STATE OF MICHIGAN

IN THE SUPREME COURT

JENNIFER BUHL,

Plaintiff-Appellant,

V

CITY OF OAK PARK,

Defendants-Appellees.

Michigan Supreme Court
Docket No. 160355

Court of Appeals
Docket No. 340359

Oakland Circuit Court
Case No. 2017-157097-NI

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Plaintiff-Appellant Jennifer Buhl's Appeal Brief

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Jurisdictional Statement

Jennifer Buhl appeals the Court of Appeals' published opinion of August 29, 2019, in Court of Appeals Docket No. 340359. (App. 174a). That opinion affirmed the Oakland County Circuit Court's September 6, 2017, order granting Defendant City of Oak Park's Renewed Motion to Dismiss and dismissing Ms. Buhl's claims with prejudice. (App. 172a). This Court has jurisdiction under MCL § 600.215(3) and MCR 7.303(B)(1).

Statement of Questions Presented

I. Whether the Court of Appeals erred in concluding that the January 2017 amendment to MCL § 691.1402a(5), see 2016 PA 419, applies retroactively.

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: No.

The trial court answered: No.

The Court of Appeals answered: No.

II. Whether 2016 PA 419 "attaches a new disability with respect to transactions or considerations already past," *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571 (1982).

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: No.

The trial court answered: No.

The Court of Appeals answered: No.

III. Whether the Court of Appeals erred in creating and applying a "*Brewer* restoration rule," in determining that 2016 PA 419 applies retroactively, see *Brewer v A D Transp Express, Inc*, 486 Mich 50 (2010).

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: Unknown.

The trial court answered: n/a.

The Court of Appeals answered: No.

IV. Whether it makes a difference to the question of retroactivity in this case that the amendment was enacted before plaintiff filed her complaint when the amended statute states, "In a civil action, a municipal corporation . . . may assert . . . a defense that the condition was open and obvious." MCL § 691.1402a(5).

Plaintiff-Appellant answers: No.

Defendant-Appellee answers: Unknown.

The trial court answered: n/a.

The Court of Appeals answered: n/a.

Introduction

Unlike a judicial decision issued by this Court, a statutory amendment enacted by the Legislature is presumed to apply prospectively, not retroactively. This presumption is so strong that it holds true even if the statutory amendment was enacted to overrule this Court's interpretation of the law. *Brewer v AD Transp Exp, Inc*, 486 Mich 50, 55–56; 782 NW2d 475 (2010).

The question in this case is whether the Legislature's January 2017 amendment to MCL § 691.1402a(5) applies retroactively. Consistent with the long-standing presumption that statutory amendments apply only prospectively, not retroactively, a unanimous panel of the Court of Appeals held in May 2019 that the January 2017 amendment to MCL § 691.1402a(5) does not apply retroactively because "there is no evidence that the Legislature intended the amendment to be retroactively applied." *Schilling v City of Lincoln Park*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019 (Docket No. 342448), p 5 (App. 220a). The analysis in *Schilling* is correct. All of the applicable factors—including the lack of any statutory language indicating that the statute should be applied retroactively—cut against retroactive application.

In Ms. Buhl's case, however, the Court of Appeals rejected *Schilling* and held exactly the opposite; namely, that the January 2017 amendment to MCL § 691.1402a(5) applies retroactively, due to what the majority opinion termed "[t]he *Brewer* restoration rule." (App. 184a, 189a n9). According to the majority, this "restoration rule" comes from this Court's decision in *Brewer* and provides that a statutory amendment is retroactive if it (1) "overrule[s] a prior judicial decision" interpreting the statute; and (2) "return[s] the state of the law to the pre-decision status quo." (App. 187a).

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

There is no support for the Court of Appeals' so-called "restoration rule." This Court's precedent—both before and after *Brewer*—holds that statutory amendments that substantively change the law apply prospectively, even if the amendment is directed at invalidating one of this Court's decisions and/or "restoring" prior law. See, e.g., *Johnson v Pastoriza*, 491 Mich 417, 430; 818 NW2d 279 (2012); *Hurd*, 423 Mich at 533. Contrary to this Court's precedent, the Court of Appeals' newly minted "restoration rule" inverts the well-established presumption of prospective application of a statutory amendment. Under the Court of Appeals' analysis, a statutory amendment is retroactive even if the amendment does not explicitly say that it is retroactive, as long as the Legislature was responding to this Court's jurisprudence. But this Court has always employed the opposite presumption—that is, a presumption of prospective application, even where "the Legislature acts to invalidate a prior decision of this Court." *Johnson*, 491 Mich at 430.

The Court of Appeals' newfound rule is also unworkable. Even the majority opinion in this case does not clearly articulate the circumstances under which the Legislature "restores" a prior state of affairs, and that inquiry is only going to get more difficult, particularly when statutes are amended multiple times over the years.

As *Schilling* recognized, the well-established factors that drive the retroactivity analysis compel the conclusion that the 2017 amendment to MCL § 691.1402a(5) applies only prospectively, not retroactively. That is why the Court of Appeals in this case resorted to the creation of a new rule—the "*Brewer* restoration rule." Without creating new law, the Court of Appeals could not justify a holding that the statute applies retroactively. This conclusion was error. Neither *Brewer* nor this Court's retroactivity jurisprudence provides any basis for the "restoration rule" coined by the Court of Appeals. The Court of Appeals' holding should be reversed.

