

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

Lower Court (Oakland Circuit)
Case No. 2017-157097-NI

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January 31, 2017	Complaint
May 10, 2017	Transcript of Hearing on City of Oak Park's Motion for Summary Disposition
May 24, 2017	City of Oak Park's Answer to Complaint
September 6, 2017	City of Oak Park's Renewed Motion for Summary Disposition
August 2, 2017	Plaintiff's Response to City of Oak Park's Renewed Motion for Summary Disposition
August 23, 2017	Transcript of Hearing on City of Oak Park's Renewed Motion for Summary Disposition
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JENNIFER BUHL,

Case No. 2017-_____-NI

Plaintiff,

Hon.
2017-157097-NI
JUDGE PHYLLIS MCMILLEN

v.

CITY OF OAK PARK,

Defendant.

MICHIGAN ADVOCACY CENTER, PLLC
By: Matthew Edward Bedikian (P75312)
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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, deterioration, 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 severely injured in the accident that occurred and has suffered grievous and painful injuries.

13. As a direct and 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.

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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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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JENNIFER BUHL,

Plaintiff,

vs

Case No. 2017-157097-NI

CITY OF OAK PARK,

Defendant.

_____/

MOTION

BEFORE THE HONORABLE PHYLLIS C. MCMILLEN

Pontiac, Michigan - Wednesday, May 10, 2017

APPEARANCES:

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

For the Defendant: JOHN J. GILLOOLY (P41948)
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Videotape Transcription Provided By:
Deanna L. Harrison, CER 7464
About Town Court Reporting, Inc.
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WITNESSES

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None.

EXHIBITS

Introduced

Admitted

None.

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Pontiac, Michigan

Wednesday, May 10, 2017

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(At 10:48 a.m., proceedings begin)

THE CLERK: Your Honor, now calling number 19 on the Court's docket, Buhl v Oak Park City, case number 17-157097-NI.

MR. BEDIKIAN: Good morning, Your Honor. Matthew Bedikian on behalf of the Plaintiff.

MR. GILLOOLY: Good morning, Judge McMillan. John Gillooly on behalf of the moving party, City of Oak Park.

Judge, as you know, this is our motion to dismiss. I rely on the position advanced in our papers, and simply suggest that first -- first that the failure of Plaintiff to note the date of the occurrence at issue in his complaint is certainly a fatal defect. Every defendant has the opportunity and right to know the date on which plaintiff claims an injury, for a myriad of reasons.

Secondly, we suggest that these claims are barred by the new open and obvious danger rule that the Michigan legislature agreed to allow municipalities to use as of late 2016. Plaintiff has incorporated pictures into their exhibits, as have we. The condition is clearly open

1 and obvious.

2 The Plaintiff relies on several cases that we
3 have a statutory duty to repair and maintain, which was
4 true. His cases all predate the amendment of the statute,
5 which said that we couldn't rely on defenses like this in
6 the past. The legislature has made it clear. There are
7 no special aspects to this condition, Judge. It's
8 unfortunate that the Plaintiff sustained injury, if she
9 did, but it's clearly open and obviously at this point.
10 The complaint even alleges that the defect, the vertical
11 discontinuity, was more than two inches. That gives us
12 under the old statute the benefit of the presumption in
13 any event.

14 We ask the Court to find as a matter of law that
15 the defect was open and obvious, precluding any liability
16 on the part of the City of Oak Park.

17 Thank you, Judge.

18 MR. BEDIKIAN: Your Honor, I'd like to address
19 both those positions.

20 The first with respect to the complaint that I
21 filed was deficient, I -- I will admit that it was an
22 omission not to include the incident date. Again, I'm
23 happy to amend that should the Court feel that the
24 complaint was deficient in that manner.

25 But for the Defendant to say that they weren't

1 on notice of the Plaintiff's claims is -- is untrue. It
2 clearly states that it -- the Plaintiff was injured when
3 she tripped and fell on a sidewalk in the exclusive
4 control of the Defendant. It alleges a negligence claim.
5 It cites the statute that we're making the claim under.
6 It provides that Plaintiff on June 23rd of 2016 filed the
7 proper notice of -- of her claim with respect to MCL
8 691.1404. It also indicates that there was a failure to
9 maintain the sidewalk. And it also indicates that she
10 suffered damages as a result of -- of the uneven sidewalk.
11 Further, they even note in their initial response, in
12 their SD motion, that the incident occurred in May of
13 2016. So they were aware of these things.

14 Again, if the Court feels that Plaintiff omitted
15 the date, and that is something that -- that should be in
16 there and -- and it is needed to be in there, we're happy
17 to amend the complaint and -- and provide that date.

18 With respect to the amendment of MCL 691.1402a,
19 we do not believe that the amendment has retroactive
20 effect. The Plaintiff's rights vested when she fell and
21 sustained injury, and her claims therefore are under the
22 older statute. And the case law is clear that a cause of
23 action for tort accrues when all elements of the claim
24 have occurred and can be alleged in a complaint.

25 Defendant is also incorrect in that its

1 retroactive. The statute on its face does not indicate
2 that its retroactive. Further, if it did, it would
3 indicate clearly, directly, and unequivocally --

4 THE COURT: But it's -- the amendment is not
5 eliminating her rights. She still has a right to bring
6 the lawsuit. All it did was to allow them the opportunity
7 to bring the affirmative defense that had previously been
8 precluded.

9 MR. BEDIKIAN: Right.

10 THE COURT: So how is it not just procedural in
11 nature?

12 MR. BEDIKIAN: Well, again, it -- it would --
13 the amendment does abrogate her right, because --

14 THE COURT: You didn't -- you didn't have a
15 right to not have a defense.

16 MR. BEDIKIAN: Well, I -- I understand that.
17 But even -- even assuming that -- I'll -- I'll move on,
18 because if -- if we feel that -- if the Court feels that
19 the amendment is proper and we are --

20 THE COURT: Well, I -- this is -- this is your
21 ability to convince me otherwise --

22 MR. BEDIKIAN: Okay.

23 THE COURT: -- so I'm telling you what I'm
24 thinking here, and that is that it appears to me that
25 vested rights were not taken away because your client

1 still has the right to bring the suit; the only difference
2 is that they have a right to bring an affirmative defense
3 which was available to everybody else in the world except
4 municipalities in sidewalk cases.

5 MR. BEDIKIAN: Right. Understood. And -- but I
6 think the -- the case law indicates and it was indicated
7 in the Court of Appeals in Grew v Knox, that when a
8 statute retroactively -- I guess I understand the
9 distinction. You're -- yeah --

10 THE COURT: Not terminate vested rights.

11 MR. BEDIKIAN: -- you're saying -- right.
12 You're not saying that the right has not been --

13 THE COURT: Otherwise, it's pro -- if it's
14 procedural or remedial, it gets retroactive application.

15 MR. BEDIKIAN: Okay.

16 THE COURT: If it's not, if it affects vested
17 rights, substantial rights, then it's --

18 MR. BEDIKIAN: Assuming that they have the open
19 and obvious defense -- we'll -- we'll go under that
20 assumption, this is not proper -- the MSD is not proper at
21 this time as they had -- Defendant has the burden of
22 proving that it is entitled to MSD by identifying the
23 issues where there's no genuine issue of material facts
24 and presenting evidence of that. If it's left un rebutted,
25 then it would establish the parties moving right to -- to

1 summary disposition.

2 Here, all Defendant has to state that the
3 condition was open and obvious was an affidavit from an
4 employee taking a picture saying it's open and obvious.
5 But they don't have -- there's no discovery. That was
6 their first responsive pleading in this matter. They
7 don't have deposition of the Plaintiff. They don't know
8 where the Plaintiff was when she tripped, what she was
9 looking at, what her viewpoint was. And in order to make
10 a determination on open and obvious, it has to be that the
11 condition was open and obvious to a -- a person -- a
12 reasonable person in the Plaintiff's position --

13 THE COURT: Where do you allege that this
14 occurred?

15 MR. BEDIKIAN: It is alleged that it occurred on
16 a sidewalk -- let me grab my complaint -- located at 8580
17 West Nine Mile Road in Oak -- Oak Park, Michigan, and I
18 give the address. So the -- the sidewalk is -- is located
19 -- they've given notice. In our notice that was sent
20 prior to filing suit, we indicated that it was right out
21 front of the Trend Express Market.

22 And so we believe that it's not yet ripe for
23 summary disposition. If they -- if we take discovery and
24 they get the Plaintiff's version of the story and they
25 feel that, you know, based on what she said that an

1 ordinary person in -- in her position should have noticed
2 that the defect in the sidewalk was open and obvious, then
3 that's fine, we can -- we can discuss this at that point.
4 But there's been no discovery. They don't have any
5 testimony. All they have is an affidavit from a -- an
6 employee taking a shot of the sidewalk its -- in its
7 entirety saying this is open and obvious.

