented. See *Duffy v Dep't of Natural Resources*, 490 Mich 198, 209 n 3; 805 NW2d 399 (2011). Here, the factual issues surrounding the application of MCL 691.1402a have not been "adequately presented and briefed" so as to allow us to make a determination on that issue. *Id.* For example, whether the defect was more, less, or exactly 2 inches in height was not argued before the trial court; nor was evidence of any other features of the defect that may be of relevance to defendant's duty to keep the sidewalk in reasonable repair.[7] Additionally, issues surrounding defendant's actual or constructive knowledge of the defect were not explored before the trial court. Nor has the trial court addressed whether the Legislature intended that its statutory inference or presumption apply to a vertical discontinuity defect as measured at the precise point of impact or otherwise. We therefore decline to entertain defendant's proposed alternate ground for affirmance at this time.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

[7] We note that plaintiff argued below that the vertical discontinuity measured "about 2 and a half inches," whereas defendant argues on appeal—arguably inconsistently within a single brief—that the vertical discontinuity measured "not two inches or more" and that it measured "exactly, or perhaps just under, two inches." From our review, the pictorial evidence is inconclusive in this regard, rendering even more appropriate our determination to defer any consideration of this issue until such time as the trial court has had occasion first to address it.

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Exhibit 7

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Mato v. City of Livonia, 102915 MICA, 323071 /**/ div.c1 {text-align: center} /**/

DEBORAH MATO, Plaintiff-Appellee,

v.

CITY OF LIVONIA, Defendant-Appellant,

and

BRYAN MARRA, Defendant.

No. 323071

Court of Appeals of Michigan

October 29, 2015

UNPUBLISHED

Wayne Circuit Court LC No. 13-010174-NO

Before: Meter, P.J., and Wilder and Ronayne Krause, JJ.

PER CURIAM.

In this slip-and-fall case, defendant[1] appeals as of right from the trial court's denial of its motion for summary disposition based on governmental immunity. We affirm.

On October 23, 2012, plaintiff tripped and fell on a sidewalk while walking her dog in her Livonia neighborhood. She suffered injuries and sued defendant for failure to maintain the sidewalk in a safe condition. Defendant filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(10). Defendant argued that plaintiff had not rebutted the statutory presumption that the sidewalk was in reasonable repair, that the notice plaintiff was required to provide was defective, and that the proximate cause of plaintiff's injuries was an accumulation of leaves on the sidewalk that defendant had no duty to remove. The trial court ruled, in part:

This court will deny the motion. We believe in light of the photographs, there has been a successful rebutting of the statutory presumption that the sidewalk was in reasonable repair. At the very least it remains an issue of fact whether the sidewalk at issue was in reasonable repair. The defendant focuses his argument on the requirement that the condition be a proximate cause of the injury. Defendant believes that the accumulation of the leaves was the sole proximate cause of the accident. As you know, under the statute the defendant need not prove that the defect was the sole proximate cause of the injury. Under the statute it is sufficient to establish that it was simply a proximate cause of the injury. . . . With regard to the issue of notice and whether or not the notice was sufficient because it didn't make reference to the leaves involved here, we believe that the notice was proper. Plaintiff gave notice of the only hazardous condition for which the city could be responsible.

We review de novo a trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999). A court may grant summary disposition under MCR 2.116(C)(7) based on "immunity granted by law . . . ." "In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v Dearborn*, 302 Mich.App. 68, 72-73; 836 N.W.2d 916 (2013). "In reviewing a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other

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evidence introduced by the parties to determine whether no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *McLean*, 302 Mich.App. at 73. "The evidence submitted must be considered in the light most favorable to the opposing party." *Id.* (citation and quotation marks omitted).

MCL 691.1402a 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 subsection (3) has been rebutted is a question of law for the court. (5) 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.

Defendant does not dispute that the sidewalk on which plaintiff tripped, at its edge, did in fact contain a vertical discontinuity defect of two inches or more. It argues, however, that it is pure speculation that plaintiff fell because of this discontinuity defect. Defendant claims that "since the argument that [plaintiff] tripped only where the discontinuity was greater than two inches is based upon conjecture and speculation, it cannot serve to rebut the [statutory] presumption."

Defendant's argument is unavailing. At her deposition, plaintiff testified that, before her fall, she did not see the defect in the sidewalk because of leaves that were covering it. However, she clearly testified that after she fell, she was able to determine that the sidewalk was raised where she had tripped and that she "tripped on [her] right foot as [her] right foot hit the right edge of the sidewalk." Plaintiff's attorney asked, "[Y]ou could visualize that there was [a] two-to[-]three-inch height discrepancy there?" Plaintiff replied, "Right." The attorney then asked, "And that's where you tripped?" Plaintiff replied, "Yes." Plaintiff's testimony served to rebut the statutory presumption. [2]

Defendant next argues that plaintiff provided inadequate notice under MCL 691.1404(1), which states:

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

Defendant claims that plaintiff's notice was inadequate because it failed to mention the leaves covering the sidewalk. Once again, defendant's argument is unavailing.

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In *Plunkett v Dep't of Transp*, 286 Mich.App. 168, 176-177; 779 N.W.2d 263 (2009), this Court stated:

[W]hen notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect. The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured. [Citations omitted.]

The defect *as applied to defendant* was the vertical discontinuity defect, not the leaves. Plaintiff never argued that defendant had a duty to remove the leaves and admits that defendant could not be held liable for a failure to remove leaves from the sidewalk.[3] The notice referred to the defect for which defendant was responsible. The notice was proper.

Defendant argues that the accumulation of leaves, and not the vertical discontinuity defect, was the sole proximate cause of plaintiff's injuries. Yet again, defendant's argument is unavailing. As noted by the trial court, MCL 691.1402a(3) refers to "*a* proximate cause . . ." (emphasis added). There may be more than one proximate cause of an injury. *Brisboy v Fibreboard Corp*, 429 Mich. 540, 547; 418 N.W.2d 650 (1988). Plaintiff's testimony sufficiently indicated that she tripped because of the vertical discontinuity defect. As such, the vertical discontinuity defect was *a* proximate cause such that the statutory presumption in MCL 691.1402a was rebutted.

Defendant argues that it had no actual or constructive notice of the defect under MCL 691.1402a(2) because the sidewalk "was reasonably safe and convenient for travel, except when covered by leaves." As noted, the focus of this case as applied to defendant is the vertical discontinuity defect, not the leaves. Accordingly, defendant's argument is without merit. In addition, plaintiff's safety engineer averred that the defect had been in existence for more than 30 days. We find no basis for reversal.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

Notes:

[1] References to "defendant" in this opinion are to the city of Livonia.

[2] Citing *Plunkett v Dep't of Transp*, 286 Mich.App. 168, 188; 779 N.W.2d 263 (2009), defendant argues that the presumption could not have been rebutted because the sidewalk was not unsafe for public travel *at all times*, stating that "no harm has befallen anyone traversing that sidewalk in a fully populated residential area occupied by families" and further stating that "it is only a problem when it is covered by a foreign substance." This argument is untenable. Clearly the vertical discontinuity defect was a continually unsafe condition and served to rebut the presumption in MCL 691.1402a(3). The *Plunkett* Court stated, "The plaintiff must show that the injury was caused by the ice, snow, or water, *in tandem with the defect itself*, for example, tripping or losing one's balance on the edge of the defect and then slipping. *Plunkett*, 286 Mich.App. at 188 (emphasis in original). This case, involving a continual defect combined with leaves, is analogous.

[3] Defendant filed a notice of nonparty fault against the owner of the property adjoining the portion of the sidewalk where plaintiff fell.

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EXHIBIT 1G

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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.

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DEFENDANT, CITY OF OAK PARK'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S RENEWED MOTION TO DISMISS

Defendant, City of Oak Park ("Defendant"), seeks an Order from this Court dismissing Plaintiff's Complaint on the basis that it is improperly pled and that Defendant cannot be held liable for Plaintiff's alleged injuries where the presence of any defect was open and obvious and no special aspects existed to remove it from the open and obvious doctrine. Plaintiff's Response to Defendant's Motion: (1) improperly argues that her Complaint meets the state's notice pleading standard, despite not including the date of the incident in her Complaint; (2) erroneously claims that Public Act No. 419 (2016) does not apply in this case; and (3) incorrectly proposes that the open and obvious doctrine does not apply in this case. This reply brief will address the shortcomings of the arguments advanced by Plaintiff.

ARGUMENT

1. Plaintiff improperly claims that her Complaint meets the state's notice pleading requirements, despite not including the date of the incident in her Complaint.

While Michigan is a notice pleading state and not one that requires pleading with particularly, that does not mean that there is no burden for Plaintiff. MCR 2.111(B) provides that

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a complaint must contain a "statement of the facts, without repetition, on which the pleader relies in stating the cause of action, **with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend**". MCR 2.111(B) (emphasis added). Moreover, complaints must "set forth facts upon which [the] pleader relies in stating [their] cause of action". *Sullivan v. Thomas Organization, P. C.*, 88 Mich. App. 77, 84; 276 N.W.2d 522, 525 (1979). This has been described as a "set of facts that is sufficient to meet substantive requirements for relief, i.e., that it state claim upon which relief can be granted". *O'Toole v. Fortino*, 97 Mich. App. 797, 802; 295 N.W.2d 867, 869 (1980). Plaintiff's Complaint fails to meet these requirements as it does not list the incident date at issue. Thus, it should be dismissed pursuant to MCR 2.116(C)(8).