Statement of Facts and Proceedings

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

On May 4, 2016 at approximately 4:30 p.m., Jennifer Buhl's husband pulled his car up to the curb in front of Trend Express, a party store in Oak Park, Michigan, to allow his wife to exit the car. (App. 3a, 93a). It was raining as Ms. Buhl stepped from the car and made her way toward the store. (App. 94a).

As she approached the store, Ms. Buhl saw a raised crack in the sidewalk and attempted to step over it. (App. 94a, 111a). But she did not see that the concrete was uneven on the other side of the crack. When she stepped over the crack, she stepped off the unseen drop-off and fell. Her left foot "flipped over and it kind of twisted," ultimately fracturing her left ankle (App. 112a; *see also* App. 121a).

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

The City of Oak Park (the "City") has a statutory obligation to maintain its sidewalks in reasonable repair. See MCL § 691.1402a(1). Since at least 1995, Michigan courts have held that a municipal corporation could not assert an open and obvious defense to a

defective sidewalk claim under MCL § 691.1402a. See *Walker v City of Flint*, 213 Mich App 18, 23; 539 NW2d 535 (1995). This was because liability under that statute involves the violation of a statutory duty and is therefore not susceptible to common-law defenses. See *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) ("[T]he open and obvious doctrine is inapplicable to a claim that a municipality has violated its duty to maintain . . . a sidewalk on a highway.").

But on January 3, 2017, nearly eight months after Ms. Buhl's claim against the City accrued, the Michigan Legislature passed Public Act 419 of 2016. (App. 203a). Public Act 419 changed the law, amending MCL § 691.1402a to allow a municipal corporation to assert "any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious." MCL § 691.1402a(5). The amendment took effect the next day, on January 4, 2017. (App. 203a). The language of the amendment contains no statement that it would apply retroactively. (App. 203-04a).

C. Ms. Buhl sues the City.

Ms. Buhl sued the City on January 31, 2017 in Oakland County Circuit Court. (App. 5a). Almost immediately, the City moved for summary disposition, arguing that the sidewalk's defective condition was open and obvious. Because the prior version of MCL § 691.1402a allowed no open and obvious defense, the City could only raise that defense if the January 2017 amendment applied retroactively to Ms. Buhl's incident. The trial court denied the City's motion without prejudice, pending Ms. Buhl's deposition. (App. 15a-16a).

On July 10, 2017, the City renewed its motion for summary disposition. The trial court heard that motion on August 23, 2017, and it granted the City's motion on September 6, 2017. (App. 172a-173a). At the hearing and in its order, the trial court held that: (1) the January

2017 amendment to MCL § 691.1402a applies retroactively to Ms. Buhl's incident; (2) as a result, the City can assert an open and obvious defense; and (3) the alleged defect was open and obvious as a matter of law. (App. 172a-173a).

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

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

The Court of Appeals rendered its decision in Ms. Buhl's appeal only a few months later. But instead of agreeing with the unanimous decision in *Schilling*, the majority opinion rejected *Schilling* on the basis of a new rule that the majority divined from *Brewer*. According to the majority, *Brewer* enshrined a two-prong "restoration rule" (App. 184a), under which a statutory amendment is retroactive if it (1) "overrule[s] a prior judicial decision" interpreting the statute; and (2) "return[s] the state of the law to the pre-decision status quo." (App. 187a).

According to the majority, the January 2017 amendment returned the law to the status quo that existed before the judiciary ruled that MCL § 691.1402a does not allow a municipality to assert an open and obvious defense. The majority opinion held that the amendment "demonstrates what [the Legislature] intended the law to be all along" and that therefore "the new legislation does not enact a substantive change in the law." (App. 188a). The

majority opinion concluded that, under the new rule that it fashioned from *Brewer*, the 2017 amendment to MCL § 691.1402a applies retroactively. (App. 174a).

Judge Letica dissented, observing that no statutory language suggests that the January 2017 amendment should be applied retroactively; that *Brewer* does not contain a "restoration rule;" and that the *Schilling* panel correctly ruled that the amendment applies prospectively, consistent with the presumption in favor of prospective application. (App. 193a).

E. This Court grants Ms. Buhl's application for leave to appeal.

Ms. Buhl timely applied to this Court for leave to appeal. The Court granted Ms. Buhl's application and directed the parties to brief four questions:

1) whether the Court of Appeals erred in concluding that the January 2017 amendment to MCL 691.1402a(5), see 2016 PA 419, applies retroactively;

2) whether 2016 PA 419 "attaches a new disability with respect to transactions or considerations already past," *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571 (1982);

3) whether the Court of Appeals erred in creating and applying a "*Brewer* restoration rule," in determining that 2016 PA 419 applies retroactively, see *Brewer v A D Transp Express, Inc*, 486 Mich 50 (2010); and

4) whether it makes a difference that the amendment was enacted before plaintiff filed her complaint when the amended statute states, "In a civil action, a municipal corporation . . . may assert . . . a defense that the condition was open and obvious." MCL 691.1402a(5).