8 THE COURT: Okay.

9 MR. GILLOOLY: Very briefly.

10 We have more than just the affidavit. We have
11 the Plaintiff presenting photographs in response -- in
12 their responsive brief and in their complaint alleging
13 that the vertical discontinuity is more than two inches.
14 The show pictures of where the Plaintiff fell. It's
15 clearly the open and obvious. I mean there's nothing in
16 the area that could have hidden this condition. It's --
17 it's a simple rise between two flags of concrete.

18 The governmental immunity act encourages, as the
19 Court knows, to -- for municipal entities to file motion
20 for summary disposition as early as possible, so as to
21 eliminate municipalities from having to engage in the
22 expense of litigation if questions like this can be
23 resolved by way of -- of photographs and the like.

24 We think it's pretty straightforward. We are
25 the first to test this, quite frankly, in terms of filing

1 it as a first responsive pleading since the amendment of
2 the statute. I know that the plaintiff bar has been very
3 active looking at this in comments made by plaintiffs in
4 various chat rooms and the like, but we think there's
5 enough for the Court to make a determination here.

6 MR. BEDIKIAN: Just, the -- the pictures are
7 submitted, but where the Plaintiff was coming from has not
8 been -- there's no testimony resulting from that.

9 Now, if she was coming outside from the Trend
10 Express viewing the street this way, yes, you can see the
11 lip. But if she's coming from the other way, which her
12 testimony will show, you cannot see the lip, because it's
13 from the opposite side.

14 So there's a question of fact on whether or not
15 the condition was open and obvious to a reasonable person
16 in her position in this particular matter. And I think
17 because there's no direct testimony by the Plaintiff
18 regarding the incident, where she was when she fell, that
19 there remains a question of fact moving forward that
20 precludes summary disposition at this point.

21 THE COURT: Well, I will do this. I will allow
22 limited discovery, and that limit is the deposition of the
23 Plaintiff. That's all the discovery that I will authorize
24 at this time. All other discovery is held in abeyance
25 pending that and a renewal of this motion, all right? So

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once you've completed the deposition, come on back in and I'll rule on the open and obvious.

MR. GILLOOLY: Thank you very much.

MR. BEDIKIAN: Thank you, Your Honor.

MR. GILLOOLY: Thank you, Judge.

(At 10:59 a.m., proceedings concluded)

- - -

CERTIFICATION

I certify that this transcript, consisting of 12 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, May 10, 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.

Deanna L. Harrison

/s/ Deanna L. Harrison, CER 7464
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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’S ANSWER TO PLAINTIFF’S COMPLAINT,
NOTICE OF SPECIAL AND/OR AFFIRMATIVE DEFENSES
AND RELIANCE UPON JURY DEMAND pd/ct**

NOW COMES Defendant, CITY OF OAK PARK, by and through its attorneys,
GARAN LUCOW MILLER, P.C., and for its Answer to Plaintiff’s Complaint states as
follows:

COMMON ALLEGATIONS

1. Admit.
2. Admit.
3. Admit.

4. As to allegations contained herein, including sub-paragraphs a-b,
Defendant denies same for the reason that they are untrue.

5. Denied, for the reason that same is untrue, and for the further reason that
no facts exist to support the allegations contained herein.

6. Denied, for the reason that same is untrue, and for the further reason that
no facts exist to support the allegations contained herein.

7. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

8. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

9. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

10. As to allegations contained herein, including sub-paragraphs a-c, Defendant denies same for the reason that they are untrue

11. As to allegations contained herein, including sub-paragraphs a-b, Defendant denies same for the reason that they are untrue.

12. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

13. As to allegations contained herein, including sub-paragraphs a-h, Defendant denies same for the reason that they are untrue.

WHEREFORE, Defendant, CITY OF OAK PARK, respectfully requests the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal together with an award of interest, costs and attorneys fees so wrongfully incurred.

Respectfully Submitted:
GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly
Attorney for Defendant
1155 Brewery Park Blvd., Suite 200
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P41948

Dated: May 24, 2017

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)
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John J. Gillooly (P41948)
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NOTICE OF SPECIAL AND/OR AFFIRMATIVE DEFENSES

NOW COMES Defendant, CITY OF OAK PARK, by and through its attorneys, GARAN LUCOW MILLER, P.C. and for its Affirmative Defenses pled under the first responsive pleading and incorporated by reference herein, states as follows:

1. Defendant denies it has breached any of its duties and denies it was negligent in any manner, but states it was guided by and strictly observed all of its legal duties and obligations imposed by operation of law and otherwise, and that all of the actions of its agents, servants, and/or employees were careful, prudent, proper and lawful.
2. The Plaintiff has failed to mitigate her own damages.
3. The Plaintiff has failed to mitigate her own damages by refusing, neglecting or otherwise making a reasonable effort to find gainful employment consistent with her physical and educational capabilities.

4. The Plaintiff was negligent and/or comparatively negligent in the causation of the subject incident.

5. The claim brought by Plaintiff is barred by the running of the statute of limitations and the Defendant hereby reserves the right to bring a Motion for Summary Disposition.

6. The Plaintiff has failed to state a claim against Defendant on which relief can be granted and Defendant therefore reserves the right to move for summary disposition pursuant to the Michigan Court Rules.

7. Defendant relies upon all defenses available to it under the decision of the Michigan Supreme Court in *Riddle v. McLouth Steel Products*, 440 Mich. 85; 485 N.W.2d 676 (1992).

8. Defendant denies it owed or breached any express or implied warranties of safety and/or fitness.

9. That each of the claims are barred by release and/or fraud.

10. Plaintiff's claim for non-economic damages is barred by MCL 600.2959 because Plaintiff's fault is greater than the aggregate fault of the other person, persons, firm or corporation that contributed to Plaintiff's injury, whether or not parties to this action.

11. Plaintiff's claim for damages is barred by MCL 600.2955(a)(1) and (2) because Plaintiff was impaired due to the ingestion of alcohol or controlled substances and Plaintiff's fault is equal to or greater than the aggregate fault of the other person or persons that contributed to Plaintiff's injuries, whether or not parties to this action.

12. Plaintiff's claim for damages is limited by MCL 600.2946(a).

13. That there was negligence and intervening actions of others, including the Plaintiff, that was the sole proximate cause of the incident at issue.

14. Defendant specifically objects to the failure of Plaintiff to join all indispensable claims and/or parties.

15. Defendant will rely upon all defenses available to it under the Governmental Immunity Act, MCL 691.1407, et seq.

16. Defendant will rely upon all defenses available to it under MCL 691.1402a.

17. That plaintiff has failed to provide the statutory required notice to the City of Oak Park.

18. That each of the claims advanced in the Complaint of Plaintiff are barred by Act 419 of the Public Acts of 2016 and that this Defendant hereby intends to rely upon the Open and Obvious Danger Rule.

19. Defendant hereby demands a response to each of the above-stated Special and/or Affirmative Defenses.

20. Defendant reserves the right to add any other Special and/or Affirmative Defenses which may become known or warranted during the course of subsequent discovery or investigation.

Respectfully Submitted:

GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly

Attorney for Defendant

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Dated: May 24, 2017

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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John J. Gillooly (P41948)
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RELIANCE UPON JURY DEMAND

NOW COMES Defendant, CITY OF OAK PARK, by and through its attorneys,
GARAN LUCOW MILLER, P.C. and hereby relies upon the Jury Demand filed by
Plaintiff in the above cause.

Respectfully Submitted:

GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly
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P41948

Dated: May 24, 2017

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)
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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.

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Dated: July 10, 2017

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 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”).

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).

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

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,

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Dated: July 10, 2017

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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

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

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

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).

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

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.

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.

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:

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.

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

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

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

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).

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.

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.

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,

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Dated: July 10, 2017

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Defendant.

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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, deterioration, 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 severely injured in the accident that occurred and has suffered grievous and painful injuries.

13. As a direct and 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.

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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
248-957-0456
matt@miadvocacycenter.com

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
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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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Min-U-Script® with Word Index

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
1155 Brewery Park Blvd.
Suite 200
Detroit, Michigan 48207
313-446-5501

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

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

T A B L E O F C O N T E N T S

JENNIFER BUHL		
Examination by Mr. Gillooly		03
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 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

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.

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;

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

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?

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

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?

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.

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.

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

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

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?

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?

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

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.

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

**STATE OF MICHIGAN
98TH LEGISLATURE
REGULAR SESSION OF 2016**

Introduced by Reps. Santana, Gay-Dagnogo and Banks

ENROLLED HOUSE BILL No. 4686

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

The People of the State of Michigan enact:

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

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

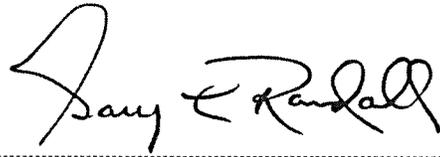
(3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:

- (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
- (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
- (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.