2. Plaintiff erroneously claims that Public Act No. 419 (2016) does not apply in this case, despite the fact that it impacts no vested rights, was intended to be apply in this case by the legislature, and only applies to the filing date of civil actions and not to the underlying incidents of civil actions.

In an attempt to further support her position, Plaintiff erroneously claims that Public Act No. 419 (2016) does not retroactively apply to this case, meaning that the open and obvious doctrine would not be available as a defense for Defendant. However, Public Act No. 419 (2016) impacts no vested rights, was intended to be applied by the legislature under such circumstances, and only applies to the date of filing for civil actions and not to the underlying incidents of civil actions.

MCL 691.1402a requires that municipal corporations maintain sidewalks "in reasonable repair." The earlier version of this statute did not allow municipal corporations to assert the open and obvious doctrine as a defense to incidents on sidewalks. However, Public Act No. 419 (2016) was passed to rectify this issue, providing that municipal corporations could now assert "any defense available under the common law with respect to a premises liability claim,

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including, but not limited to, a defense that the condition was open and obvious". Public Act No. 419 (2016) (**Exhibit A**). The effective date of this legislation was January 4, 2017. No language was included as to whether this amendment to MCL 691.1402a had retroactive effect.

Generally, statutes and statutory amendments are presumed to operate prospectively. See *Davis v. State Emples. Ret. Bd.*, 272 Mich. App. 151, 155; 725 N.W.2d 56, 60 (2006). However, there is an exception where a statute or amendment is "remedial or procedural in nature, as long as it does not deny vested rights." *Davis* at 158 (citations omitted). 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," *Macomb Co Professional Deputies Ass'n v Macomb Co*, 182 Mich. App. 724, 730; 452 N.W.2d 902 (1990). A "vested right," as that term is used in relation to constitutional guarantees (sic), 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." *Rookledge v. Garwood*, 340 Mich. 444, 456, 65 N.W.2d 785, 791 (1954) (citation omitted).

As is the case here, a statutory defense is not considered to be a vested right. See *Rookledge* at 456-458. The Michigan Supreme Court provided clearly in *Rookledge* that holders of statutory defenses "may be deprived of it after the cause of action to which it may be interposed has arisen." *Rookledge* at 457. Simply put, "no right is destroyed when the law restores a remedy which had been lost." *Id.; See Cona v. Avondale Sch. Dist.,* 303 Mich. App. 123; 842 N.W.2d 277 (2013). In this case, the only effect of Public Act No. 419 (2016) was to allow municipal corporations to use a defense that has long been available to the public. Thus, since no vested right has been impacted, Public Act No. 419 (2016) should apply to this case.

Nonetheless, even if this Court views Public Act No. 419 (2016) as one impacting vested rights, the legislature clearly intended that Public Act No. 419 (2016) apply in this case. This

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intent is easily seen from a previous amendment (Public Act 205 (1995) (**Exhibit B**)) to MCL 691.1402a. This statutory amendment provided as follows:

> Enacting section 1. Sections 1 and 2 of 1964 PA 170, MCL 691.1401 and 691.1402, as amended by this amendatory act, and section 2a, as added by this amendatory act, **apply only to a cause of action arising on or after the effective date of this amendatory act.**

Public Act 205 (1995) (emphasis added). As evidenced by the unambiguous language of this 1995 amendment, it was drafted with the intent to operate prospectively. There is no such language here. In fact, the very absence of such language implies that *this* amendment was designed to operate retroactively. After all, if statutes are generally presumed to operate prospectively by the courts, inclusion of such retroactive language in the 1995 amendment implies the legislature considered MCL 691.1402a to be remedial or procedural in nature. In other words, the legislature intended MCL 691.1402a to operate as an exception to the presumption of prospective application.

Plaintiff asserts that Public Act No. 419 (2016) should be prospectively applied and bases her argument on a combination of irrelevant and unpublished case law. For example, she cites *Nabil Sufi v. City of Detroit*, 2015 Mich. App. LEXIS 272 (Mich. Ct. App. Feb. 17, 2015)(**Exhibit C**) to support her argument for prospective application. But not only is that case unpublished, it relates *only* to issues different than those here. While this amendment restores a defense that is normally available to the public, the *Nabil Sufi* case dealt with government immunity presumptions. No substantive rights are impacted by this amendment, which makes it different than the cases cited by Plaintiff.

Additionally, even if the Court interpreted Public Act No. 419 (2016) as operating prospectively (Defendant contests this), it would still apply in this case. This is because Public Act No. 419 (2016) only amended MCL 691.1402a to include section five of the statute, which

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relates only to "civil action[s]" and not to the general duties for municipal corporations to maintain sidewalks. **(Exhibit A)**. As such, Public Act No. 419 (2016) applies only to the date an action is filed and not to the date of the underlying incident at issue. As such, since Plaintiff's Complaint was filed on January 31, 2017, Public Act No. 419 (2016) would apply in this case. **(Exhibit D)**.

3. Plaintiff has still shown why her claim falls outside the open and obvious doctrine and as such, her claim should be dismissed.

Plaintiff's Response claims that the pictures cited in Defendant's Motion are "not representative of the area as it existed in May of 2016" because a tree appears to have been removed near the area of Plaintiff's alleged fall. However, the photograph attached as Exhibit 3 to Plaintiff's Response depicts the same scene. As such, this is simply a red herring to distract this Court from the fact that the alleged defect that caused Plaintiff's fall was open and obvious with no special aspects.

Additionally, Plaintiff's Response points to the weather and "debris" as reasons why the alleged defect was not open and obvious. However, when reviewing photographs of the area at issue, Plaintiff testified that she could see the defect. (Buhl Dep. Pg, 22, attached as Ex B to Def's motion). Moreover, Plaintiff directly testified that nothing was blocking her view of the area. Thus, there is little denying that the defect at issue was open and obvious and dismissal of Plaintiff's Complaint is proper, as she cannot overcome the open and obvious doctrine.

Respectfully submitted,

/s/John J. Gillooly
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Dated: August 9, 2017

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STATE OF MICHIGAN
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PROOF OF SERVICE

Monica Parent, being first duly sworn, deposes and says that she is employed by GARAN LUCOW MILLER, P.C., and that on the 9th day of August, 2017, she served by electronic filing the foregoing paper with the Clerk of the Court using the Wiznet E-File & Serve system which will send notification of such filing to the following:

Matthew Edward Bedikian, Esq.
matt@miadvocacycenter.com

/s/Monica Parent

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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.

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EXHIBIT A

This act is ordered to take immediate effect.

Clerk of the House of Representatives

Secretary of the Senate

Approved .....

.....

Governor

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GOVERNMENTAL LIABILITY FOR NEGLIGENCE (EXCERPT)
Act 170 of 1964

691.1402a Municipal corporation; maintenance of sidewalk; liability; presumption; additional defense; limitation.

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.

History: Add. 1999, Act 205, Imd. Eff. Dec. 21, 1999;—Am. 2012, Act 50, Imd. Eff. Mar. 13, 2012;—Am. 2016, Act 419, Imd. Eff. Jan. 4, 2017.

Compiler's note: Enacting section 1 of Act 205 of 1999 provides:

"Enacting section 1. Sections 1 and 2 of 1964 PA 170, MCL 691.1401 and 691.1402, as amended by this amendatory act, and section 2a, as added by this amendatory act, apply only to a cause of action arising on or after the effective date of this amendatory act."

Popular name: Governmental Immunity Act

Popular name: 2-Inch Rule

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EXHIBIT B

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Nabil Sufi v. City of Detroit

Court of Appeals of Michigan

February 17, 2015, Decided

No. 312053

Reporter
2015 Mich. App. LEXIS 272 *

NABIL SUFI, as Personal Representative of the Estate of ALI SUFI, Deceased, Plaintiff-Appellee, v CITY OF DETROIT, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Wayne Circuit Court. LC No. 10-013454-NO.

Core Terms

summary disposition, sidewalk, trial court, governmental immunity, reasonable repair, defense motion, highway, motions, scheduling order, court rule, vertical, subrule, rebut, dispositive motion, government agency, discontinuity, municipal, travel

Counsel: For SUFI NABIL PERSONAL REPRESENTATIVE, PLAINTIFF-APPELLEE: RACINE M MILLER, SOUTHFIELD, MI.

For CITY OF DETROIT, DEFENDANT-APPELLANT: SHERI L WHYTE, DETROIT, MI.

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

Opinion

PER CURIAM.

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

---

[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 **[*2]** 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)*.

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EXHIBIT C

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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 [*3] 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 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).

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 [*4] (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 [*5] 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]

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[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,

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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 [*6] 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).

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 dispute, the question of whether the claim is barred is an issue of law for the court. *Id*. "*But*, if a question of fact [*8] 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 [*9] erred in denying its motion for summary disposition because plaintiff cannot establish that defendant failed to

---

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 [*7] 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) 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.