Standard of Review

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

Argument

I. The Court of Appeals erred in concluding that the January 2017 amendment to MCL § 691.1402a(5) applies retroactively.

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

The Legislature's intent determines whether a statute applies prospectively or retroactively. *Johnson*, 491 Mich at 429. Because of the potential unfairness of applying a statute retroactively, "[s]tatutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Id.* "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Davis v State Employees' Ret Bd*, 272 Mich App 151, 155–156; 725 NW2d 56 (2006).

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

> First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

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

These factors demonstrate that the strong presumption against retroactive statutory amendments is born from a desire not to inequitably disturb causes of action that have

already accrued. This desire and resulting presumption are so strong that the presumption holds true even when the Legislature expressly enacts a substantive change in the law in order to overrule a decision of this Court. "Even if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law." *Brewer*, 486 Mich at 56 (quoting *Hurd*, 423 Mich at 533).

Importantly, the presumption against the retroactivity of legislative amendments is the opposite of the presumption that applies to the retroactivity of judicial decisions. Judicial decisions are presumptively retroactive and are limited to prospective application only in unusual circumstances. *Rowland v Washtenaw Cty Rd Comm'n*, 477 Mich 197, 220; 731 NW2d 41, 55 (2007). The presumption for legislative amendments, on the other hand, is precisely the opposite: they are presumed to be prospective, unless the Legislature clearly expresses its intent for retroactive application. *Johnson*, 491 Mich at 429; *Davis*, 272 Mich App at 155–156.

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

As recognized in *Schilling* and the dissent in this case, the *LaFontaine* factors clearly establish that the January 2017 amendment to MCL § 691.1402a applies only prospectively, not retroactively. (App. 217a). This is especially true given the requirement that "[t]he Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Davis*, 272 Mich App at 155–156.

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

The first factor—statutory language—is the most important, as the Legislature speaks most clearly through the language that it uses. "[T]he Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Davis*,

272 Mich App at 156. See also *Johnson*, 491 Mich at 431–432 (noting examples of other statutes that the Legislature explicitly made retroactive); *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (noting additional examples); *Moeller v Am Media, Inc*, 235 F Supp 3d 868, 874–875 (ED Mich, 2017) (noting additional examples).

Thus, it is "most instructive" if "the Legislature included no express language regarding retroactivity," because the absence of such language strongly indicates that the Legislature, despite knowing how to make a statute retroactive, chose not to do so. *Davis*, 272 Mich App at 156.

Here, the January 2017 amendment does not contain any language indicating that it applies retroactively. (App. 203a). The amendment provides a specific, future effective date, January 4, 2017. (App. 203a). "[P]roviding a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only." *Johnson*, 491 Mich at 432 (quotation marks and citation omitted). Additionally, "[u]se of the phrase 'immediate effect' does not at all suggest that a public act applies retroactively." *Id*. at 430. Instead, this phrase, too, supports prospective-only application. *Id*.

This first *LaFontaine* factor therefore overwhelmingly supports prospective-only application. See *Schilling*, unpub op at 7. See also *Sufi v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, issued February 17, 2015 (Docket No. 312053), p 4 (holding that a prior amendment to MCL § 691.1402a did not apply retroactively when it gave additional defenses to municipal defendants and had no explicit language regarding retroactivity) (App. 228a-229a). Indeed, even the Court of Appeals' majority opinion agrees with this conclusion on the first factor. (App. 178a).

B. Factor Two is not applicable.

The second *LaFontaine* factor is not applicable in this case. (App. 178a). See also *Schilling*, unpub op at 8. The amendment at issue does not relate to an antecedent event.

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

The third *LaFontaine* factor restates the effect of a retroactive statute, noting that statutes cannot be applied retroactively to impair a party's substantive rights. *Davis*, 272 Mich App at 158. In this case, the Court of Appeals ruled that retroactive application would be impermissible only if it affected a plaintiff's "vested rights," and that none of Ms. Buhl's vested rights are affected by the legislature's decision to give municipalities a new, complete affirmative defense against claims like Ms. Buhl's. (App. 178a (ruling that only the abolition of an accrued cause of action "impairs a plaintiff's vested rights")). But this analysis is not accurate, for several reasons.

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

Second, limiting the anti-retroactivity principle only to circumstances in which a plaintiff has "vested rights" is inconsistent with this Court's jurisprudence on the issue, as evidenced by the fact that amended statutes of limitations apply prospectively.[1] According to the Court of Appeals, a retroactive statute would impair a plaintiff's vested rights "only if [the

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

amendment] extinguishes [the plaintiff's cause of action] as a matter of law." (App. 179a). Thus, according to the majority opinion, the addition of an affirmative defense cannot possibly impair a plaintiff's vested rights, because it does not extinguish the plaintiff's cause of action as a matter of law. (App. 178a, 190a).