(5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious.

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

This act is ordered to take immediate effect.



.....
Clerk of the House of Representatives



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Secretary of the Senate

Approved

.....
Governor

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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.

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

/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

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.

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 N.W.2d 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).

³We 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.

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

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

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

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 unavailability 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.

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,](#)

[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.

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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Cited

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

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

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.

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. Gibbs *, 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

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](#).

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

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

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).

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

JENNIFER BUHL,

Plaintiff,

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

v.

CITY OF OAK PARK,

Defendant.

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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



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

JENNIFER BUHL,

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

Plaintiff,

v.

CITY OF OAK PARK,

Defendant.

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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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Plaintiff's theory of liability focuses upon a statutory violation by the Defendant which makes the open and obvious doctrine inapplicable. This violation falls under MCLA 691.1402(a)(1), which requires the municipality to maintain the sidewalk in reasonable repair. The open and obvious doctrine, which is a doctrine defining what duty a defendant has, does not apply when there has been a violation of a statutory duty. *Jones v Enertel, Inc*, 467 Mich 266, 269 (2002); *also see, O'Donnell v Grasic*, 259 Mich App 569 (2003).

Thus plaintiff shall proceed to a discussion of the statutory duties involved.

MCL 691.1402(a)(1), in relevant part, 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.

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Plaintiff's pictures show a vertical discontinuity of more than 2 inches in the sidewalk at issue. Plaintiff has enough support to rebut the presumption that the City maintained the sidewalk in reasonable repair. Plaintiff has shown there is an issue of fact as to whether the sidewalk at issue was in reasonable repair. At this point, that is enough to survive Defendant's motion to dismiss.

In *Foren v City of Taylor*, unpub COA op docket no. 317773 decided 10/23/14 (opinion attached as Exhibit 6), plaintiff-pedestrian changed course to avoid a bicyclist. He tripped, slipped and fell on a raised portion of sidewalk and sought damages under the Government Tort Liability Act's highway exception. The trial court granted SD to defendant.

On appeal, the COA reversed. At slip op pages 4-5 the Court held that (1) "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" and (2) "a genuine issue of material fact exists as to whether the raised sidewalk was the legal cause of plaintiff's injuries." And at page 5, the Court succinctly held that Open and Obvious is to be inapplicable to claims alleging violation of statutorily-imposed duties:

[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).

In *Walker*, the COA said at pages 22-23:

The defense of open and obvious danger relates to a claim of a duty to warn, but will not exonerate a defendant from liability where the claim is one of a duty to maintain and repair the premises. We emphasize that the defense of open and obvious danger does not apply to this case, where liability is premised on a statutory duty to maintain and repair a sidewalk. Defendant city had a statutory duty to maintain the sidewalk in reasonable repair so that it was reasonably safe for public travel. MCL 691.1402(1); MSA 3.996(102)(1). Thus, defendant cannot

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use the defense of open and obvious danger to avoid liability where it has a statutory duty to maintain the sidewalk in reasonable repair.

In *Mato v. City of Livonia*, unpub COA op docket no. 323071 decided 10/29/15 (opinion attached as Exhibit 7), Plaintiff tripped and fell on a sidewalk while walking her dog. Defendant filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(10). Defendant argued Plaintiff had not rebutted the presumption that Defendant had kept the sidewalk in reasonable repair. The trial court denied Defendant's motion. In part the trial court found: "[w]e 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 Court of Appeals affirmed the trial court's decision.

It is clear that there is a vertical discontinuity of more than 2 inches, and that Plaintiff has rebutted the presumption that the sidewalk was in reasonable repair. Further, Plaintiff believes that since the photos supplied by both parties show the uneven sidewalk, it creates an issue of fact regarding whether the sidewalk was in reasonable repair.

4. THE CONDITION IS NOT OPEN AND OBVIOUS

Assuming this Court determines the amendment is retroactive, the condition that gave rise to Plaintiff's injury was not open and obvious. An open and obvious condition generally does not pose an unreasonable risk of harm because an invitee either knows of it or is reasonably expected to discover the condition and realize the danger. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516- 517; 629 NW2d 384 (2001), quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) and *Riddle v McLouth Steel Products Corp*,

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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)

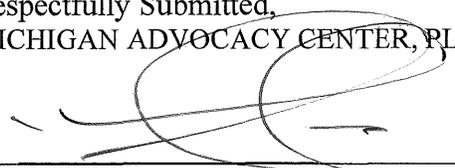
Like in *Price*, the testimony of Plaintiff, the conditions that existed that day, and Plaintiff's view of the dangerous condition should be enough evidence to create a genuine issue of material fact on whether an ordinary user upon casual inspection would have discovered the dip.

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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



Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
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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
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
1155 Brewery Park Blvd.
Suite 200
Detroit, Michigan 48207
313-446-5501

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

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

T A B L E O F C O N T E N T S

JENNIFER BUHL

Examination by Mr. Gillooly	03
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 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

Page 5

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.

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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 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 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 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?

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 incident?
 7 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?

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.

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.

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 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 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 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.

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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Exhibit 3

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 EXHIBIT
 121a
 113

Exhibit 4

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STATE OF MICHIGAN
COURT OF APPEALS

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

UNPUBLISHED
February 17, 2015

Plaintiff-Appellee,

v

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

CITY OF DETROIT,

Defendant-Appellant.

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).

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

after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401. [MCR 2.116(D)(3).]

The plain language of MCR 2.116(D)(3) provides that the trial court does not have discretion to deny motions based on governmental immunity merely because they are filed after the dispositive motion deadline in the scheduling order. To read the rule otherwise would render the second half of the rule, which explicitly permits filing after the cutoff date, nugatory. *Grzesick*, 237 Mich App at 560. Staff comments to the rule reiterate this interpretation. See 2007 Staff Comment to MCR 2.116 (stating, “motions for summary disposition based on governmental immunity . . . may be filed even if the time set for filing dispositive motions in a scheduling order has expired,” and distinguishing a governmental immunity defense from the holding of *Grove*, *supra*).

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

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

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

³ 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.

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

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 WR, 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.

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.

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.

- (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,

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).

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).

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.*

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:

² 2014 PA 489.

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)

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).

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

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

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.

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.

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

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

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.

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

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”).

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

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.

(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.

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.

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

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.

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 inexperienced 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.

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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Pontiac, Michigan
Wednesday, August 23, 2017

- - -

(At 10:42 a.m., proceedings begin)

COURT CLERK: Your Honor, calling number 14 on
the Court's docket, Buhl v Oak Park City, 17-157097-NI.

MR. GILLOOLY: Good morning, Judge McMillen.
John Gillooly on behalf of the City of Oak Park.

MR. BEDIKIAN: Good morning, your Honor.
Matthew Bedikian on behalf of plaintiff, Jennifer Buhl.

MR. GILLOOLY: Judge McMillen, this is our
renewed motion to dismiss and/or for summary disposition.
You had previously ordered a stay of all discovery pending
the completion of the plaintiff's deposition. We have
completed her deposition. I argue, as a matter of law,
that Public Act 419 should be applied retroactively to the
date of the incident at issue because it does not affect
any vested rights of the plaintiff, number one. Number
two, we suggest to you that there's no duty on the part of
the City of Oak Park as the open and obvious danger rule
applies. The condition was open and obvious. There was
no special aspects. Plaintiff testified clearly and
unequivocally in her deposition that she saw the alleged
defect was a vertical discontinuity of more than two
inches, as she pled in her complaint. We suggest the

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

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 then 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

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

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

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

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.

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,

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.

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

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

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

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

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

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

1 complaint is that this occurred about 4:30 in the
2 afternoon. Under no circumstances, any season of the
3 year, is it dark at 4:30 in the afternoon.

4 MR. BEDIKIAN: Your Honor? But she did indicate
5 in her testimony that it was raining, so I mean, you know,
6 it could --

7 THE COURT: So the sun was not brightly shining.

8 MR. BEDIKIAN: The sun was not brightly shining.
9 I mean --

10 THE COURT: (Indiscernible - multiple speakers).

11 MR. BEDIKIAN: And there's a tree.

12 THE COURT: (Indiscernible - multiple speakers)
13 and saying that it's dark.

14 MR. BEDIKIAN: Understood. But there's a tree
15 that was there at the time the incident occurred. That
16 provides shade, and then it's raining, it's -- I mean it's
17 darker than it would normally be if the sun was completely
18 shining and there was no rain.