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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:

> (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) **[*10]** 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 **[*11]** 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 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.

Presumption aside, both parties implicitly suggest that this **[*12]** 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.

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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 **[*13]** 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.

/s/ Christopher M. Murray

/s/ **[*14]** Joel P. Hoekstra

/s/ Kurtis T. Wilder

End of Document

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[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)*.

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Approved, SCAO

Original - Court
1st copy - Defendant

2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT 6TH JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO. 17- NI 2017-157097-NI JUDGE PHYLLIS MCMILLEN

Court address
1200 N. Telegraph Road, Pontiac, MI 48341

Court telephone no.
(248) 858-1000

Plaintiff's name(s), address(es), and telephone no(s).		Defendant's name(s), address(es), and telephone no(s).
JENNIFER BOHL	v	CITY OF OAK PARK
Plaintiff's attorney, bar no., address, and telephone no. MAC, PLLC Matthew Bedikian (P75312) 2000 Town Center, Suite 1900 Southfield, MI 48075 248-957-0456		

SUMMONS NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons to file a written answer with the court and serve a copy on the other party or take other lawful action with the court (28 days if you were served by mail or you were served outside this state). (MCR 2.111(C))
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

Issued	This summons expires	Court clerk
JAN 31 2017	MAY 02 2017	Lisa Brown

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

COMPLAINT *Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.*

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

Family Division Cases

☐ There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.

☐ An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.

General Civil Cases

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.

VENUE

Plaintiff(s) residence (include city, township, or village)	Defendant(s) residence (include city, township, or village)
Oakland County, Michigan	Oakland County, Michigan

Place where action arose or business conducted
Oakland County, Michigan

01/31/2017
Date

Signature of attorney/plaintiff

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

MC 01 (5/15) SUMMONS AND COMPLAINT MCR 2.102(B)(1), MCR 2.104, MCR 2.105, MCR 2.107, MCR 2.113(C)(2)(a), (b), MCR 3.206(A)

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/Pages/efiling.

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EXHIBIT D

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

JENNIFER BUHL,

Plaintiff,

v.

CITY OF OAK PARK,

Defendant.

Case No. 2017-.....-NI

Hon.
2017-157097-NI
JUDGE PHYLLIS MCMILLEN

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

MAC, PLLC
MICHIGAN ADVOCACY CENTER
2000 TOWN CENTER
SUITE 1900
SOUTHFIELD, MI
48075
PHONE/FAX:
(248) 957-0456

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in this complaint.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Jennifer Buhl, (hereinafter referred to as "Plaintiff") by and through her attorneys, MICHIGAN ADVOCACY CENTER, PLLC., by Matthew Edward Bedikian, submits this Complaint and Demand for Jury Trial.

COMMON ALLEGATIONS

1. Plaintiff is a resident of Oakland County, Michigan.
2. The Defendant, the city of Oak Park, is a governmental municipality in the state of Michigan.
3. The amount in controversy exceeds $25,000.

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MICHIGAN
ADVOCACY CENTER
2000 TOWN CENTER
SUITE 1900
SOUTHFIELD, MI
48075
PHONE/FAX:
(248) 957-0456

4. Governmental immunity does not apply because:

   a. MCL 691.1402a establishes Plaintiff's cause of action, with notice having been served on Defendant on June 28, 2016, in accordance with MCL 691.1404, and

   b. The facts of this case constitute a defective sidewalk and nuisance per se, created and maintained by Defendant.

5. The sidewalk in question runs parallel to Nine Mile Road. in the City of Oak Park, Oakland County Michigan and is under the exclusive jurisdiction and direct control of the Defendant City of Oak Park.

6. At approximately 4:30 pm, Plaintiff sustained injuries when she tripped over a sidewalk located right out front of 8580 W. Nine Mile Rd., Oak Park, MI 48237. The sidewalk had a vertical discontinuity defect of more than two inches.

7. The condition of the sidewalk has deteriorated over time and was severely in need of maintenance, repairs and resurfacing, or reconstruction.

8. The Defendant had actual and constructive notice of this defect 30 days prior to the Plaintiff's fall.

9. All relevant times, Defendant had a duty created by MCL 691.1402a to maintain the sidewalk in a reasonable repair and in a condition so that it was reasonably safe and fit for public travel.

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PHONE/FAX:
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10. Defendant's duties include, but are not limited to, the following:

a. to periodically inspect roadways under its jurisdiction to discover possible dangers, defects, deterioration, or damage.

b. To promptly and correctly repair, resurface, reconstruct, and otherwise correct, repair, and maintain imperfections or other hazardous conditions that it knows or should have known exist on sidewalks under its jurisdiction it knows or should have known exist on roadways un

c. to take all reasonable precautions to protect pedestrians who use sidewalks under its jurisdiction from dangers that are foreseeable and that would render any sidewalk unsafe or not reasonably fit for public travel

11. Defendant breached its statutory duties by committing the following acts and omissions:

a. failing to periodically inspect the sidewalk in question to discover possible dangers, defects, deteriotion, or damage.

b. failing in general to repair and maintain the sidewalk in a condition that was reasonably safe and fit for travel by the public.

12. As a proximate cause of Defendant's breach of its duties, Plaintiff was severally injured in the accident that occurred and has suffered grievous and painful injuries.

13. As a direct an proximate result of the Defendant's negligence, Plaintiff suffered the following serious injuries and damages:

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a. fracturing of the left ankle;

b. physical pain and suffering;

c. loss of social, household, and recreational activities;

d. mental anguish;

e. medical expenses past, present, and future;

f. out of pocket incident related expenses;

g. wage loss or actual future loss of earnings;

h. and other damages, injuries, and consequences related to the accident and that develop during the course of discovery.

WHEREFORE, Plaintiff asks the court to award damages against Defendant in whatever amount Plaintiff is found to be entitled to in excess of $25,000, plus interest, costs, and attorney fees.

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian
Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
2000 Town Center, Suite 1900
Southfield, MI 48075
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JURY DEMAND

Plaintiff demands a trial by jury.

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian
Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
2000 Town Center, Suite 1900
Southfield, MI 48075
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EXHIBIT 1H

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JENNIFER BUHL, Case No. 2017-157097-NI

Plaintiff,

vs

CITY OF OAK PARK,

Defendant.

_____/

MOTIONS

BEFORE THE HONORABLE PHYLLIS C. McMILLEN

PONTIAC, MICHIGAN - WEDNESDAY, AUGUST 23, 2017

APPEARANCES:

For the Plaintiff: Matthew Edward Bedikian—P75312
Michigan Advocacy Center, PLLC
2000 Town Center, Suite 1900
Southfield, MI 48075-1152
(248) 957-0456

For the Defendant: John J. Gillooly—P41948
Garan Lucow Miller, PC
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207-2641
(313) 446-5501

TRANSCRIBED BY: Naomi D. Leach, CSR-0158
About Town Court Reporting, Inc.
248-634-3369

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WITNESSES PAGE

(None offered.)

EXHIBITS: Introduced Admitted

(None offered.)

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1 Pontiac, Michigan
2 Wednesday, August 23, 2017
3 - - -
4 (At 10:42 a.m., proceedings begin)
5 COURT CLERK: Your Honor, calling number 14 on
6 the Court's docket, Buhl v Oak Park City, 17-157097-NI.
7 MR. GILLOOLY: Good morning, Judge McMillen.
8 John Gillooly on behalf of the City of Oak Park.
9 MR. BEDIKIAN: Good morning, your Honor.
10 Matthew Bedikian on behalf of plaintiff, Jennifer Buhl.
11 MR. GILLOOLY: Judge McMillen, this is our
12 renewed motion to dismiss and/or for summary disposition.
13 You had previously ordered a stay of all discovery pending
14 the completion of the plaintiff's deposition. We have
15 completed her deposition. I argue, as a matter of law,
16 that Public Act 419 should be applied retroactively to the
17 date of the incident at issue because it does not affect
18 any vested rights of the plaintiff, number one. Number
19 two, we suggest to you that there's no duty on the part of
20 the City of Oak Park as the open and obvious danger rule
21 applies. The condition was open and obvious. There was
22 no special aspects. Plaintiff testified clearly and
23 unequivocally in her deposition that she saw the alleged
24 defect was a vertical discontinuity of more than two
25 inches, as she pled in her complaint. We suggest the

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1 condition was open and obvious and that there was no duty
2 on the City of Oak Park and rely on the position advanced
3 in our brief and supporting papers. Thank you.
4 MR. BEDIKIAN: Your Honor, I'd first like to
5 address the position that the statute -- statutory
6 amendment is retroactive. As I stated before when we were
7 here a couple months ago, I believe that it is not
8 retroactive. It's very clear that statutes are to operate
9 prospectively unless the legislator indicates a clear and
10 concise language indicating that it is retroactive, and
11 that is not present here. I did cite two unpublished
12 cases as persuasive authority to cement that point. One
13 deals with this particular act when it was amended in
14 2012. I do agree with defense counsel that the provision
15 that was amended is not the same provision. However, the
16 theory behind what the Court of Appeals determined and
17 their logic remains the same. They indicated that in that
18 case. I believe it was Sufi versus City of Detroit. The
19 amendment occurred in 2012. The date of the injury was
20 2010, and they filed suit in 2010. The Court of Appeals
21 reasoned that the amendment does not apply because it did
22 not indicate, on its face, that it was to apply
23 retroactively, and it also indicated that the cause of
24 injury, when the rights actually vested, is when the
25 injury occurred in 2010. Therefore, the amendment did not