But this Court's jurisprudence in the context of amendments to statutes of limitations shows that this approach is incorrect. "[T]he running of the statute of limitations is an affirmative defense." *Dell v Citizens Ins Co of Am*, 312 Mich App 734, 752; 880 NW2d 280 (2015) (quotation marks and citation omitted). Under the majority opinion's analysis, therefore, amended statutes of limitations should presumptively apply retroactively because they would not affect plaintiffs' "vested" rights. But "there exists a plethora of cases extending over 100 years of jurisprudence that provide that statutes of limitations enacted by the Legislature are to be applied prospectively absent a clear and unequivocal manifestation of a legislative preference for retroactive application." *Davis*, 272 Mich App at 160–161. That is because "statutes of limitations, while generally coined as procedural, necessarily affect substantive rights where causes of action can be lost entirely because the action is time-barred." *Id*.

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

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

Finally, the Court of Appeals also analyzed for several pages of its opinion whether Ms. Buhl "relied" upon the pre-amendment version of MCL § 691.1402a. (App. 180a-183a). But the question that is relevant to retroactivity is the Legislature's intent, not Ms. Buhl's reliance on prior versions of the statute. A potential plaintiff's reliance upon earlier versions of a statute has never been a relevant factor in Michigan's retroactivity jurisprudence. See *In re Certified Questions*, 416 Mich at 571.

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

The fourth *LaFontaine* factor reflects an exception to the anti-retroactivity principle, providing that "statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." *Johnson*, 491 Mich at 432–433 (quotation marks and citation omitted). For purposes of this exception, a statutory amendment is not "remedial" merely because it remedies some perceived ill, because to do so would allow the exception to eat the rule:

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

Frank W Lynch, 463 Mich at 585. Thus, "[a]n amendment that affects substantive rights is not considered 'remedial' in this context" and may not be applied retroactively. *Brewer*, 486 Mich at 57. "Substantive rights are essential rights that affect the outcome of a lawsuit and can be protected or enforced by law." *Macklis v Farm Bureau Gen Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued Apr 25, 2017 (Docket No. 330957), p 2. (App. 214a).

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

The 2017 amendment also destroys or diminishes existing rights. For example, in *Macklis*, the court ruled that an amendment to the no-fault act that broadened an insurer's affirmative defenses "necessarily diminishe[d] the rights of certain individuals otherwise eligible for no-fault benefits (*i.e.*, those who only used a vehicle but did not unlawfully take it)," and that the amendment therefore did not apply retroactively. *Macklis*, unpub op at 3. Here, before the 2017 amendment, people who were injured because of a vertical discontinuity defect of two inches or more in the sidewalk—like Ms. Buhl—could recover against the responsible municipal

corporation, regardless of whether the defect was open and obvious. Just as the amendment in *Macklis* "necessarily diminishe[d]" the rights of plaintiffs by broadening the availability of an affirmative defense, so the 2017 amendment to MCL § 691.1402a diminished or destroyed the rights of certain individuals who otherwise could recover against municipalities (*i.e.*, those who were injured by an open and obvious sidewalk defect). As such, the 2017 amendment affects substantive rights. It is not a mere procedural or remedial amendment, and it therefore applies only prospectively, not retroactively.

As *Schilling* properly recognized, all of the applicable *LaFontaine* factors favor prospective, not retroactive, application of the January 2017 amendment to MCL § 691.1402a.

III. 2016 PA 419 "attaches a new disability with respect to transactions or considerations already past."

This Court directed the parties to brief the question whether the 2017 amendment to MCL § 691.1402a "attaches a new disability with respect to transactions or considerations already past." This analysis relates to the third retroactivity factor identified in *In re Certified Questions*, which states that "[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." 416 Mich at 571.

This factor has been addressed in detail above. Two considerations, however, are worth emphasizing. First, as *Davis* pointed out, this third retroactivity factor is not limited to an impairment of "vested rights." *Davis*, 272 Mich App at 158. Instead, the third factor lays out three alternatives. The factor cuts against retroactivity if the legislative amendment (1) impairs vested rights, or (2) imposes a new obligation, or (3) attaches a new disability with respect to past transactions or considerations. *In re Certified Questions*, 416 Mich at 571. Thus, the third

factor cuts against retroactivity even if a vested right is not impaired and a new obligation is not imposed. Instead, the third factor also cuts against retroactivity where an amendment simply attaches a new disability with respect to past transactions or considerations. That is undoubtedly the case here: before the amendment, Ms. Buhl had an accrued cause of action against which the City could not assert the affirmative defense. If the amendment applies retroactively, the City will be able to assert a new, potentially dispositive affirmative defense to her accrued cause of action. That patently amounts to a "new disability" with respect to a pre-existing transaction or occurrence.

The Court of Appeals' majority opinion confused the relevant analysis by conflating the third factor with the fourth factor under *In re Certified Questions*. The fourth factor states 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 571. The Court of Appeals majority therefore suggested that any amendment that does not destroy a vested right is necessarily "procedural" and must apply retroactively. This approach makes the question whether a "vested right" is impaired dispositive: if a vested right is impaired, then the statute does not apply retroactively, whereas if a vested right is not impaired, then the statute does apply retroactively.