19 THE COURT: And I will tell you that in my
20 evaluation of the issue of whether it was open and
21 obvious, the only picture I used in determining that was
22 Exhibit Number 1, which is the Google photo that shows the
23 existence of the tree, and since it's dated September of
24 2016, we can assume that in May of 2016, the tree was
25 there, and Exhibit Number 3, which shows really the

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,

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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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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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;

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:

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STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER BUHL,

Plaintiff-Appellant,

v

CITY OF OAK PARK,

Defendant-Appellee.

FOR PUBLICATION

August 29, 2019

9:00 a.m.

No. 340359

Oakland Circuit Court

LC No. 2017-157097-NI

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

TUKEL, J.

This case involves the question of whether a legislative act, 2016 PA 419, which makes the "open and obvious" doctrine applicable to suits against municipalities, applies retroactively—that is, whether it applies "to events antedating its enactment." *Frank W Lynch & Co v Flex Tech, Inc*, 463 Mich 578, 585; 624 NW2d 180 (2001), citing *Landgraf v USI Film Products*, 511 US 244, 283; 114 S Ct 1483; 128 L Ed 2d 229 (1994). The retroactivity question turns on whether the act impaired a "vested right," and our Supreme Court has long noted that "[t]he question of determining what is a vested right has always been a source of much difficulty to all courts." *Lahti v Fosterling*, 357 Mich 578, 588-589; 99 NW2d 490 (1959). The trial court found that the statutory amendment applied retroactively and, applying the open and obvious doctrine, granted summary disposition to defendant. We hold that because no vested right of plaintiff was impaired by the Legislature's actions and because the Legislature's actions were remedial in nature, the resulting grant of summary disposition to defendant on the basis of the open and obvious doctrine was correct; we therefore affirm the trial court's judgment.

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

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

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

I. RETROACTIVITY OF AMENDMENT TO MCL 691.1402a

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

A. STATUTORY BACKGROUND

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

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

² The relevant timeline of events is thus:

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

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

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

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

B. RETROACTIVITY DEFINED

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

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

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

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

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

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

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

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

C. APPLYING THE RETROACTIVITY TEST

1. STATUTORY TEXT

The first factor to consider is whether the text of the statute at issue provides that it is to be given retroactive or prospective effect. *In re Certified Questions*, 416 Mich at 570; see also *Johnson*, 491 Mich at 429. Our Supreme Court “has recognized that ‘providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.’ ” *Johnson*, 491 Mich at 432 (citation omitted). In the present case, the statute did not include a future effective date, but rather was given immediate effect. “Use of the phrase ‘immediate effect’ does not at all suggest that a public act applies retroactively.” *Id.* at 430. Rather, “immediate effect” means only “that the Legislature by a $\frac{2}{3}$ vote expressed an intention that the amendatory act take effect on the date it was filed.” *Id.* at 431 n 30. Thus, the lack of any language here regarding retroactivity weighs in favor of prospective application only.

2. TAKING AWAY OR IMPAIRING VESTED RIGHTS

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

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

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

While the total damages which plaintiff could have received were significantly reduced by § 2949, *plaintiff's cause of action was not legally barred or taken away.*

Section 2949 does not bar any claim, legal or equitable, but it states that “damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.” Section 2949 *is not a legal bar,* but is a principle established by the Legislature which mitigates damages in products liability actions.

In short, we hold that the applicability of the products liability statute in the instant case did not offend Michigan’s general rule against the retrospective application of a statute which “take[s] away vested rights.” [*Id.* at 577-578 (citations omitted; emphasis added).]

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

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

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

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

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

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

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

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

Congress expressly made it so applicable. The *Landgraf* inquiry would become pointless.” *Id.* at 1062 n 1.³ The dissent here commits exactly that error, by stating that “[t]he legal question before us is whether the Legislature clearly stated its intention to apply 2016 PA 419 retroactively.” That would be true for a rule one analysis; it is incorrect for the rule three and rule four analyses applicable here because it would override and therefore make pointless any analysis under those rules.⁴

In the present case, the only claimed reliance on plaintiff’s part is to the non-applicability of the open and obvious doctrine. In the words of the dissent, 2016 PA 419 is “a game changer” because it so radically changed the “ ‘expectation of success’ in [plaintiff’s] litigation.” 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 US at 271. This principle explains cases such as *Brewer*, which denied retroactive application. In *Brewer*, an amendment to the workers’ compensation act created “an entirely new jurisdictional standard, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan.” *Brewer*, 486 Mich at 57.⁵ Retroactive application thus would have upset expectations regarding

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

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

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

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

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

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

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

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

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

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

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

a. REINSTATING THE PREVIOUS STATE OF THE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thus, by enacting 2016 PA 219, the Legislature has stated that the *Jones* doctrine was not what it had intended for the law to be; rather, the amendment shows that it was the Legislature's intent for defenses available to private parties, as provided for by the 1964 Act, to have applied all along. In essence, the amendment states, "The *Jones* doctrine is overruled," thereby satisfying the first prong of *Brewer*. In addition, the remainder of the statute essentially states, "And we never intended for the *Jones* doctrine to be the law, so we are reinstating the law as we set forth in the 1964 Act," thereby satisfying the second prong of *Brewer*. By so acting, the legislation also clarified the Legislature's intent regarding the previous law and settled the

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

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

It is this second aspect of the amendment, in which the Legislature clarified that it never had intended for the *Jones* doctrine to be the law, which the dissent rejects, stating that “applying 2016 PA 419 retroactively eliminates the city’s duty,” and thereby impairs plaintiff’s vested rights. The dissent states that *Brewer* stands for the rule that “[e]ven if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive *change* in the law.” *Brewer*, 486 Mich at 56, citing *Hurd v Ford Motor Co*, 423 Mich 531, 533; 377 NW2d 300 (1985) (emphasis added). That is of course true but not relevant—the point of the reinstatement doctrine is that if the Legislature overrules a judicial decision by restoring the status quo ante, it demonstrates what it intended the law to be all along; under such circumstances, the new legislation does not enact a substantive change in the law.

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

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

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

be applied retroactively because it was “designed to correct an existing oversight in the law or redress an existing grievance.” *Davis*, 272 Mich App at 158-159, citing *Lahti*, 357 Mich at 589. Our analysis thus fully complies with the requirement that we look beyond the label of “remedial” to the substance of whether an amendment affects substantive rights. “[W]e have rejected the notion that a statute significantly affecting a party’s substantive rights should be applied retroactively merely because it can also be characterized in a sense as “remedial”:

“In that regard, we agree with Chief Justice RILEY’s plurality opinion in *White v General Motors Corp*, [431 Mich 387; 429 NW2d 576 (1988),] that the term “remedial” in this context should *only be employed to describe legislation that does not affect substantive rights*. Otherwise, the mere fact that a statute is characterized as remedial is of little value in statutory construction. Again, the question is one of legislative intent.” [*Johnson*, 491 Mich at 433 (citation omitted).]

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

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

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

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

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

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

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

II. OPEN AND OBVIOUS

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

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

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

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

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

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

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

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

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

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

/s/ Colleen A. O'Brien

/s/ Jonathan Tukel

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER BUHL,

Plaintiff-Appellant,

v

CITY OF OAK PARK,

Defendant-Appellee.

FOR PUBLICATION
August 29, 2019

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

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

LETICA, J. (*dissenting*).

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

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

I. STANDARD OF REVIEW

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

II. THE APPLICABLE LEGAL PRINCIPLES

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

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

First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event.^[2] Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [*Id.* at 38-39 (citations omitted).]

III. THE STATUTORY LANGUAGE SUPPORTS PROSPECTIVE APPLICATION

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

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

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

governs. All other rules of construction and operation are subservient to this principle.’ ” *Frank W Lynch & Co*, 463 Mich at 583, quoting *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715 (1985) (alteration in original). “Statutes are presumed to apply prospectively only unless a contrary intent is clearly manifested.” *Brewer v A D Transp Express, Inc*, 486 Mich 50, 56; 782 NW2d 475 (2010). Indeed, “the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively.” *Frank W Lynch & Co*, 463 Mich at 584.³ “Use of the phrase ‘immediate effect’ does not at all suggest that a public act applies retroactively.” *Johnson v Pastoriza*, 491 Mich 417, 430; 818 NW2d 279 (2012). To the contrary, when the Legislature provides a law will take immediate effect, this “only confirms its textual prospectivity.” *LaFontaine Saline, Inc*, 496 Mich at 40. Here, the Legislature directed the statutory amendment “to take immediate effect” and used no retroactive language. This weighs against retroactive effect, and, instead, confirms the statutory amendment applies prospectively.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. RESPONSE TO THE MAJORITY

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

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

To buttress its conclusion that the Legislature’s intent to overrule our Supreme Court’s 2002 *Jones* decision renders the 2016 statutory amendment remedial and retroactive, the majority extracts from *Brewer* a rule that substantive changes are only to apply prospectively “if the Legislature adopts an amendment directed at a particular judicial decision, and through that amendment not only overrules the judicial decision but also reinstates the state of the law as it existed prior to the amendment, then the amendment is considered remedial and will be applied retroactively.” But in *Brewer*, the Supreme Court explained that “[e]ven if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law.” *Brewer*, 486 Mich at 56, citing *Hurd*, 423 Mich at 533. See also *Johnson*, 491 Mich at 430, quoting *Brewer*, 486 Mich at 56. The Supreme Court did not incorporate the majority’s rule. See also *Frank W Lynch & Co*, 463 Mich at 585 (“[W]e have rejected the notion that a statute significantly affecting a party’s substantive rights should be applied retroactively merely because it can also be characterized in a sense as ‘remedial.’ ”). Thus, while the majority applies a rule it derives from *Brewer*, I discern non-binding obiter

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

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

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

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

considered ‘remedial’” *Brewer*, 486 Mich at 57. See also *Frank W Lynch & Co*, 463 Mich at 585 (“[W]e have rejected the notion that a statute significantly affecting a party’s substantive rights should be applied retroactively merely because it can also be characterized in a sense as ‘remedial.’ ”).