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1 apply. The next case that I cited was Macklis, which
2 deals with a completely different statute, but it stands
3 for the proposition that even if the cause of action
4 occurs at a prior date before the amendment but a lawsuit
5 is filed after the amendment comes into effect, the Court
6 of Appeals found that the previous amendment applied
7 because the date of when the plaintiff's claims vested
8 were the injury date.
9 THE COURT: You need to be a little bit more
10 scientific, I think, in your determination of what the
11 vested right is. You have to be able to argue that she
12 had a vested right and them not being able to raise the
13 defense, because that's the only thing that the amendment
14 occasioned.
15 MR. BEDIKIAN: Right, and --
16 THE COURT: And so -- and so --
17 MR. BEDIKIAN: I'm --
18 THE COURT: -- I'm unaware of that being a
19 vested right that anybody has.
20 MR. BEDIKIAN: Well, I would -- I would --
21 THE COURT: Because let me give you an example
22 of a statutory issue that arose and -- so they -- a
23 statute was passed in Michigan some years ago where they
24 said that governmental agencies were no longer subject to
25 adverse possession, all right? And in the analysis of

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1 those cases they said well, wait a minute, you know, that
2 right to claim the property by adverse possession vested
3 at the end of the 15 year tolling period, and therefore,
4 for you to make that ruling now, despite the fact that the
5 lawsuit or anything comes after that, that's a vested
6 right. Is that the same as this?
7 MR. BEDIKIAN: Well, I would -- in terms of her
8 rights, she still has the right to pursue her claim.
9 THE COURT: She's pursuing her claim.
10 MR. BEDIKIAN: Right, right, and I understand
11 that, but I think what -- the point that I'm trying to
12 make, and there's a couple cases that were cited within
13 the two unpublished opinions that remain good case law and
14 that I wanted to point out to the Court is one, in the
15 previous statute there was -- it was determined by the
16 Supreme Court in Jones v Enertel that the open and obvious
17 defense was not available when the defendant violated a
18 statutory duty. That's a case that came down prior to
19 this amendment. So what the amendment essentially did was
20 kind of overturn that precedential decision by the Supreme
21 Court. So in essence, I can somewhat agree that the
22 amendment is remedial in nature. It did not necessarily
23 affect her right to bring her lawsuit but what it did
24 affect is, you know, her -- at the time she got injured,
25 that defense was not available, and so it's creating an

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1 additional legal burden, and the other case that I wanted
2 to indicate was -- and it was cited in Macklis. In Brewer
3 versus ADT, the Supreme Court held that the statute at
4 issue was not retroactive. Among other things, when the
5 Supreme Court's prior interpretation of the statute
6 triggered the amendment, the amendment imposed a new legal
7 burden, and the legislature did not indicate that the
8 amendment was retroactive. So, that case is still good
9 case law, and in this case, the amendment was created by
10 the legislature to essentially amend the Supreme Court's
11 ruling in Enertel to allow defendants, municipalities, to
12 plead, as an affirmative defense, the open and obvious
13 defense, and as such, it creates and imposes a new legal
14 burden. This is a burden that is granted -- the defendant
15 has to plead it affirmatively and has to prove it, but it
16 is a new legal burden that wasn't there when the -- her
17 cause of action occurred. And the last thing that I would
18 say for proof that the amendment was not to be applied
19 retroactively is, defense counsel, in his reply brief,
20 indicated and specifically looked at the 1995 amendment,
21 and in that amendment, the particular language that states
22 -- it says MCL 691.1 -- .1402(a), this statutory amendment
23 provides as follows: Enacting section 1. Section 1 and
24 2, 96 -- 1964 PA 170, MCL 691.1401 and 691.1402, as
25 amended by this amendatory act, and in section 2, as added

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1 by this amendatory act, apply only to cause of actions
2 arising on or after the date -- the effective date of this
3 amendatory act, and he used that to say clearly, in 1995,
4 the legislature intended this amendment to the statute to
5 apply prospectively, and since the legislature does not
6 have anything in the new act that says it acts
7 prospectively, then it should be allowed to act
8 retroactively, but that's not the status of the case law.
9 The status of the case law, and it's very clear, that
10 statutes are to be applied retro -- prospectively unless
11 there's a clear indication by the legislature to have it
12 apply retroactively, and if you look at the actual
13 language of the amendment where it allows for the open and
14 obvious defense to be asserted, it says, in subsection 5,
15 in a civil action, a municipal corporation that has a duty
16 to maintain a sidewalk under the subsection may assert, in
17 addition to other defenses, a defense of, you know, common
18 law and open and obvious. So, I want to emphasize the
19 word has. That is present tense, that is not past tense.
20 If the legislature indicated that they wanted this to act
21 retroactively, they could have used, you know, a
22 municipality that had or has a duty to maintain, or that
23 was under a duty to maintain, or similar language that
24 would allow people reading the statute to say okay, this
25 is -- this portion of the amendment will apply

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1 retroactively. If you want, I can stop there on the -- on
2 my position on retroactive and let defense counsel
3 respond, and then we can get to the open and obvious, or
4 if you want me to continue on on the open and obvious --
5 THE COURT: No, let's resolve this issue. Do
6 you have anything else you want to say?
7 MR. GILLOOLY: No, your Honor.
8 THE COURT: So, you know, I've done more than I
9 wanted to do research on the issue of retroactivity as a
10 result of the Covenant decision, obviously, and there is a
11 distinction between statutory application and, you know,
12 the judicial decision application, but kind of the
13 prevailing thing here is really kind of getting back to
14 that whole constitutional concept of due process and the
15 taking away of rights, and I still don't see that there
16 was a vested right to not have a defense raised. I just
17 -- you know, that's my hang-up with the argument about
18 where, you know, application gets applied here, and so it
19 just does not strike me that there is any vested right
20 that is being disrupted, and absent that, you don't --
21 because here's the thing. And with the, you know, with
22 the judicial decision stuff, number one, the cases are all
23 over the board on retroactivity, but the -- at the heart
24 of every decision is a determination of fairness, like
25 what's what, and you don't leave somebody out in the cold.

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1 Your client's not getting left out in the cold. Your
2 client still has the very claim that she had on the day
3 that she fell and was injured. The question is just
4 whether or not, you know, they have the ability to bring
5 this defense, and I really do view that as a procedural
6 change and not a substantive change in her ability to
7 bring her claim, and for that reason I would find that the
8 statute does apply in this instance, particularly where
9 the suit was filed after the advent of the amendment.
10 MR. BEDIKIAN: Can I ask a question, your Honor?
11 Do you not believe that the amendment establishes a new
12 legal burden?
13 THE COURT: You know, I guess it's their burden
14 to prove (indiscernible).
15 MR. BEDIKIAN: Right. I mean the case law
16 doesn't distinguish --
17 THE COURT: It's not your burden.
18 MR. BEDIKIAN: Yeah.
19 THE COURT: It doesn't change the facts, it
20 doesn't change the proofs, it doesn't change anything. It
21 changes their burden, you know.
22 MR. BEDIKIAN: I mean the cases that were cited
23 within the ones that I provided to the Court, you know, --
24 THE COURT: Yeah. And you know, and the other
25 thing about statutes is -- is -- and judicial decisions,

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1 is you look at like how -- how the language in the
2 decision or the -- or the statute impacted the way people
3 conducted themselves. Well, nothing -- I mean nothing
4 about that statute impacted how she conducted herself.
5 She didn't walk around saying oh, that's open and obvious
6 and so I'm going to trip over it because they don't have
7 that defense, you know? So, it doesn't -- it just doesn't
8 impact that kind of, you know, -- I mean, she didn't
9 change her, I hope, I can only assume, --
10 MR. BEDIKIAN: Right.
11 THE COURT: -- that she did not change her
12 position and choose to be injured because she thought they
13 wouldn't be able to bring an open and obvious defense, and
14 so she's in no worse position now than she was before the
15 amendment in terms of her conduct, and that's the whole
16 purpose of the statutes, is for us to bring our conduct
17 within the bounds of the statutes, to be able to read the
18 statutes, and if they are clear on their face, to, you
19 know, conduct ourselves in that manner, but this is not
20 one of those cases where she didn't get insurance because
21 she thought that, you know, they were going to be liable.
22 I mean, you know, case law's replete with all sorts of
23 examples of when it would be unfair because people did
24 conduct themselves in a certain manner. This just isn't
25 one of those cases.