This approach, however, fails to recognize that "factor four" primarily is focused not on whether a vested right is or is not implicated, but instead on whether a statutory amendment is procedural or remedial rather than substantive. The threshold question under factor four is whether an amendment is procedural or remedial. Only if that question is answered in the affirmative does this factor require assessment of whether the procedural or remedial amendment affects a "vested right" and therefore counsels against retroactivity, notwithstanding

the fact that the amendment is merely procedural or remedial. Interpreted correctly, the fourth factor does not require a showing that an amendment affects a "vested right" in order to cut against retroactive application. If the statutory amendment is substantive rather than procedural, then the fourth factor is not implicated at all, and the amendment applies prospectively only, regardless of whether the substantive changes affect "vested rights" or instead implement some other type of substantive change in the law (that is, a new obligation or a new disability).

The Court of Appeals' erroneous approach to the fourth factor derailed the court's analysis under the third factor. The majority held that the third factor, too, applies only where "vested rights" are affected. But the third factor interrogates more broadly whether there is a substantive change in the law. Although an impairment of a vested right is a substantive change in the law, a "new obligation" or a "new disability" imposed upon a past transaction or occurrence also works a substantive change in the law. The third factor appropriately recognizes that substantive changes in the law can encompass effects that go beyond vested rights to include new obligations or disabilities. The Court of Appeals' majority opinion missed that distinction. Instead, the Court of Appeals' erroneous approach has the practical effect of eliminating "factor three" altogether.

The second overall point to be emphasized with respect to this question is that none of the four factors is on its own dispositive. Even if one of the factors cuts in favor of retroactivity, that does not overcome the presumption against retroactivity. *LaFontaine*, 496 Mich at 38-39. With respect to MCL § 691.1402a(5), all four factors confirm the presumption against retroactivity. But even if one of them did not, that lone factor would not be outcome-dispositive, particularly in light of the statutory text.

IV. The Court of Appeals erred in divining a *Brewer* "restoration rule" that does not exist and that inverts the presumption against retroactivity.

Instead of following the well-established precedent mandated by this Court's retroactivity jurisprudence, the Court of Appeals majority created a new rule—what it called the "*Brewer* restoration rule" (App. 184a)—to support its determination that the 2017 amendment applies retroactively. The majority opinion confirmed in footnote 9 that this "restoration rule" was the fundamental rationale for its decision to differ with *Schilling* on the question of retroactivity. (App. 189a n9). The problem with the Court of Appeals' divination of this rule, however, is that the rule appears nowhere in *Brewer*, was not relied upon in *Brewer*, has never been relied upon by any other court, and is fundamentally incompatible with this Court's retroactivity jurisprudence.

A. *Brewer* does not contain a "restoration rule."

First, the portion of *Brewer* upon which the Court of Appeals relied is dicta and did not adopt any sort of "restoration rule." In *Brewer*, this Court held that an amendment to the workers' compensation statutes did *not* apply retroactively. 486 Mich at 58. The Court in *Brewer* gave at least four reasons for its determination that the Legislature did not intend for the amendment to apply retroactively, noting that: (1) there was no explicit language stating that the amendment applied retroactively; (2) the Legislature adopted a specific effective date for the amendment instead of stating that it was intended to apply retroactively; (3) the statutory amendment did not reinstate the state of the law that existed prior to an intervening judicial decision; and (4) the amendment was not a "remedial" or "procedural" statute because it imposed new burdens and changed existing legal rights. *Id*. at 57-58.

In this case, the Court of Appeals zeroed in on the third of *Brewer*'s rationales. The Court of Appeals then turned *the negative implication* of this Court's rationale into an

absolute rule: "The obvious teaching of this aspect of *Brewer* is that if the legislation which overruled [the prior judicial decision] also had restored the pre-[decision] status quo, then the new enactment would have applied retroactively." (App. 184a).

The majority opinion's interpretation is demonstrably wrong. *Brewer* specifically held that these multiple factors counseled *against* retroactivity, not that the inverse of any one of them would have sufficed on its own to overcome the presumption against retroactivity. Additionally, to reach its contrary interpretation of *Brewer*, the majority opinion quotes the relevant paragraph from *Brewer*—but omits the last sentence of the paragraph. (App. 183a). The omitted sentence reveals that the third factor (which is the inverse of the so-called "restoration rule") was not the sole basis for this Court's opinion. Instead, the omitted sentence makes clear that this Court's holding in *Brewer* relied on all four factors, *plus the statutory language*, which made no reference to retroactivity: "In light of these circumstances *and the text of the amendment*, we simply can discern no clearly manifested legislative intent to apply the amendment retroactively." *Brewer*, 486 Mich at 57 (emphasis added).

Thus, the majority is wrong that it is "obvious" that the legislative amendment in *Brewer* would have applied retroactively as long as the amendment had restored the pre-decision status quo. *Brewer* says no such thing. This Court has never held that the legislature's "restoration" of a nebulous pre-existing status quo is on its own sufficient to overcome the presumption against retroactivity. There is no "restoration rule" in *Brewer*.

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

Second, *Brewer* reiterates this Court's long-held view that statutory amendments are presumptively prospective even if they overrule an existing judicial decision: "Even if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to

prospective application if it enacts a substantive change in the law." *Brewer*, 486 Mich at 56 (quoting *Hurd*, 423 Mich at 533).