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

VI. THE CITY’S REMAINING ARGUMENT

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

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

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

VII. CONCLUSION

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

/s/ Anica Letica

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

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

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

**STATE OF MICHIGAN
98TH LEGISLATURE
REGULAR SESSION OF 2016**

Introduced by Reps. Santana, Gay-Dagnogo and Banks

ENROLLED HOUSE BILL No. 4686

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

The People of the State of Michigan enact:

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

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

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

- (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
- (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
- (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.

(5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious.

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

This act is ordered to take immediate effect.



.....
Clerk of the House of Representatives



.....
Secretary of the Senate

Approved

.....
Governor

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2019 WL 4282069

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.

Alan DRAKE, Plaintiff-Appellee,

v.

CITY OF OAK PARK, Defendant-Appellant.

No. 340975

|
September 10, 2019

Oakland Circuit Court LC No. 2017-158907-NO

Before: [K. F. Kelly](#), P.J., and [Riordan](#) and [Gadola](#), JJ.**Opinion**

Per Curiam.

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

I. BASIC FACTS AND PROCEDURAL HISTORY

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

On June 20, 2017, defendant filed a motion to dismiss pursuant to [MCR 2.116\(C\)\(7\), \(8\), and \(10\)](#), alleging that [MCL 691.1402a](#) was amended to allow it to raise a defense

that the condition was open and obvious. Defendant asserted that it was entitled to summary disposition because the condition was open and obvious where an average user with ordinary intelligence would have discovered the danger and the risk upon casual inspection. It offered the photographs of the area purportedly to demonstrate that the sidewalk's condition was clearly visible to an ordinary user upon casual inspection. Further, defendant contended that there were no special aspects to the open and obvious condition that made the risk unreasonably dangerous.

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

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

II. LEGAL STANDARDS AND APPLICATION

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

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

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

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

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

- (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
- (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the

exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

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

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

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

(4) Whether a presumption under 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 324.91131.

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

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

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

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

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Percy LEWIS, Plaintiff–Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Defendant–Appellee.

Percy Lewis, Plaintiff–Appellee,

v.

City of Ferndale, Defendant–Appellant.

Docket Nos. 307672, 311528.

|
Sept. 10, 2013.

Oakland Circuit Court; LC Nos. 11–000069–MD, 11–122989–NO.

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

Opinion

PER CURIAM.

*1 Docket No. 307672 arises out of plaintiff Percy Lewis's action against the Michigan Department of Transportation (MDOT) seeking damages for an injury sustained as a result of MDOT's alleged negligence in maintenance of pavement. The trial court granted summary disposition in favor of MDOT based on governmental immunity, and Lewis appeals as of right.

Docket No. 311528 arises out of Lewis's action against the city of Ferndale seeking damages for the same injury and alleging the city was negligent in its maintenance of the pavement. The trial court granted partial summary disposition in favor of Lewis and denied Ferndale's motion for summary disposition based on governmental immunity, and Ferndale appeals as of right.

We affirm the trial court's rulings and hold, as a matter of law, that the site of the alleged defect was a portion of the sidewalk existing outside the improved portion of the highway designed for vehicular travel. Accordingly,

Ferndale is potentially liable for failure to maintain the area in reasonable repair.

On May 13, 2010, Lewis fractured his left wrist when he allegedly stepped in a missing portion of concrete and fell. Lewis was in the process of crossing Woodward Avenue, a state highway, at Cambourne Street in Ferndale when the incident occurred. The sidewalk was cut and sloped to allow for handicapped access to the crosswalk. The alleged defect where Lewis fell was located at the base of the sloped curb where the curb and gutter installation bring the sidewalk flush with the roadway. Lewis sent a notice letter to both MDOT and Ferndale informing them of the nature and location of the incident and his intention to file a claim, as required by MCL 691.1404.

Lewis filed suit against MDOT, alleging negligence and asserting that MDOT had failed to maintain the area of the alleged defect in reasonable repair. MDOT answered, alleging that it was shielded by governmental immunity, and filed a motion for summary disposition under MCR 2.116(C)(7). MDOT contended that the defect was not located in the improved portion of the highway designed for vehicular travel, and that, therefore, the state was not responsible for maintenance. The trial court agreed with MDOT and granted MDOT's motion for summary disposition, ruling that “the Plaintiff fell on the curb portion of the sidewalk and not the improved portion of the highway designed for vehicular travel.”

Lewis subsequently filed suit against the city of Ferndale, asserting that Ferndale had failed to maintain the sidewalk in reasonable repair. Ferndale answered, alleging that it was shielded by governmental immunity, and also filed a motion for summary disposition under MCR 2.116(C)(7). Ferndale contended that the defect was located in the “gutter pan,” allegedly a portion of the highway for which municipalities are not liable. Lewis responded that the area was part of the “curb cutout” and was therefore an extension of the sidewalk. The trial court agreed with Lewis and denied Ferndale's motion for summary disposition, ruling that the area of the defect “was a sloped curb or ‘curb cutout’ designed to make pedestrian travel easier.... The Court finds that Defendant is responsible for maintaining the sloped curb or ‘curb cutout’ area .” The trial court also found that Lewis's notice of intention to file a claim was adequate.

I. RETROACTIVITY

*2 Whether a statute applies retroactively is a question of statutory interpretation that this Court reviews de novo. *Johnson v. Pastoriza*, 491 Mich. 417, 428–429; 818 NW2d 279 (2012).¹

Ferndale contends that the amendments to MCL 691.1401, 1402, and 1402a contained in 2012 PA 50 should govern in this case. We disagree.

The intent of the Legislature governs a determination of whether a statute applies retroactively or prospectively. *Johnson*, 491 Mich. at 429. “Statutes are presumed to apply prospectively, unless the Legislature clearly manifests the intent for retroactive application.” *Id.* This is “ ‘especially true when giving a statute retroactive application will ... create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed.’ ” *Id.* at 429–430, quoting *Hansen–Snyder Co v. General Motors Corp*, 371 Mich. 480, 484; 124 NW 286 (1963). “ ‘[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.’ ” *Id.* at 430, quoting *Brewer v. A D Transport*, 486 Mich. 50, 56; 782 NW2d 475 (2010).

“ ‘[T]he Legislature has shown ... that it knows how to make clear its intention that a statute apply retroactively.’ ” *Johnson*, 491 Mich. at 430, quoting *Frank W Lynch & Co v. Flex Technologies, Inc*, 463 Mich. 578, 584; 624 NW2d 180 (2001). Nothing in the legislative history or text of 2012 PA 50 indicates an intention for retroactive application. “Use of the phrase ‘immediate’ effect does not at all suggest that a public act applies retroactively.” *Johnson*, 491 Mich. at 430. “ ‘[P]roviding a specific, future effective date and omitting any reference to retroactivity support a conclusion that a statute should be applied prospectively only.’ ” *Id.* at 432, quoting *Brewer*, 486 Mich. at 56. The amendments at issue in this case are silent on retroactivity and include a specific time—“immediate effect”—for the amendments to take effect. 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.

Ferndale relies on the following exception to the presumption that statutes apply prospectively: “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 (internal citations and quotation marks omitted). However, “the term ‘remedial’ in this context should only be employed to describe legislation that *does not affect substantive rights.*” *Lynch*, 463 Mich. at 585 (emphasis added). The Michigan Supreme Court has held that because an amended statute was enacted to invalidate a prior decision of the Court, it “effect[ed] a substantive change in the law” and would apply prospectively. *Hurd v. Ford Motor Co*, 423 Mich. 531, 534; 377 NW2d 300 (1985).