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1 MR. BEDIKIAN: Okay. Then I will move on to the
2 open and obvious defense. So, the standard when applying
3 open and obvious is whether the danger is open and
4 obvious, and it depends on whether a reasonable -- it is
5 reasonable to expect an average person of ordinary
6 intelligence to discover the danger upon casual
7 inspection, and when deciding whether or not the condition
8 is open and obvious, we need to place ourselves in
9 plaintiff's position, not to remove the condition and put
10 it in, you know, some vacuum, and when it's, you know,
11 perfect conditions, you have to look at the condition as
12 the plaintiff looked at the condition on the date that she
13 was injured, and I want to discuss that because I think in
14 the brief and the -- what was represented by the defendant
15 is slightly different, and it's based on perception, and
16 if I may, your Honor, can I move off the podium to kind of
17 demonstrate my point?
18 THE COURT: Keep close to a microphone.
19 MR. BEDIKIAN: I'm loud enough so hopefully the
20 microphone will get me. So I'm -- I would imagine, and
21 I'll try and analogize what my point is by -- if you could
22 imagine that this was an infinity pool, okay, and where
23 I'm standing right now, this is the front of the infinity
24 pool and that edge over there is where the horizon --
25 where the infinity pool meets the horizon. Well, if I'm

1 standing here and I'm looking this way, it looks as if the
2 infinity pool goes on forever, and there's no edge and
3 there's no drop-off. Now, if I walk around to the other
4 side and I stand where the catch basin is and I look
5 towards where the pool begins, I can clearly see that
6 there's -- maybe not clearly because it's a fraction --
7 you know, it's 1/4 of an inch or 1/6 of an inch
8 difference, but there's clearly a difference in the level
9 of the two areas that I'm describing. What the defendant
10 did in its motion for summary disposition was essentially
11 provide the Court a point of view that the plaintiff did
12 not have of the condition. So, I would argue that when
13 the plaintiff encountered the condition, she was standing
14 where I was standing, where the road is here where I'm
15 standing and the door to the entrance of the Trend Express
16 Market is where the infinity edge pool is. From this
17 angle, she indicated that she could not see the dip where
18 she fell. Now, when she was presented with a picture that
19 was from the opposite angle where she is standing at,
20 where the door and entrance is looking back towards where
21 her vehicle had parked, that opposite angle clearly shows
22 that there's a drop-off in that crack of concrete, and so
23 I would say, you know, when we're looking at this, and the
24 open and obvious -- whether the condition was open and
25 obvious, you have to look at it where the plaintiff was

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1 looking at it, and which we've supplied you a picture. In
2 our exhibit, the picture one is -- again, it's not to
3 scale and it is not exactly how the space looked on May 4,
4 2016. It says it's September 6 or September 9, 2016, a
5 couple months after, and you can see, there's a large tree
6 there, there's the sidewalk, there's some -- you know,
7 cement sidewalk, and then there's the entrance to the
8 door, and then further, I believe it's Exhibit 3 or 4, is
9 a closer up version where you're -- you know, she's
10 looking. Now, on the date that this incident occurred,
11 she testified that it was raining, it was dark, there was
12 debris around the tree, and as she walking, she was
13 rushing to get into the store as it was raining, she was
14 walking, she did notice the crack. You could see there's
15 a crack in the cement in all pictures that have been
16 provided to the Court. However, she testified that she
17 did not see the dip that precedes the crack. She never
18 saw that. And so for the -- now, defendant did indicate
19 in its brief, plaintiff indicated that she could see the
20 dip. However, again, perception. She was presented with
21 a picture, and when you're -- she was able to look at the
22 picture for an amount longer than, you know, five, ten
23 seconds when you're getting out of a car rushing to get
24 into a store. Yeah. When she looked at the picture, she
25 answered defense counsel's question; yes, I could see the

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1 dip, but she testified that at the time the incident
2 occurred, she could not see the dip, and I put -- cited
3 two cases. The Mato case, while it is unpublished, I
4 think it does provide some insight. Essentially in that
5 case, the defendant -- or the plaintiff was on a sidewalk.
6 He, I believe was walking, and someone was coming in the
7 other direction. He moved over to try and avoid colliding
8 with that, and he stubbed his toe on the two inch vertical
9 discontinuity and alleged injuries, and in that case --
10 sorry. That's a different -- in the Mato case, the
11 plaintiff was walking, there was a confirmed inches that
12 was not objected to by the defendant and the defense in
13 that, and there was leaves covering the dip or the portion
14 that had been raised, and the plaintiff testified in her
15 deposition that at the time she tripped and fell, she did
16 not see it. However, at her deposition she also testified
17 that after she fell and after she was shown pictures, she
18 indeed saw it. Well, the trial court and the Court of
19 Appeals indicated that given that she testified she didn't
20 see it at the time, then there's at least an issue of fact
21 as to whether the condition was open and obvious, and the
22 other case that I cited was Price, and again, I know it's
23 different in a sense that in Price, the plaintiff is
24 walking in a grocery -- Kroger, I believe, and there was a
25 one inch -- like barb or some sort of wire that was

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1 hanging off the -- some sort of box or some sort of grate
2 or something, and it was at ankle height, and you know,
3 the court found that because the barb was small, it was
4 one inch, it was at ankle level, that a reasonable person
5 may not have found it upon casual inspection, and that it
6 was a question of fact for a jury to determine. So, if we
7 look at the open and obvious defense, they have the duty
8 to show that it was open and obvious in the plaintiff's
9 perspective as she proceeded through her injury, and with
10 her testimony, the fact that she indicated that it was
11 raining, it was dark, there was debris, she did not see
12 the dip and she was rushing to get into the store,
13 certainly it's enough to have a question of fact whether a
14 jury would feel that the condition was open and obvious
15 given those circumstances.
16 THE COURT: All right. What time of day did
17 this happen, 4:30?
18 MR. BEDIKIAN: It was later on in the afternoon,
19 I believe.
20 MR. GILLOOLY: Very briefly, your Honor. I find
21 it very interesting that the plaintiff relies on a picture
22 of the area of the incident taken from Google instead of
23 the pictures that were used during the course of her
24 client -- of her deposition, and the reason being is that
25 plaintiff admitted in her deposition that if she had been

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1 looking where she was going, on page 17, she would have
2 noticed the condition. There was nothing whatsoever
3 impeding her vision, and I asked the specific question at
4 line 13, page 17: So if you'd looked down at this area,
5 you would have been able to see it, correct? Correct. I
6 was just walking to the party store. The condition was
7 open and obvious. It wasn't inherently dangerous. There
8 was no special aspects to it. You know, the law with
9 regard to premises liability in Michigan, it is what it
10 is, quite frankly, and there's nothing whatsoever that
11 distracted the plaintiff in this case, that was hiding the
12 condition whatsoever. It was open and obvious if she
13 would have been looking where she was going. In fact,
14 they haven't even alleged the date of the occurrence in
15 their complaint. It's a fatal flaw, I might suggest.
16 MR. BEDIKIAN: Can I briefly respond?
17 THE COURT: I'm not too concerned about that
18 because I think that I would have to allow you to amend
19 your complaint. I'll make a decision (inaudible).
20 MR. BEDIKIAN: Okay. And the complaint
21 specifically indicates that I've provided them notice, as
22 required by the statute, on June 28th of 2016. I mean, you
23 can infer by that that the injury occurred within 90 -- a
24 90 day range in that so I -- you know, again, it was an
25 error on my part. I would ask to allow to amend to

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1 provide the actual date. But with respect to the pictures
2 that were shown, the picture that I provided in my brief
3 on one is just to provide the Court with an idea -- a rec
4 -- a somewhat accurate representation of what it looked
5 like around the time, because the pictures that were used
6 at the deposition show that the tree has been cut down so
7 -- and the other exhibit was the actual exhibit that was
8 used at her deposition, and of course, if someone's
9 sitting there answering questions looking at a picture --
10 he asked, when you look at this picture, can you see this
11 dip? Well, yeah, she can see the dip. It's from the
12 other side, not the view that she had, it's from the other
13 side, and she's answering his questions in regard to
14 looking at that picture.
15 THE COURT: Okay. So, just a couple kind of
16 preliminary things. I know that plaintiffs, in their
17 argument, have -- or plaintiff, in her argument, has made
18 the statement that there was debris around the thing. I
19 don't find anything in her testimony that supports that.
20 I think she said there were a couple of cigarette butts
21 but not something -- if the implication is that there was
22 debris that was obscuring her view, that's not supported
23 in the evidence. I think she was asked about that kind of
24 repeatedly, and at best you got a couple cigarette butts.
25 And as to the darkness issue, the allegation in the

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1 perspective that she would have had as she alighted from
2 the car. I actually think the presence of the tree is
3 important because without, you know, adding too much, you
4 know, to the facts here, it's pretty obvious that this --
5 this piece of concrete was raised by the roots to that
6 tree, that it was raised sufficiently that it caused a
7 crack across the corner, which in the picture in Exhibit 3
8 would be the upper right-hand corner of the cement piece
9 in question, and that should have put her on even more
10 notice that there was going to be an irregularity in the
11 sidewalk. I can clearly see, looking at this picture,
12 that the back corner is raised, and again, the crack that
13 she clearly identified as having seen and the existence of
14 the tree next to that, only bolster that. You know, yes,
15 we have to take into consideration some things that are
16 subjective in terms of, you know, the conditions, but it
17 is an objective standard, and the question is, would
18 anybody getting out of a car and walking across that note
19 that there was a fairly substantial irregularity in that
20 sidewalk that would cause you to make sure that you
21 stepped over it and not on it, which it sounds like that's
22 maybe how she turned her ankle, was by stepping directly
23 on it or like -- I'm not sure exactly what that would --
24 but in any circumstances, I do believe that the situation
25 -- that the condition was open and obvious and therefore,

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1 the -- and there were no special conditions. It's not
2 like there was a 12 foot drop on the other side of that
3 that was obscured in some manner from her view, or
4 something that made it so inherently dangerous that
5 regardless of its obvious nature, it should not be a
6 hurdle to recovery, but in this circumstance, I do find
7 that the condition was open and obvious, and that would be
8 a defense to the action.
9 MR. GILLOOLY: Thank you, your Honor.
10 MR. BEDIKIAN: Thank you, your Honor.
11 THE COURT: Motion's granted.
12 (At 11:11 a.m., proceedings concluded)
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CERTIFICATION

I certify that this transcript, consisting of 22 pages, is a true and accurate transcription, to the best of my ability, of the video proceeding in this case before the Honorable Phyllis C. McMillen on Wednesday, August 23, 2017, as recorded by the clerk.