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

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

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

The majority opinion attempts to evade *Brewer*'s plain language by claiming that the January 2017 amendment to MCL § 691.1402a did not effect a substantive change in the law. According to the majority opinion, the law did not truly change "[b]ecause the Legislature has told us that the *Jones* decision [under which a municipality could not assert a common-law defense] never should have applied." (App. 189a). There are at least two problems with this analysis.

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

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

The cases that the majority opinion cites do not make the illogical argument that the majority opinion advances. The decision in *Lahti*, 357 Mich at 595, for example, determined that an amendment to the workers' compensation statutes was retroactive because it was remedial, such that it fell within the "remedial" exception to the anti-retroactivity principle. *Lahti* did not hold that the amendment was not actually a substantive change in the law.

As this Court has explicitly held, a legislative amendment that is aimed at overturning one of this Court's decisions is a substantive change in the law. "[T]he Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Davis*, 272 Mich App at 156. Unless the legislative amendment is accompanied by statutory text that clearly indicates the Legislature's intent for retroactive application, an amendment intended to overturn one of this Court's substantive decisions will not apply retroactively. *Hurd*, 423 Mich at 533. The analysis of the Court of Appeals' majority decision directly contradicts the long-standing principle reflected in *Hurd*.

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

Second, the majority opinion asserts that "the Legislature has told us that the *Jones* decision never should have applied." (App. 189a). To extrapolate the Legislature's intent that *Jones* "never should have been applied," the majority imagines things that the Legislature did not say. For example, the majority imagines that "[i]n essence, the amendment states, 'The *Jones* doctrine is overruled' . . . ." (App. 187a). The majority further imagines that "the remainder of the statute essentially states 'And we never intended for the *Jones* doctrine to be the law, so we are reinstating the law as set forth in the 1964 Act' . . . ." (App. 187a).

But the Legislature did not say any of this. Rather, the Legislature was silent on retroactivity. The amendment merely stated that, effective January 4, 2017, the amendment is the law.

That is a significant and dispositive difference. Amending a statute and intending that the amendment apply retroactively are two very different things. The mere fact that the Legislature amends a statute does not mean that the Legislature also intends for it to apply retroactively. Here, for example, the Legislature could have intended for the January 2017 amendment to reflect its intent that *Jones* was mistaken and that *Jones* would no longer be the law *from now on*. In fact, that is exactly the interpretation that this Court has always required: courts must presume that legislative amendments apply only prospectively, not the other way around, "[e]ven if the Legislature acts to invalidate a prior decision of this Court." *Brewer*, 486 Mich at 56. Where the statutory text is silent as to retroactivity, the presumption of anti-retroactivity mandates that the amendment be applied prospectively only.

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

D. The majority's "restoration rule" contradicts this Court's precedent and is unworkable.

As indicated, the majority's "restoration rule" contradicts *Brewer* and this Court's retroactivity jurisprudence. By establishing a presumption of retroactivity in circumstances

where an amendment re-asserts some pre-existing status quo, the majority's rule also contradicts this Court's long-held presumption that statutory amendments are prospective. See *Johnson*, 491 Mich at 429.

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

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

The majority's approach demands that Michigan courts go down all of these paths and more—none of which is consistent with this Court's precedent, and none of which is consistent with this Court's repeated admonition that the best place to discern legislative intent is to look at the language of the statute, not the circumstances surrounding the statute's enactment. See, e.g., *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The

Court of Appeals' new rule is not the correct one, nor is it one that, in the final analysis, can even be implemented.

This case should instead be governed by this Court's long-standing jurisprudence establishing and confirming the presumption that statutory amendments be applied prospectively, not retroactively. The fundamental reason for the presumption against retroactivity is that the question of retroactivity turns upon legislative intent. "Retroactive application of legislation presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine*, 496 Mich at 38 (cleaned up).

This Court presumes that the Legislature did not intend to foster inequity. *LaFontaine*, 496 Mich at 38. That is why "[i]t is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation." *Barber v Barber*, 327 Mich 5, 11; 41 NW2d 463 (1950 (quotation marks and citation omitted). Indeed, one of this Court's seminal cases on retroactivity arose from a legislative amendment that altered the requirements for suing a municipality due to injury caused by a defective sidewalk. See *Angell v City of W Bay City*, 117 Mich 685, 688–689; 76 NW 128 (1898) (city enacted a provision requiring notice of an accident resulting from defective streets or sidewalks to be given within 60 days of the injury). This Court observed that, if the legislative amendment was applied retroactively, "the effect would be to cut off one whose claim had accrued . . . before the law took effect . . ." *Id*. at 689. The Court explained, "We cannot ascribe to the legislature the purpose of working out so great an injustice, in the absence of clear and unequivocal language." *Id*. See also *id*. (supporting its holding by analogy to the fact that amendments to statutes of limitations do not apply retroactively).

This Court's long-standing retroactivity jurisprudence appropriately hews to the presumption that the Legislature does not intend to act inequitably. The newfound *Brewer* restoration rule does the opposite. It has no basis in this Court's precedent.

V. The statutory reference to "a civil action" does not change the presumption against retroactivity.

Finally, MCL § 691.1402a(5)'s reference to a municipality's ability to assert a defense in "a civil action" makes no difference to the retroactivity analysis in this case. The amended statute provides, "In a civil action, a municipal corporation . . . may assert . . . a defense that the condition was open and obvious." MCL § 691.1402a(5). Presumably, the City's argument will be that this language permits a municipality to assert the defense in any "civil action," regardless of when the cause of action accrued. There are several flaws in this reasoning.