*3 The amended versions of the statutes at issue in this case alter a municipality's potential liability. Previously, municipalities had a general duty, if certain conditions such as prior knowledge were met, to maintain all portions of a county “highway,” except for the improved portion designed for vehicular travel. 2012 PA 50 limits a municipality's duty to only the *sidewalk* located next to municipal, state, or county highways. The change removes the ability to bring a cause of action, which existed before the amendments, for injuries occurring on trailways, crosswalks, or other installations. See former MCL 691.1402a. Because the amended versions of the statutes eliminate previously existing rights to bring causes of action and thus effect a substantive change in the law, the amended versions apply prospectively and do not apply to the present case.

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.

II. DEFECTIVE NOTICE

Ferndale contends that Lewis's notice was defective because it stated that the incident occurred “on the crosswalk of Woodward Avenue,” when the accident allegedly occurred, instead, on the “gutter pan.” We disagree.

We review questions of statutory interpretation de novo. *Plunkett v. Dep't of Transportation*, 286 Mich.App 168, 174; 779 NW2d 263 (2009).

To bring a claim under the highway exception to governmental immunity, an injured person must within 120

days provide notice of the injury to the governmental agency having jurisdiction over the defective area. [MCL 691.1404\(1\)](#). “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.” *Id.*

Lewis correctly named the intersection where his accident occurred, and he attached photographs of the defect in context with the surrounding area that were sufficient to identify the exact location of the defect. The fact that Lewis used the term “crosswalk” in his notice letter is not sufficient to render the notice defective, even if, for purposes of roadway engineering, the area is technically referred to as a “gutter pan.”

Ferndale relies on [Jakupovic v. Hamtramck](#), 489 Mich. 939, 939; 798 NW2d 12 (2011), where the plaintiff was injured while walking on a sidewalk in front of a home and gave written notice with the wrong address for the defect. The notice was held defective because it did not specify the “exact” location. *Id.* In the present case, Lewis could not have given a numbered address for the particular defect, but he did submit the proper intersection and enough photographic evidence to unmistakably alert the respective governmental agencies about the exact location of the defect.

III. MDOT DOES NOT HAVE JURISDICTION

This Court reviews de novo the applicability of governmental immunity and the statutory exceptions to governmental immunity. [Moraccini](#), 296 Mich.App at 391.

*4 The governmental tort liability act (GTLA), [MCL 691.1401 et seq.](#), broadly shields governmental agencies, extending them immunity when engaged in the discharge of a governmental function. [Nawrocki v. Macomb County Road Comm](#), 463 Mich. 143, 156; 463 NW2d 702 (2000). There is an exception to this broad grant of immunity—the highway exception—contained in [MCL 691.1402\(1\)](#):

Except as otherwise provided in [\[MCL 691.1402a\]](#), 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.... The duty of the state and county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.... [2]

A “highway” is defined in [MCL 691.1401\(e\)](#) as:

a public highway, road, or street that is open for public travel and includ [ing] bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles. [3]

The highway exception is to be narrowly construed. [Nawrocki](#), 463 Mich. at 150. Under the highway exception, the duty of the state agency, MDOT, does not extend to every “improved portion of highway,” but only to improved portions “designed for vehicular travel.” [Grimes](#), 475 Mich. at 78.

The duty of the state agency for portions of the road “designed for vehicular travel” only extends to travel lanes of the highway, not to areas where it is merely possible that a vehicle may proceed. *Id.* at 90–91. In [Grimes](#), a driver caused an accident when the driver attempted to return to a travel lane from a highway shoulder graded lower than the travel lane. *Id.*

at 74–75. The Michigan Supreme Court held that the shoulder did not fall within the phrase “designed for vehicular travel,” despite the fact that it might at some point be used by vehicles. *Id.* at 92.

This Court, in applying *Grimes*, concluded that the phrase “designed for vehicular travel” should be interpreted narrowly, but does not “exclude specialized, dual-purpose, or limited-access travel lanes.” *Yono v. Dep’t of Transp.*, 299 Mich.App 102, 110; 829 NW2d 249 (2012). In *Yono*, this Court held that a lane along a highway that is reserved for parallel parking qualifies as “designed for vehicular travel” because it is designated for continuous vehicular travel. *Id.* at 113.

*5 MDOT had jurisdiction and control over Woodward Avenue. However, the area where Lewis fell was not part of the “improved portion of the highway designed for vehicular travel” under MCL 691.1402(1). The alleged defect was not located in a travel lane, nor was the gutter and curb system designed for continuous vehicular travel. Ferndale contends that because the purpose of the gutter is to drain runoff water from the roadway, thereby facilitating vehicular travel, this means it is *designed* for vehicular travel. However, this contention is not supported by the *Grimes* and *Yono* holdings that limit “designed for vehicular travel” to the lanes on the roadway where vehicles continuously operate. Accordingly, the trial court properly granted summary disposition to MDOT, because MDOT would only be liable if the defect was located in the improved portion of the highway designed for vehicular travel.

IV. FERNDALE DOES HAVE JURISDICTION

The highway exception to governmental immunity imposes a general duty on municipalities to maintain the sidewalks in their jurisdiction in reasonable repair. *Moraccini*, 296 Mich.App at 393.

This Court has defined “sidewalk” as a “paved way that runs alongside and adjacent to a public roadway intended for the use of pedestrians.” *Roby v. Mount Clemens*, 274 Mich.App 26, 30; 731 NW2d 494 (2007). “[S]uch proximity does not necessarily make it a sidewalk, and a court will take into

account the character of the paved way and its intended use.” *Id.* In *Moraccini*, 296 Mich.App at 389, the plaintiff was injured when the wheels on his motorized scooter became jammed in concrete irregularities, causing him to fall from his scooter. The irregularities were located at the base of the ramped sidewalk where the concrete meets the roadway. *Id.* This Court held that the ramped area of the curb was part of the sidewalk for purposes of the definition of “highway” because the ramped curb was an extension of the sidewalk “that ... constituted a path for pedestrians and was designed and intended to be used by pedestrians.” *Id.* at 402–403.

The area where Lewis fell was substantially similar to the defect that caused the accident in *Moraccini*. In both *Moraccini* and the instant case, the areas in question were located at the base of the ramped sidewalk, thus serving as an extension of the sidewalk in order for pedestrians to access the crosswalk. By examining the character of the area where Lewis fell, *Moraccini* is dispositive, and Ferndale has jurisdiction over the defect.

Ferndale attempts to distinguish *Moraccini* by stating that the area where Lewis fell was not part of the “curb cutout,” but was in fact a “gutter pan.” Ferndale argues that the former is specifically designed to facilitate pedestrian travel, while the latter is specifically designed to control runoff to facilitate vehicular travel. This distinction does not change the result. By examining the total character of the area where Lewis fell, it is clear that the alleged defect was located in an area designed to facilitate pedestrian travel. It is located at the base of a sloped sidewalk. A pedestrian is required to cross over the area in order to reach the crosswalk. Even if the area is called a “gutter pan” for purposes of MDOT engineering, it is clear that the specific location of the alleged defect is part of the sidewalk, because it is a “paved way ... intended for the use of pedestrians.” *Roby*, 274 Mich.App at 30. The alleged defect causing Lewis's fall was an extension of the sidewalk. The trial court correctly found Ferndale responsible for the area.

*6 We affirm in both appeals. In Docket No. 311528, we remand for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2013 WL 4823526

Footnotes

- 1 As noted, this case also involves summary-disposition motions brought under [MCR 2.116\(C\)\(7\)](#); we review the rulings on such motions de novo. *Grimes v. Mich. Dep't of Transportation*, 475 Mich. 72, 76; 715 NW2d 619 (2006)
- 2 [MCL 691.1402](#) was amended by 2012 PA 50, effective March 13, 2012. Unless otherwise indicated, all references to [MCL 691.1402](#) are to the statute in effect at the time of the incident.
- 3 [MCL 691.1401](#) was amended by 2012 PA 50, effective March 13, 2012. Unless otherwise indicated, all references to [MCL 691.1401](#) are to the statute as amended by 2001 PA 131, the version in effect at the time of the incident.

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2017 WL 1488969

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED Court of Appeals of Michigan.

David MACKLIS, Plaintiff–Appellee,

v.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, Defendant–Appellant.

No. 330957

April 25, 2017

Synopsis

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

Holdings: The Court of Appeals held that:

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

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

Affirmed.

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

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

Opinion

Per Curiam.

*1 In this claim for first-party no-fault benefits, defendant, Farm Bureau General Insurance Company of America,

appeals the trial court's order that denied its motion for summary disposition.¹ Although the trial court incorrectly used the amended version of MCL 500.3113(a) instead of the prior version that was in effect at the time plaintiff's claims accrued, we nonetheless affirm.