Videotape proceedings were recorded and were provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceedings, or for the content of the videotape provided.

Naomi D. Leach

/s/ Naomi D. Leach, CSR-0158
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EXHIBIT 1I

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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.

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This act is ordered to take immediate effect.

Clerk of the House of Representatives

Secretary of the Senate

Approved .....

Governor

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EXHIBIT 1J

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WICKER v. HOUSE OF LIQUOR & WINE, INC.

Court of Appeals of Michigan

June 11, 1999, Decided

No. 206386

Reporter
1999 Mich. App. LEXIS 611 *; 1999 WL 33441232

MELZINE ***WICKER*** and FRED ***WICKER***, Plaintiffs-Appellants, v HOUSE OF ***LIQUOR*** & WINE, INC., Defendant-Appellee.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Wayne Circuit Court. LC No. 96-645497 NO.

Disposition: Affirmed.

Core Terms

sidewalk, invitee, warn, summary disposition, trial court

Case Summary

Procedural Posture
Appellants, husband and wife, sought review of the judgment of the Wayne Circuit Court (Michigan), which granted summary judgment to appellee business in the action brought by the husband and the wife alleging that the wife was injured due to a defective sidewalk on the business's premises.

Overview
The wife was injured when she tripped over the uneven sidewalk at the business. The husband and the wife filed suit against the business and the trial court granted summary judgment to the business. On appeal, the court affirmed finding that the defect in the sidewalk was open and obvious. The court found that the only defect in the sidewalk was that two slabs were uneven at the point where they met. The court found that an average user of ordinary intelligence would have readily discovered the imperfection and stepped over it. The court found that the sidewalk did not present any unusual circumstances suggesting that it was so unreasonably dangerous as to warrant submitting the issue of the standard of care to a jury. The court found that the open and obvious nature of the defect in the sidewalk negated any duty on the part of the business to warn or protect the wife with regard to it.

Outcome
The court affirmed the grant of summary judgment in favor of the business.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

The appellate court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. When considering an appeal of an order granting summary disposition under *Mich. Ct. R. 2.116(C)(10)*, a reviewing court must examine all relevant documentary

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evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ.

Torts > ... > Elements > Duty > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Known Dangers

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

Torts > ... > General Premises Liability > Defenses > General Overview

Torts > ... > General Premises Liability > Duties of Care > General Overview

Torts > ... > Duty On Premises > Invitees > General Overview

HN2[] **Elements, Duty**

The open and obvious doctrine concerns the duty element of a negligence action, regardless of the nature of any alleged breach. Where the dangers are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. Thus, although the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care, the openness and obviousness of the hazard remains relevant to an inquiry into a premises owner's liability where a party claims injury resulting from a condition on the premises. A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. The appropriate inquiry is whether the condition is open and obvious, and, if so, whether the risk of injury is unreasonable despite the obviousness of the condition.

Judges: Before: Saad, P.J., and Murphy and O'Connell, JJ.

Opinion

PER CURIAM.

Plaintiff [1] brought this negligence action on allegations that she suffered injury caused by a defective sidewalk on defendant's premises. The trial court granted defendant's motion for summary disposition pursuant to *MCR 2.116(C)(10)*, holding that the condition of the sidewalk was open and obvious. Plaintiff appeals as of right, and we affirm.

HN1[] This Court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v Farm Bureau Mutual Ins Co, 218 Mich App 221, 233; 553 NW2d 371 (1996).* **[*2]** When considering an appeal of an order granting summary disposition under *MCR 2.116(C)(10)*, a reviewing court must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark, 437 Mich 175, 184-185; 468 NW2d 498 (1991)*; *Shirilla v Detroit, 208 Mich App 434, 437; 528 NW2d 763 (1995)*.

Plaintiff contends that the trial court erred in granting summary disposition because genuine factual issues exist regarding whether the alleged defects constituted an open and obvious condition. We disagree.

In *Bertrand v Alan Ford, Inc, 449 Mich 606, 610-611; 537 NW2d 185 (1995)*, our Supreme Court expounded on the open and obvious doctrine as it relates to the standard of care to which possessors of land are held with respect to invitees:

> If the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability **[*3]** if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that

[1] Because plaintiff Fred Wicker's interest in this suit is derivative of that of plaintiff Melzine Wicker, for convenience in this opinion the term "plaintiff" will refer exclusively to the latter.

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the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide. [Id. at 610-611 (emphasis in original) (citations and footnote omitted).]

Plaintiff alleges that the cause of her fall was the uneven level and dilapidated condition of the sidewalk. However, "differing floor levels were not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous." Id. at 614 (emphasis in original). The Court announced that public policy favored encouraging a person to "look where he is going" and "take appropriate care for his own safety," id. at 616, then stated as follows:

> If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. If the jury determines that the risk of harm was unreasonable, then **[*4]** the scope of the defendant's duty to exercise reasonable care extended to this particular risk. At any rate, the trial court may appropriately consider the specific allegations of the breach of the duty of reasonable care, such as failure to warn, negligent maintenance, or dangerous construction. If the plaintiff alleges that the defendant failed to warn of the danger, yet no reasonable juror would find that the danger was not open and obvious, then the trial court properly may preclude a failure to warn theory from reaching the jury by granting partial summary judgment. [Id. at 617 (citation omitted).]

Accordingly, for sidewalks of differing levels to be actionable, unusual circumstances must be present to warrant the imposition of liability. As this Court stated in Novotney v Burger King Corp (On Remand), 198 Mich App 470, 475; 449 NW2d 379 (1993), "The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger?"

After reviewing the photographs of the sidewalk included in **[*5]** the record, we conclude that an average user with ordinary intelligence would have readily discovered the imperfections where the two concrete slabs in question meet. Although the precise extent of the unevenness may be difficult to gauge on casual observation, rather than engage in any such calculation a user of ordinary perception and prudence could simply and easily step over that minor imperfection.

Nor do the photographs suggest that there was anything unusual about the condition of the sidewalk that rendered it unreasonably dangerous despite its open and obvious nature. The two concrete slabs appear neither cracked nor uneven, except where they meet. A person walking down any sidewalk must expect to encounter irregularities of this sort. Thus, this sidewalk does not present any unusual circumstances suggesting the possibility of unreasonable dangerousness sufficient to warrant presenting the standard-of-care inquiry to the trier of fact.

Plaintiff argues that the open and obvious doctrine applies only to the duty to warn and does not to the duty to maintain, inspect, and repair. We disagree. *HN2*[↑] The open and obvious doctrine concerns the duty element of a negligence action, regardless **[*6]** of the nature of any alleged breach. "Where the dangers . . . are so obvious that the invitee might reasonable be expected to discover them, an invitor owes no duty to *protect* or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." Riddle v McLouth Steel Products Corp, 440 Mich 85, 96; 485 NW2d 676 (1992) (emphasis added). Thus, although "the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care," Bertrand, supra at 611, the openness and obviousness of the hazard remains relevant to an inquiry into a premises owner's liability where a party claims injury resulting from a condition on the premises. "'A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*'" Id. at 610, adding emphasis and quoting 2 Restatement Torts, 2d, § 343A(1), p 218. We note that there is no limiting language in *Bertrand* to indicate that the open and obvious **[*7]** doctrine only applies to the duty to warn. The appropriate inquiry remains whether the condition was open and obvious, and, if so, whether the risk of injury was unreasonable despite the obviousness of the condition.

In this case, the defect in the sidewalk presented no unusual or unreasonable risk, and thus its open and obvious nature negated any duty on defendant's part to warn or otherwise protect plaintiff with regard to it.

Finally, plaintiff argues that the open and obvious

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doctrine violates public policy. However, as noted above, our Supreme Court has stated that public policy favors encouraging people to look where they are going and to take reasonable care for their own safety. *Bertrand, supra at 616*. For these reasons, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Henry William Saad

/s/ William B. Murphy

/s/ Peter D. O'Connell

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Business (On Remand), 251 Mich App 1, 8-9; 649 NW2d 392 (2002).