A. The statutory language does not unequivocally express an intent to apply the amendment retroactively.

First, statutory language that might imply retroactive intent is not sufficient to overcome the presumption against retroactivity. A statutory command to apply an amendment retroactively must be explicit. "It is a fundamental rule of law that the Legislature must give a clear, direct and unequivocal expression of its intent to that effect if a statute is to have retroactive effect." *Olkowski v Aetna Cas & Sur Co*, 53 Mich App 497, 503; 220 NW2d 97 (1974).

Section 691.1402a(5)'s use of the term "in a civil action" does not unequivocally state anything about retroactivity. When the Legislature chooses to make a statute apply retroactively, it knows how to do so: it uses phrases like "[t]his act shall be applied retroactively . . ." and "[t]he changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application." *Johnson*, 491 Mich at 432 n 28 (quoting MCL §§ 141.1157 and 324.21301a(2)). Section 691.1402a(5) contains no such language. The phrase

"in a civil action" is not the type of "unequivocal" statement that is required to overcome the anti-retroactivity presumption. *Olkowski*, 53 Mich App at 503.

B. Retroactivity turns on the effect that a statutory amendment will have on an accrued cause of action, not on whether the plaintiff has sued.

Second, the retroactivity analysis depends, in part, on the effect that a statutory amendment has on an accrued cause of action; it never depends upon whether the plaintiff has managed to make her way to the courthouse. As the Court of Appeals has explained, "[w]e use[ ] the terms 'prospective' and 'retroactive' with some hesitation, recognizing that when we apply a statute 'prospectively' we mean that the statute applies only to causes of action which accrue after the effective date of a statute." *Farris v Beecher*, 85 Mich App 208, 214; 270 NW2d 658 (1978). In other words, a statute that applies "prospectively" does not apply to causes of action that have already accrued but have not yet been filed in court. The term "prospective" means that the statutory amendment applies only to causes of action that have not yet accrued.

Michigan's retroactivity analysis has consistently hewn to this principle. For example, the question whether a pre-amendment statute of limitations applies depends upon when the cause of action accrued. "The pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose"—not the one that is in effect when the plaintiff files her complaint. *Chase v Sabin*, 445 Mich 190, 192 n2; 516 NW2d 60 (1994), abrogated on other grounds by *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 392; 738 NW2d 664 (2007); see *also Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999).

Likewise, the analysis in *Johnson* turned on the date that the plaintiff's cause of action accrued, not on the date that the plaintiff filed suit. There, this Court observed that "Public Act 270 of 2005 took effect on December 19, 2005, and plaintiffs' cause of action arose on November 1, 2005." *Johnson*, 491 Mich at 429. The Court then held that Public Act 270 of 2005

does not apply to the plaintiffs' claim because it applies prospectively. *Id.* at 433-434. The Court did not mention the date that the plaintiffs sued; rather, the Court based its holding on the date that the plaintiffs' cause of action arose. That is because the date of accrual is the only date that is relevant to the retroactivity analysis.

Similarly, the Court of Appeals has repeatedly held that a substantively similar amendment to MCL § 691.1402a applies prospectively to defective-sidewalk injuries that occur after the amendment's effective date but does not apply to causes of action that had already accrued before the amendment took effect. In *Moraccini v City of Sterling Hts*, 296 Mich App 387, 389; 822 NW2d 799 (2012), the court held that 2012 PA 50, which amended MCL § 691.1402a to add a rebuttable presumption that a municipal corporation had maintained a sidewalk in reasonable repair, did not apply because the plaintiff's injury occurred before the amendment's effective date:

> MCL 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.

Id at 389 n 1.

Likewise, *Lewis v Dept of Transportation*, unpublished per curiam opinion of the Court of Appeals, issued September 10, 2013 (Docket Nos. 307672 & 311528) (App. 208a), held that the 2012 amendment to MCL 691.1402a did not apply because the plaintiff's injury occurred before the amendment's effective date:

> There is a presumption that the amended language applies only to injuries occurring on or after the effective date (March 13, 2012) of 2012 PA 50, rendering the amendments inapplicable to the present case.

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> We agree with *Moraccini v Sterling Heights*, 296 Mich App 387, 388, n 1; 822 NW2d 799 (2012), that because the effective date of 2012 PA 50 was subsequent to the accident in this case, the amendments do not apply.

Id. at p 3. (App. 209a). The decision in *Sufi*, unpub op at 4, similarly concluded that the 2012 amendment to MCL 691.1402a did not apply retroactively to injuries occurring before the amendment's effective date. (App. 229a ("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.")). See also *Angell*, 117 Mich 688–89 (amendment to defective-sidewalk ordinance did not apply retroactively to injuries occurring before the date of the amendment).

The reason that the retroactivity analysis in each of these cases turns upon the date of the injury is because that is the date upon which the plaintiff's cause of action accrues – i.e., the date when the plaintiff's right to recovery comes into existence. See MCL 600.5827. The retroactivity analysis has always depended upon the date that the cause of action accrues; it has never turned upon the date upon which the plaintiff happens to make her way to the courthouse.