I. BASIC FACTS

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

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

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

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

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

Here Defendant asserts Plaintiff's admittedly nefarious conduct precludes him from obtaining the typical statutory mandated no-fault benefits.

*2 Defendant's position does not comport with the plain language of the operative statutory provision, at least not as a matter of law on this record.

Plaintiff was unquestionably unlicensed and possibly intoxicated on marijuana while driving this mysterious van, but this does not mean Plaintiff had taken this vehicle unlawfully.

* * *

The Court merely holds that on this current record Plaintiff is not excluded under [MCL 500.3113\(a\)](#) as a matter of law as there are genuine issues of fact regarding the ownership of the subject van and what plaintiff knew or should have known about such ownership.

II. STANDARD OF REVIEW

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

III. ANALYSIS

A. WHICH VERSION OF [MCL 500.3113\(a\)](#) APPLIES?

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

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

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

*3 A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

(a) The person was using a motor vehicle or motorcycle *which he or she had taken unlawfully*, unless the person reasonably believed that he or she was entitled to take and use the vehicle. [Emphasis added.]

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

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

(a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

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

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

The legislative history makes clear that the amendment was intended to ban from no-fault benefits those who knowingly use an unlawfully taken vehicle regardless of who unlawfully took the vehicle in the first place. Because this necessarily diminishes the rights of certain individuals otherwise eligible for no-fault benefits (i.e., those who only used a vehicle but did not unlawfully take it), we hold that the amendment can only be applied prospectively. See *Brewer v. AD Transport Express, Inc.*, 486 Mich. 50, 58; 782 N.W.2d 475 (2010) (holding that the statute at issue was not retroactive where, among other things, the Supreme Court's prior interpretation

of the statute triggered the amendment, the amendment otherwise imposed a new legal burden, and the Legislature did not indicate the amendment was retroactive); *Franks v. White Pine Copper Div.*, 422 Mich. 636, 672; 375 N.W.2d 715 (1985) (remedial statutes may be applied retroactively unless they destroy, enlarge or diminish existing rights). Accordingly, the trial court erred when it retroactively applied the amended version of MCL 500.3113(a) when plaintiff's claims accrued under the prior version of the statute.

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

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

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

(a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

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

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

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

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

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

Footnotes

- 1 We granted defendant's application for leave to appeal. *Macklis v. Farm Bureau Gen. Ins. Co. of Mich.*, unpublished order of the Court of Appeals, entered June 6, 2016 (Docket No. 330957).
- 2 2014 PA 489.
- 3 "In order to determine legislative intent, this Court may examine the legislative history of an act to ascertain the reason for the act and the meaning of its provisions." *Swan v. Wedgwood Christian Youth & Family Servs. Inc.*, 230 Mich. App. 190, 197; 583 N.W.2d 719 (1998).
- 4 Of course, a fact-finder at trial could find either way.
- 5 We are aware that this result appears absurd because it rewards criminal behavior. Perhaps, the Legislature will attend to this anomalous result.

IV. CONCLUSION

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

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

All Citations

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

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.

Rhonda SCHILLING, Plaintiff-Appellee,

v.

CITY OF LINCOLN PARK, Defendant-Appellant.

No. 342448

|
May 16, 2019

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

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

Opinion

Per Curiam.

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

I. PERTINENT FACTS AND
PROCEDURAL BACKGROUND

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

took photographs, which depicted a slab of sidewalk raised about two inches higher than the adjacent slab.

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

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

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

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

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

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

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

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v. Dep't of Transp.*, 456 Mich. 331, 337; 572 N.W.2d 201 (1998). The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal. *Snead v. John Carlo, Inc.*, 294 Mich. App. 343, 354; 813 N.W.2d 294 (2011). MCR 2.116(C)(7) provides for summary disposition when a claim is "barred because of ... immunity granted by law..." The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v. Wayne Co.*, 482 Mich. 459, 466; 760 N.W.2d 217 (2008). The contents of the

complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* We must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *RDM Holdings, Ltd. v. Continental Plastics Co.*, 281 Mich. App. 678, 687; 762 N.W.2d 529 (2008). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id.* But when a relevant factual dispute does exist, summary disposition is not appropriate. *Id.*

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

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

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

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

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

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

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

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

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

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

(4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.¹

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

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

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

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

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

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

However, contrary to the trial court’s ruling, the question whether the vertical discontinuity met the two-inch threshold necessary to rebut the presumption under MCL 691.1402a(3) is not a question of fact for a jury. MCL 691.1402a(4) expressly provides that “[w]hether a presumption under

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

III. APPLICATION OF MCL 691.1402a(5)

Next, the City claims that MCL 691.1402a, as amended by 2016 PA 419, to add subsection (5), which permits a municipality to assert the common law defense that the condition of the sidewalk was open and obvious, applies retroactively in this case and the trial court erred in deciding otherwise. We disagree and conclude that the amended version of MCL 691.1402a(5) does not apply to this case because plaintiff’s cause of action accrued before the amendment took effect and there is no evidence that the Legislature intended the amendment to be retroactively applied.

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

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

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

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

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

(5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including,

but not limited to, a defense that the condition was open and obvious.⁷

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

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

There is an exception to the presumption that statutes apply prospectively where a statute is remedial or procedural in nature, which the City relies on here. See *Johnson*, 491 Mich. at 432-433; *Lynch*, 463 Mich. at 584. The exception provides that “ ‘statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested.’ ” *Johnson*, 491 Mich. at

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

[W]e have rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as “remedial.” In that regard, ... the term “remedial in this context should only be employed to describe legislation that does not affect substantive rights. Otherwise, the mere fact that a statute is characterized as remedial is of little value in statutory construction. Again, the question is one of legislative intent.” [*Johnson*, 491 Mich. at 433, quoting *Lynch*, 463 Mich. at 585 (internal citations and emphasis in *Lynch* omitted).]

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

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

Regarding the first principle, 2016 PA 419 contains no specific language indicating either retroactive or prospective only application. MCL 691.1402a; *In re Certified Questions*, 416 Mich. at 570-571. The Legislature gave 2016 PA 419 immediate effect on January 4, 2017, the date it was filed, but did not include any language in 2016 PA 419 indicating retroactive application. MCL 691.1402a; House Legislative Analysis, HB 4686, December 9, 2015. Our Supreme Court

has recognized that “ ‘the Legislature has shown ... that it knows how to make clear its intention that a statute apply retroactively.’ ” *Johnson*, 491 Mich. at 430, quoting *Lynch*, 463 Mich. at 584. Accordingly, the Legislature is “cognizant of the operative language necessary to apply any particular provision in the amendatory act retroactively, but did not include such language in” 2016 PA 419. *Johnson*, 491 Mich. at 431. Further, the Supreme Court “has recognized that ‘providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.’ ” *Id.* at 432, quoting *Brewer*, 486 Mich. at 56. This is “akin” to what the amendment to MCL 691.1402a does: “it provides a specific effective date, that being the date of filing with the Secretary of State, without the slightest hint of retroactive application.” *Id.* The absence of any language expressing a legislative intent to apply the amendment to MCL 691.1402a(5) retroactively weighs in favor of prospective only application. See *id.*

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

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

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

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

*9 Thus, contrary to the City's argument, retroactive application of the amendment under 2016 PA 419 would affect the substantive rights of a party who, as here, had a vested right in her cause of action before the amendment but was injured by a dangerous condition of a sidewalk that is open and obvious. In such cases, retroactive application of the amendment would, in effect, legally bar or “take away” plaintiff's accrued cause of action against the City because

the open and obvious nature of the sidewalk's condition would cut off the City's liability for her injuries. See [In re Certified Questions](#), 416 Mich. at 573-577. Generally, the rule is against the retroactive application of a statute that takes away vested rights and “[a] new statute which abolishes an existing cause of action brings the statute with the general proscription of rule three.” [Id.](#) at 573-578. Thus, the third principle weighs in favor of prospective application of 2016 PA 419.

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

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

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

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

on February 15, 2016, when she tripped and fell on the sidewalk. Accordingly, as in *Moraccini*, the amendment to MCL 691.1402a applies prospectively and is not applicable in this case. The trial court did not err in denying defendant's motion for summary disposition on this basis.