Here, plaintiff testified in her deposition that she did not see the height differential between the two sidewalk slabs because she was not looking down at the time she tripped and fell; rather, she was looking straight ahead. However, plaintiff testified, the condition at issue was noticeable from two or three feet away if one was looking at the ground. We note that the pictures of the condition support plaintiff's testimony. Thus, employing an objective standard, we conclude that "an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Joyce, 249 Mich App at 238* (citation omitted). Accordingly, the condition was open and obvious.

Further, the condition was not unreasonably dangerous. Sidewalks with slight height differentials between the cement **[*4]** slabs are fairly common and the condition is readily avoided by simply stepping over or around the slight elevation. See *Lugo, 464 Mich at 518*; *Kenny, 264 Mich App at 117*. Thus, plaintiff has failed to establish that special aspects of this open and obvious condition prevented the application of the open and obvious doctrine. Accordingly, the trial court should have granted defendant's motion for summary disposition.

Reversed and remanded for entry of an order of summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Mark J. Cavanagh

/s/ Henry William Saad

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NETTLE v. KIMCO-CLAWSON 143, INC.

Court of Appeals of Michigan

June 12, 2005, Decided

No. 260494

Reporter
2005 Mich. App. LEXIS 1672 *

SANDRA NETTLE, Plaintiff-Appellant, v KIMCO-CLAWSON 143, INC., Defendant-Appellee.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Oakland Circuit Court. LC No. 2004-056308-NO.

Disposition: Affirmed.

Core Terms

trial court, premises, summary disposition, concrete, sidewalk, insured, slabs, unreasonable danger, plaintiff's claim, genuine issue of material fact, documentary evidence, impose liability, insurance policy, pay damages, deposition, asserting, possessor, coverage, differed, elevated, expenses, pavement, pictures, invitee, argues, hidden, uneven

Judges: Before: Cooper, P.J., and Hood and R.S. Gribbs *, JJ.

Opinion

PER CURIAM.

In this premises liability case, plaintiff Sandra Nettle appeals as of right from the circuit court's orders granting defendant Kimco-Clawson 143, Inc. summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was shopping at a strip mall owned by defendant when she tripped and fell on a sidewalk on the premises. Plaintiff alleged that she caught her toe between two slabs of concrete which differed in height by approximately one-quarter of an inch. The trial court dismissed plaintiff's negligence claim, finding that the condition of the sidewalk was open and obvious and that no special aspects rendered the sidewalk unreasonably dangerous. The trial court also dismissed plaintiff's claim seeking reimbursement [*2] from defendant, pursuant to its insurance policy.

This Court reviews a trial court's determination regarding a motion for summary disposition de novo. [1] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. [2] [*3] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." [3] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. [4]

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] MacDonald v PKT, Inc, 464 Mich 322, 332; 628 NW2d 33 (2001).

[2] Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc, 238 Mich. App. 394, 397; 605 N.W.2d 685 (1999). The trial court did not specify the subrule upon which its grant of summary disposition was based. However, as the trial court relied on the documentary evidence submitted, we treat the motion as one under MCR 2.116(C)(10).

[3] Singer v American States Ins, 245 Mich. App. 370, 374; 631 N.W.2d 34 (2001).

[4] MacDonald, supra at 332.

Megan Cavanagh

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I. Open and Obvious Defect

Plaintiff argues that the trial court erred in concluding that the irregularity in the pavement was an open and obvious condition. We disagree.

> "The general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk."
>
> A special aspect exists when the danger, although open and obvious, is unavoidable or imposes a "uniquely high likelihood of harm or severity of harm." Pursuant to *Lugo* [*v Ameritech Corp*], a court must "focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff" or other idiosyncratic factors related to the particular plaintiff. [5]

[*4] Plaintiff asserts that the uneven condition of the two slabs of concrete was a hidden danger. Plaintiff points to the deposition testimony of defendant's agents asserting that they repeatedly failed to discover the elevated concrete despite continuous inspections of the property. Based on this evidence, plaintiff arguably created a question of fact that this condition was not open and obvious.

However, plaintiff has not established that, even if the condition was hidden, the sidewalk was so dangerous as to impose liability. This Court and the Michigan Supreme Court have found that differing surface levels, such as steps and uneven pavement, "are 'not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous.'" [6] The pictures submitted into evidence show that there are noticeable gaps between the slabs and there are several cracks in the concrete. A review of these pictures clearly shows that none of these conditions appear dangerous in any way. A small, unnoticeable rise in elevation between two slabs of concrete on a generally imperfect walkway is not an unusual or dangerous condition that would trigger liability. **[*5]** Accordingly, the trial court properly dismissed plaintiff's claim.

II. Insurance

Plaintiff argues that defendant's insurance policy obliged defendant to cover her medical expenses from the fall. We disagree. Defendant was insured under a policy entitled "*Liability* Policy." The policy provides for the payment of medical expenses for a "bodily injury" arising "out of premises or operations for which [defendant is] afforded bodily injury *liability* coverage." Such coverage is available when "the insured becomes legally obligated to pay [damages] by reason of *liability* imposed by law or assumed under an insured contract." The trial court properly determined that defendant was not liable for the plaintiff's **[*6]** injury. Furthermore, plaintiff has not alleged that defendant assumed a contractual duty to pay damages to her. Accordingly, the trial court properly determined that defendant had no duty to pay damages to plaintiff simply because it was insured.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

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[5] Bragan v Symanzik, 263 Mich. App. 324, 331-332; N.W.2d (2004), quoting Lugo v Ameritech Corp, 464 Mich. 512, 517-519, 523-524; 629 N.W.2d 384 (2001).

[6] Weakly v Dearborn Hgts, 240 Mich. App. 382, 385; 612 N.W.2d 428 (2000), remanded on other grounds ***463 Mich. 980 (2001)***, quoting Bertrand v Alan Ford, Inc, 449 Mich. 606, 614; 537 N.W.2d 185 (1995) (emphasis in original).

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EXHIBIT 2

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2019 WL 4126130
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

Jennifer BUHL, Plaintiff-Appellant,
v.
CITY OF OAK PARK, Defendant-Appellee.

No.
340359
|
August 29, 2019, 9:00 a.m.

Synopsis
Background: Claimant brought negligence action against municipality, seeking damages for her slip and fall injury under the defective sidewalk exception to governmental immunity. The Circuit Court, Oakland County, granted summary disposition in favor of city, based on statutory amendment that allowed municipality to assert open and obvious doctrine as a defense. Claimant appealed, asserting improper retroactive application of the amendment.

Holdings: The Court of Appeals, Tukel, J., held that:

amendment did not provide that it was to be given retroactive effect;

amendment did not totally bar or take away claimant's cause of action;

amendment did not take away or impair claimant's vested rights at the time of injury;

amendment could be applied retroactively as a remedial statute; and

sidewalk defect was an open and obvious condition.

Affirmed.

Letica, J., dissented with separate opinion.

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

Before: O'Brien, P.J., and Tukel and Letica, JJ.

Opinion

Tukel, J.

*1 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 N.W.2d 180 (2001), citing *Landgraf v. USI Film Products*, 511 U.S. 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 N.W.2d 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

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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

***2** 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 N.W.2d 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 N.W.2d 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 Mich. App. at 392, 822 N.W.2d 799. 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 U.S. at 263-264, 114 S.Ct. 1483 (citations omitted).

> ***3** 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, 114 S. Ct. 1483 (citations omitted).]

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"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, 114 S. Ct. 1483 (citations omitted), nor is it " 'made retroactive merely because it draws upon antecedent facts for its operation,' " *id.* at 269 n. 24, 114 S. Ct. 1483 (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 F.3d 650, 657 (C.A. 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 U.S. at 269-270, 114 S.Ct. 1483. "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, 114 S. Ct. 1483. "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 U.S. Court of Appeals for the Sixth Circuit*, 416 Mich. 558, 570, 331 N.W.2d 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, 331 N.W.2d 456 (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, 818 N.W.2d 279. 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, 624 N.W.2d 180 (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 N.W.2d 475 (2010); *Franks v. White Pine Copper Div.*, 422 Mich. 636, 670, 375 N.W.2d 715 (1985).

***4** "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, 331 N.W.2d 456, 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, 331 N.W.2d 456 (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 U.S. at 280, 114 S.Ct. 1483.

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, 331 N.W.2d 456; see also *Johnson*, 491 Mich. at 429, 818 N.W.2d 279. 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, 818

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N.W.2d 279 (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, 818 N.W.2d 279. Rather, "immediate effect" means only "that the Legislature by a 2/3 vote expressed an intention that the amendatory act take effect on the date it was filed." *Id.* at 431 n. 30, 818 N.W.2d 279. 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 N.W.2d 269 (2001), citing *In re Certified Questions*, 416 Mich. at 572-573, 331 N.W.2d 456. 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, 331 N.W.2d 456. 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, 818 N.W.2d 279 (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, 331 N.W.2d 456, specifically noted that only a "legal bar" would implicate the "totally barred or taken 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, 331 N.W.2d 456. In analyzing the issue, our Supreme Court stated:

> ***5** 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, 331 N.W.2d 456 (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

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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 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*.