C. The City's presumed interpretation of the statutory language would overturn a century of precedent regarding the retroactivity of statutes of limitations.

Third, adopting the City's presumed analysis would upend this Court's precedent regarding the retroactivity of statutes of limitations. The City's argument depends upon the assertion that the statutory permission to assert the defense "in a civil action" means that the defense may be asserted in any civil action as soon as the statutory amendment takes effect, even if the cause of action accrued long ago. But statutory language that is tied to "civil actions" is not unique to MCL § 691.1402a(5). Similar language appears in a host of Michigan's generally applicable statutes of limitations. If the City's argument is applied to the same language in those

statutes, the result would overturn a century of this Court's precedent in the context of statutes of limitations. *Cf. Angell*, 117 Mich 688–89 (analogizing to statutes of limitation jurisprudence).

Statutes of limitations typically provide that certain steps must be taken in a civil "action" within a specified period of time. For example, Michigan's general statute of limitations for personal and property injury claims provides that "[a] person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." MCL § 600.5805(1). Michigan's other statutes of limitations similarly refer to a party's ability to assert an "action" within a certain period of time. See, e.g., MCL § 600.5801 ("No person may bring or maintain any action . . ."); MCL § 600.5807(1) ("A person may not bring or maintain an action . . ."); MCL § 600.5813 ("All other personal actions shall be commenced . . .").

If any legislative amendment to these statutes applies to any causes of action that have accrued but have not yet been filed as of the amendment's effective date simply because the statute applies to "actions", then this Court's retroactivity analysis would be fundamentally altered. For example, MCL §§ 600.5805(1) & (11) provide that "[a] person shall not bring or maintain an action to recover damages" for libel unless the action is filed within one year of the claim's accrual. If these provisions were amended to impose a 6-month limitations period instead, the City's argument would conclude that a plaintiff who was libeled 7 months before the effective date of the amendment but had not filed a lawsuit before the statute was amended, would be barred by the newly shortened limitations period. This result is patently unfair and would deprive the injured party of her claim that existed before the amendment took effect.

In other words, the City's interpretive argument has sweeping consequences. If the "civil action" language of § 691.1402a(5) implicitly demonstrates that the statute applies retroactively to causes of action that have accrued but where a lawsuit has not yet been filed, then the prohibition in each of Michigan's general statutes of limitations against a plaintiff filing "an action" would also demonstrate that they, too—if amended—would apply retroactively to causes of action that have accrued but where a lawsuit has not yet been filed.

But that has not been the rule, for at least 100 years. See *Davis*, 272 Mich App at 160–161 (noting 100 years of precedent). Instead, "[t]he pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose"—not the one that is in effect when the plaintiff files her complaint. *Chase*, 445 Mich at 192 n 2. For example, in *Farris*, the court ruled that a statutory amendment was not retroactive when it shortened the statute of limitations for certain medical malpractice claims. 85 Mich App at 214. Like the 2017 amendment to § 691.1402a(5), the amendment took effect after the plaintiff's cause of action had accrued. *Id*. Moreover, like the 2017 amendment to § 691.1402a(5), the amendment referred to requirements that needed to be met in "an action." See *id*. at 212 ("An action involving a claim based on malpractice may be commenced at any time within the applicable period . . ." (quoting amended statute)). Nevertheless, the court had no trouble ruling that the amendment did not apply retroactively: "[W]e see nothing in the statute to indicate an intention to apply its provisions to causes of action which accrue prior to the effective date of [the amendment]." *Id*. at 214.

In short: if the Court interprets MCL § 691.1402a(5) to permit a municipality to assert the defense in any civil action, regardless of when the cause of action accrued, then the Court will be re-writing all of its precedent pertaining to the retroactivity of statutes of limitations, as well. The consequences to Michigan jurisprudence would be far-reaching.

D. The City's presumed interpretation would cause plaintiffs to rush to the courthouse in an attempt to evade potential legislative amendments.

Finally, significant practical consequences would follow if this Court adopted the City's interpretation of MCL § 691.1402a(5). If the determinative factor in whether a statute operates retroactively to bar or impair a particular plaintiff's claims is whether the plaintiff has made it to the courthouse before the amendment was enacted, then the incentive for plaintiffs is clear: once the cause of action has accrued, the plaintiff must rush immediately to the courthouse to file suit before an amendment might be enacted. This would encourage needless litigation, instead of pre-suit resolution. The much better rule is the one that currently exists: once someone is injured, they are subject to the substantive statutory law that is in effect at that time. At that point, all interested parties know the controlling substantive rules and can negotiate or attempt mediation accordingly. Adopting the City's statutory interpretation would significantly disrupt parties' ability to rely upon the controlling substantive law as of the date that the cause of action accrued.

The City's argument is not only an incorrect interpretation of the statutory language, but it is also an invitation for this Court to open Pandora's box and cause perverse incentives for plaintiffs to rush to the courthouse. This case does not warrant that result.

Relief Sought

The opinion of the Court of Appeals should be reversed, and the case should be remanded to the trial court for further proceedings.

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