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

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

All Citations

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

Footnotes

- 1 As we discuss later, effective January 4, 2017, MCL 691.1402a was amended to add subsection (5), which permits a municipality to assert any defense available under the common law with respect to a premises liability claim, including a defense that the condition was open and obvious. 2016 PA 419.
- 2 Plaintiff did not allege a dangerous condition in the sidewalk other than the vertical discontinuity, nor does she argue such on appeal. At the motion hearing, the City also argued that it was entitled to summary disposition on the basis that plaintiff did not trip and fall as a result of the vertical discontinuity, given her deposition testimony that she did not see what caused her to fall at the time of the accident and the EMS and medical records indicating that she slipped on ice, causing her to fall. However, plaintiff testified unequivocally that she tripped, and did not slip, the sidewalk was not snow covered or icy, and she did not recall telling the medical personnel who treated her that she slipped but believed she told them that she tripped. Further, although plaintiff testified that she did not know what caused her to trip at the time of the accident as she did not look, it could be reasonably inferred from the location of her accident, at a point where the sidewalk was clearly raised and uneven, that she fell as a result of tripping on the raised sidewalk. Minimally, the evidence presents a question of fact regarding the proximate cause of her injury.
- 3 Apparently, these are the photographs of the location of her trip and fall that plaintiff initially provided to the City.
- 4 As plaintiff pointed out on appeal, it is apparent that the series of photographs measuring the vertical discontinuity she originally submitted with her initial response to the City's motion for summary disposition depicts the opposite side of the sidewalk slab from where she tripped and fell. Thus, those photographs did not accurately reflect the vertical discontinuity

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

- 5 The measuring tape in the photograph presented by plaintiff appears to be measuring a point farther left from the “X” than the measurement of the ruler in the photograph the City relied on to support its motion for summary disposition, albeit both measurements appear to be in the same general area.
- 6 While the deposition testimony indicates that the photographs presented by the parties were taken months after plaintiff tripped and fell, Kozuh, the City’s DPS director and a civil engineer familiar with vertical discontinuities, testified that he believed the vertical discontinuity in the instant case was caused by tree roots, which would take years to develop. From this testimony, as well as the photographs of sidewalk where plaintiff purportedly tripped and fell, showing a large tree abutting the sidewalk with roots protruding, it is reasonable to infer that the discontinuity took a significant amount of time, i.e., years, to develop. Thus, although the photographs were taken months after she tripped and fell, they arguably accurately depicted the vertical discontinuity existing at the time of the accident.
- 7 In premises liability cases in the private sector, the open and obvious defense is well established. Under the doctrine, “a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises.... However, liability does not arise for open and obvious dangers unless special aspects of a condition make even an open and obvious risk unreasonably dangerous.” *Hoffner v. Lanctoe*, 492 Mich. 450, 455; 821 N.W.2d 88 (2012) (emphasis omitted). “The possessor of land ‘owes no duty to protect or warn’ of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid.” *Id.* at 460-461, quoting *Riddle v. McLouth Steel Prods. Corp.*, 440 Mich. 85, 96; 485 N.W.2d 676 (1992). “Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered [the condition] upon casual inspection.” *Hoffner*, 492 Mich. at 460-461. There is an exception where “the special aspects of an open and obvious hazard could give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable.” *Id.* at 463 (emphasis omitted).
- 8 “[S]uch dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable precautions to avoid[,]” and thus, the premises owner has no duty to protect or warn of the dangers. *Hoffner*, 492 Mich. at 460-461.

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.Nabil SUFI, as Personal Representative of the
Estate of Ali Sufi, Deceased, Plaintiff–Appellee,

v.

CITY OF DETROIT, Defendant–Appellant.

Docket No. 312053.

|

Feb. 17, 2015.

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

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

Opinion

PER CURIAM.

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

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

On August 14, 2012, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Defendant argued that it was immune from liability under the GTLA because plaintiff failed to rebut the presumption created by MCL 691.1402a(3) that the sidewalk was in reasonable repair.² Defendant further argued that plaintiff presented no evidence of a vertical defect in the sidewalk.

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

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

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

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

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

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

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

(3) The grounds listed in subrule (C)(4) and the ground of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401. [MCR 2.116(D)(3)].

The plain language of MCR 2.116(D)(3) provides that the trial court does not have discretion to deny motions based on governmental immunity merely because they are filed after the dispositive motion deadline in the scheduling order. To read the rule otherwise would render the second half of the rule, which explicitly permits filing after the cutoff date, nugatory. *Grzesick*, 237 Mich.App at 560. Staff comments to the rule reiterate this interpretation. See 2007 Staff Comment to MCR 2.116 (stating, “motions for summary disposition based on governmental immunity ... may be filed even if the time set for filing dispositive motions in a scheduling order has expired,” and distinguishing a governmental immunity defense from the holding of *Grove*, *supra*).

Reading the language of subrule (D)(3) as a limit on the trial court's discretion is not out of step with *Kemerko Clawson*, which interpreted MCR 2.116(B)(2) and MCR 2.401(B)(2)(a)(ii). *Kemerko Clawson*, 269 Mich.App at 349–351. MCR 2.116(D)(3) differs from subrule (B)(2) in that it explicitly states that the cutoff date in a “scheduling order entered pursuant to MCR 2.401[.]” does not prohibit the filing of summary disposition motions grounded on governmental immunity. With its focus on only governmental immunity and subject-matter jurisdiction, (D)(3) is also more specific

than the scheduling order language in MCR 2.401(B)(2)(a)(ii), and is therefore controlling. *Haliw*, 471 Mich. at 706. Moreover, governmental immunity is “not an affirmative defense but a characteristic of government...” *Mack v. Detroit*, 467 Mich. 186, 197 n 13; 649 NW2d 47 (2002). That characteristic does not cease to exist because a governmental defendant asserts it after the dispositive motion cutoff date. *Id.* Accordingly, the trial court abused its discretion in refusing to consider defendant's motion for summary disposition.³

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

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

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

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

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

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

(1) Except as otherwise provided in section 2a [MCL 691.1402a], each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1), as amended by 1999 PA 205.⁵]

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

*4 (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion

of the highway designed for vehicular travel, including a sidewalk, railway, 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, railway, 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, railway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair. [See 1999 PA 205.]

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

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

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

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

(4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court. [MCL 691.1402a(3), (4).]

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

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

it is prospective, not retroactive. See *Moraccini v. City of Sterling Heights*, 296 Mich.App 387, 389 n 1; 822 NW2d 799 (2012) (the amended version of the statute does not apply where the plaintiff's injury occurred before the effective date of the amendment). "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application ." *Johnson v. Pastoriza*, 491 Mich. 417, 429; 818 NW2d 279 (2012) (citation omitted). Here, 2012 PA 50 was given an effective date of March 13, 2012, with no mention of retroactive application. "[P]roviding a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only." *Johnson*, 491 Mich. at 432, quoting *Brewer v. AD Transp. Express, Inc.*, 486 Mich. 50, 56; 782 NW2d 475 (2010). Because Ali was injured before the effective date of the amendment, the current version of MCL 691.1402a does not apply and there is no presumption that the sidewalk was in reasonable repair.

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

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

Footnotes

- 1 Ali had passed away several months after he allegedly fell on the sidewalk.
- 2 MCL 691.1402a was amended by 2012 PA 50, effective March 13, 2012, to state that a governmental entity is "presumed to have maintained the sidewalk in reasonable repair." MCL 691.1402a(3). Whether a plaintiff has rebutted the presumption created by the amendment "is a question of law for the court." MCL 691.1402a(4).
- 3 Consideration of defendant's motion did not require oral argument. MCR 2.119(E)(3) grants the trial court discretion to dispense with oral argument on a contested motion. *Fast Air, Inc. v. Knight*, 235 Mich.App 541, 550; 599 NW2d 489 (1999). The trial court should have considered defendant's motion, but did not abuse its discretion on the narrow issue of declining to hold oral argument.
- 4 In its brief on appeal defendant relies in part on an outdated and overruled summary disposition (actually summary judgment under the 1963 court rules) standard, arguing that under MCR 2.116(C)(10) the trial court can only grant a motion if the claim or the defense cannot be supported at trial because of a deficiency which cannot be overcome, citing *Durant v. Stahlin*, 375 Mich. 628; 135 NW2d 392 (1965). Yet it has been almost 15 years since the Supreme Court (1) explicitly recognized that that standard was inapplicable under the Michigan Court Rules established in 1985, and (2)

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

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

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

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

- 5 Sidewalks were also included in the definition of “highway” as it appeared in the prior version of [MCL 691.1401\(e\)](#) at the time of Ali’s injury. See 2001 PA 131.
- 6 No factual development is necessary to consider defendant’s motion on the pleadings pursuant to [MCR 2.116\(C\)\(8\)](#), but reversal on this basis is not warranted. Plaintiff alleged that the sidewalk on which Ali fell was “defective, broken, uneven, and misleveled[,]” having a “vertical height differential of greater than two inches....” Thus, plaintiff alleged sufficient “facts warranting the application of an exception to governmental immunity.” *Codd v. Wayne Co*, 210 Mich.App 133, 134–135; 537 NW2d 453 (1995).

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