***6** 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 U.S. at 280, 114 S.Ct. 1483. 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. U.S. Dep't of Agriculture*, 314 F.3d 1060, 1062 (C.A. 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]

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*7 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 *Landgraf.* 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 U.S. at 271, 114 S.Ct. 1483. 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, 782 N.W.2d 475.[5] Retroactive application thus would have upset expectations regarding 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, 782 N.W.2d 475.

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 U.S. at 270, 114 S.Ct. 1483, 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 N.W.2d 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, 99 N.W.2d 490 (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 U.S. 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 U.S. at 270 [114 S.Ct. 1483] (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 U.S. at 273-274, 132 S.Ct. 1479 (some citations omitted; emphasis added).]

*8 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

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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, 331 N.W.2d 456. "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 N.W.2d 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, 818 N.W.2d 279. 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 N.W.2d 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, 725 N.W.2d 56, and also "clarif[ies] an existing statute" and "resolve[s] a controversy regarding its meaning," *Mortgage Electronic Registration Sys.*, 271 Mich. App. at 126, 721 N.W.2d 276.

Brewer provides an example of this principle. An earlier decision, *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28, 732 N.W.2d 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, 782 N.W.2d 475, and thus was plainly a substantive change in the law which could not be applied retroactively. *Id.* at 56-57, 782 N.W.2d 475. 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, 782 N.W.2d 475 (emphasis added, emphasis in original removed).]

***9** 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, 912 N.W.2d 195 (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, 99 N.W.2d 490 (citation omitted). Thus, the Legislature's reinstatement of a prior doctrine, which "had been lost through" judicial decision and which,

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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, 725 N.W.2d 56. 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, 721 N.W.2d 276.

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 N.W.2d 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.

***10** 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 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 N.W.2d 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 N.W. 591 (1910).

In *Jones v. Enertel, Inc.*, 467 Mich. 266, 650 N.W.2d 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, 650 N.W.2d 334 (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

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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 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, 650 N.W.2d 334.

***11** 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 N.W.2d 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 N.W.2d 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 N.W.2d 45 (1999). Based on the language employed by the Legislature as well as the rule of statutory 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]

***12** 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.

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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 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, 782 N.W.2d 475, citing *Hurd v. Ford Motor Co.*, 423 Mich. 531, 533, 377 N.W.2d 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]

***13** 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, 99 N.W.2d 490 (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 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, 725 N.W.2d 56, citing *Lahti*, 357 Mich. at 589, 99 N.W.2d 490. 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 N.W.2d 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, 818 N.W.2d 279 (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

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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 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 N.W.2d 797 (1996) (citation omitted), aff'd 457 Mich. 593, 580 N.W.2d 817 (1998). "An affirmative defense presumes liability by definition." *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 132, 517 N.W.2d 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 N.W.2d 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 N.W.2d 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.

***14** 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, 99 N.W.2d 490 (" '[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, 822 N.W.2d 799. 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 provide "specific facts" that show that there is "a genuine issue of disputed fact." *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362, 547 N.W.2d 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 N.W.2d 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

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have known that the condition was hazardous." *Slaughter v. Blarney Castle Oil Co.*, 281 Mich. App. 474, 478-479, 760 N.W.2d 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, 773 N.W.2d 739. 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, 773 N.W.2d 739.

***15** 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 inspection." *Id.* at 501, 773 N.W.2d 739. 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.

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.

I. STANDARD OF REVIEW

***16** 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 N.W.2d 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 U.S. 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

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and upset settled transactions.' " *Downriver Plaza Group v. Southgate*, 444 Mich. 656, 666, 513 N.W.2d 807 (1994), quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 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 N.W.2d 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, 852 N.W.2d 78 (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 governs. All other rules of construction and operation are subservient to this principle.' " *Frank W. Lynch & Co.*, 463 Mich. at 583, 624 N.W.2d 180, quoting *Franks v. White Pine Copper Div.*, 422 Mich. 636, 670, 375 N.W.2d 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 N.W.2d 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, 624 N.W.2d 180.[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 N.W.2d 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, 852 N.W.2d 78. 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

***17** 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 N.W.2d 456 (1982), quoting *Hughes v. Judges' Retirement Bd.*, 407 Mich. 75, 85, 282 N.W.2d 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, 331 N.W.2d 456.

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.

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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.*, 463 Mich. at 585, 624 N.W.2d 180 (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 N.W.2d 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, 331 N.W.2d 456 (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 N.W.2d 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 N.W.2d 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, 821 N.W.2d 88. "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, 821 N.W.2d 88. 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 N.W.2d 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, 821 N.W.2d 88.

***18** 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 N.W.2d 334 (2002). See also *Haas v. Ionia*, 214 Mich. App. 361, 543 N.W.2d 21 (1996); *Walker v. City of Flint*, 213 Mich. App. 18, 539 N.W.2d 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, 650 N.W.2d 334; *Haas*, 214 Mich. App. at 362, 543 N.W.2d 21; *Walker*, 213 Mich. App. at 22-23, 539 N.W.2d 535. 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, 543 N.W.2d 21. "Thus, absolving the city of 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 N.W.2d 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

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> 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. at 270-271, 650 N.W.2d 334 (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 [650 N.W.2d 334]; *Walker*, 213 Mich. App. at 22-23 [539 N.W.2d 535].
>
> 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 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 [821 N.W.2d 88]. [*Schilling*, unpub. op. at 11 (footnote omitted; emphasis added; second alteration in original)].

***19** 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, 715 N.W.2d 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, 331 N.W.2d 456. 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, 331 N.W.2d 456. 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, 331 N.W.2d 456.

***20** 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 U.S. 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, 132 S. Ct. 1479. 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, 782 N.W.2d 475, citing *Hurd*, 423 Mich. at 533, 377 N.W.2d 300. See also *Johnson*, 491 Mich. at 430, 818 N.W.2d 279, quoting *Brewer*, 486 Mich. at 56, 782 N.W.2d 475. The Supreme Court did not incorporate the majority's rule. See also *Frank W. Lynch & Co.*, 463 Mich. at 585, 624 N.W.2d 180 ("[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 dictum. [7] *Perry v. Sied*, 461 Mich. 680, 687 n. 9, 611 N.W.2d 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 N.W.2d 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 N.W.2d 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.

***21** Finally, the majority repeatedly quotes *Lahti v. Fosterling*, 357 Mich. 578, 589, 99 N.W.2d 490 (1959), quoting *Evans Prod. Co. v. State Bd. of Escheats*, 307 Mich. 506, 545, 12 N.W.2d 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, 99 N.W.2d 490. 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, 99 N.W.2d 490. 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, 99 N.W.2d 490. 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, 99 N.W.2d 490. 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 considered 'remedial' ...." *Brewer*, 486 Mich. at 57, 782 N.W.2d 475. See also *Frank W. Lynch & Co.*, 463 Mich. at 585, 624 N.W.2d 180 ("[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

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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 N.W.2d 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, 65 N.W.2d 785. 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, 65 N.W.2d 785. The plaintiff opted to recover from his employer under the workers' compensation law. *Id.* at 449, 65 N.W.2d 785. 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, 65 N.W.2d 785. The plaintiff then sued the tortfeasor. *Id.* at 449, 65 N.W.2d 785. 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, 65 N.W.2d 785.

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, 65 N.W.2d 785. 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, 65 N.W.2d 785. 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, 65 N.W.2d 785. 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, 65 N.W.2d 785, quoting *Wylie v. City Comm'n of Grand Rapids*, 293 Mich. 571, 588, 292 N.W. 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, 65 N.W.2d 785.

*22 *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.

All Citations

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Footnotes

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

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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.

3 Our courts have made the same point. See *Gen. Motors Corp. v. Dep't of Treasury*, 290 Mich. App. 355, 370-371, 803 N.W.2d 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 F.3d 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 rule four. For present purposes, it is sufficient to note that the legislation in *Brewer* upset reliance interests.

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 N.W.2d 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.

7 The dissent cites *Adrian Sch. Dist. v. Mich. Pub. Sch. Employees Retirement Sys.*, 458 Mich. 326, 337, 582 N.W.2d 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, 582 N.W.2d 767; see also *id.* at 326 n. 11, 582 N.W.2d 767 ("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 L.J. 331, 424 (Appendix I), citing the following: PL 100-703, § 201; 102 Stat 4674, 4676 (1988), overruling *United States v. Morton Salt Co.*, 338 U.S. 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 U.S. 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 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917), and *Cleveland v. United States*, 329 U.S. 14, 67 S. Ct. 13, 91 L. Ed. 12 (1946), after 59 and 40 years respectively.

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 N.W.2d 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

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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, 377 N.W.2d 300.

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), 2019 WL 2146298. 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 N.W.2d 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*.

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), 2019 WL 2146298. 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), 2015 WL 5786765 (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), 2015 WL 668887, p. 6 ("[T]he 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 N.W.2d 456 (1982), and is not at issue here.

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.").

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, 543 N.W.2d 21.

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."

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 P.3d 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 P.3d 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 P.3d 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 P.2d 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 F.2d 1201, 1203 (C.A. 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.").

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.

at 56, 782 N.W.2d 475. 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 N.W.2d 56 (2007),] it did not reinstate the pre-*Karaczewski* state of the law[,]" but opted for a new rule. *Brewer*, 486 Mich. at 57, 782 N.W.2d 475.

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.]

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