STATE OF MICHIGAN

IN THE SUPREME COURT

JENNIFER BUHL,

Plaintiff-Appellant,

v.

CITY OF OAK PARK,

Defendant-Appellee.

Supreme Court Case No. 160355

Court of Appeals No. 340359

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

DEFENDANT-APPELLEE CITY OF OAK PARK'S APPEAL BRIEF

***** ORAL ARGUMENT REQUESTED *****

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes / Court Rules / Other Authorities

COUNTER-STATEMENT OF JURISDICTION

Defendant-Appellee concedes that this Court has jurisdiction pursuant to Const 1963, art VI, § 4, MCR MCL 600.215(3), 7.303(B)(1).

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly determined that 2016 PA 419 retroactively applies to make the open and obvious doctrine available to municipalities as a defense to tort actions based on sidewalk accidents that occurred before its effective date, where both 2016 PA 419's plain language and its statutory history evince a clearly manifested legislative intent that it apply retroactively, and where that clearly manifested legislative intent for retroactive application is constitutional because 2016 PA 419 is rationally related to legitimate legislative purpose?

Plaintiff-Appellant says: "No."

Defendant-Appellee says: "Yes."

The Court of Appeals said: "Yes."

The Circuit Court said: "Yes."

INTRODUCTION

2016 PA 419 amended MCL 691.1402a of the Governmental Tort Liability Act ("GTLA"[1]) effective January 4, 2017. The amendment provides that "[*i*]*n a civil action, a municipal corporation that has a duty to maintain a sidewalk . . . may assert*, in addition to any other defense available to it, any defense 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*." (Defendant's App. 8b)(emphasis added). The issue before this Court is whether the Legislature intended for 2016 PA 419 to make the open and obvious defense available to municipalities with regard to sidewalk accidents that occurred before 2016 PA 419 took effect on January 4, 2017.

This Court's order granting Plaintiff-Appellant's application for leave to appeal directed the parties to address four questions. Those questions, and a brief summary of Defendant-Appellee City of Oak Park's responses thereto, are as follows:

1. **Whether the Court of Appeals erred in concluding that 2016 PA 419 applies retroactively?**

No. The plain language of 2016 PA 419 and its statutory (not legislative) history evince a clear legislative intent that 2016 PA 419 apply to make the open and obvious defense available to municipalities with regard to any lawsuits alleging sidewalk accidents that were already pending on, or were filed after, January 4, 2017. Moreover, the Legislature's clearly manifested intent that 2016 PA 419 be so applied is constitutional because there is no "vested" right to bring a tort claim against a

[1] MCL 691.1401 *et seq.*

municipality and, even if there was, 2016 PA 419 is rationally related to a legitimate legislative purpose.

2. **Whether 2016 PA 419 "attaches a new disability with respect to transactions or considerations already past"?**

It does not. 2016 PA 419 does not preclude lawsuits premised on sidewalk accidents that occurred before its effective date. Persons injured by alleged sidewalk defects before January 4, 2017, can still assert a tort claim against a municipal corporation by alleging and proving either that the defect was not open and obvious or that, if it was, the defect possessed special aspects rendering it unreasonably dangerous despite its open and obvious nature. Moreover, 2016 PA 419 does not change the fact that before its effective date citizens already had a pre-existing duty to notice and avoid open and obvious dangers presented by defects in sidewalks. So, prior to January 4, 2017, no Michigan citizen could have reasonably relied upon then-existing law to avoid noticing open and obvious defects in sidewalks. Further, even if 2016 PA 419 did attach some new disability with respect to transactions or considerations already past, such is irrelevant because the language of 2016 PA 419 and its statutory history evince a clear legislative intent that 2016 PA 419 apply with regard to sidewalk accidents that occurred before January 4, 2016, and that legislative intent is constitutional.

3. **Whether the Court of Appeals erred in creating and applying a "*Brewer* restoration rule" in determining that 2016 PA 419 applies retroactively?**

It did not. This Court in *Brewer* merely stated the long-standing rule that, in the absence of a clearly manifested legislative intent contained in an amendment's language or its statutory history that the amendment apply retroactively, retroactive legislative

intent may be inferred where the amendment is remedial and does not affect vested (i.e., constitutionally protected) rights. Here, 2016 PA 419 is remedial in nature, and does not affect any vested rights. Thus, it may properly be inferred that the Legislature intended for 2016 PA 419 to apply retroactively. This consideration is, realistically, irrelevant because the language of 2016 PA 419 and its statutory history already reveal a clearly manifested intent for retroactive application, but this inference only confirms that intent.

4. **Whether it makes a difference that 2016 PA 419 was enacted before Plaintiff filed her Complaint?**

It does, and it does not. It does not because the clearly manifested legislative intent is that the open and obvious defense be available to municipalities not only with regard to lawsuits filed after January 4, 2017, but also with regard to lawsuits that were already pending on January 4, 2017. It does in that, since Plaintiff filed her complaint after January 4, 2017, she could have initially pled in avoidance of governmental immunity by alleging either that the sidewalk defect was not open and obvious or that, if it was, the defect possessed special aspects that rendered it unreasonably dangerous despite its open and obvious nature. But, even if Plaintiff had already filed her complaint before January 4, 2017, she of course could have moved pursuant to MCR 2.118(A)(2) to amend her complaint in response to 2016 PA 419.

COUNTER-STATEMENT OF FACTS

Plaintiff-Appellant Jennifer Buhl ("Plaintiff") claims to have suffered injuries when she tripped over a defect in a sidewalk while walking to a party store on May 4, 2016. (Plaintiff's App. 3a, 53a-56a). Photographs of the area where Plaintiff claims to have fallen demonstrate that a roughly 2' x 2' section of the sidewalk had been left

unpaved to create a garden bed to plant a tree. It appears that over time the growth of the trees' roots had caused one of the sidewalk sections next to the tree to heave up, creating a large crack in that section and a vertical discontinuity between that section of sidewalk and the section next to it. (*Id.* at 16a, 65a-70a; 121a). Plaintiff admitted that she was familiar with the sidewalk before May 4, 2016, and that she had previously seen the "big crack in the sidewalk." (*Id.* at 53a-54a). She also admittedly noticed the crack on May 4, 2016, before attempting to traverse this section of sidewalk, stating "obviously, I could see the crack in the sidewalk." (*Id.* at 54a-55a). Although she denied having noticed the vertical discontinuity, Plaintiff admitted that she would have seen it if she had looked down at the sidewalk. But, she stated that she did not look down because she was "just kind of paying attention to the store" that she was walking toward. (*Id.* at 55a-56a).

It is undisputed that this sidewalk is adjacent to a portion of Nine Mile Road located within the jurisdictional limits of Defendant-Appellee City of Oak Park ("the City"). Thus, the City acknowledges that MCL 691.1402a generally obligates the City to "maintain the sidewalk in reasonable repair". At the time of Plaintiff's May 6, 2016, incident, 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. . . . [Defendant's App. 6b.[2]]

After Plaintiff's incident the Legislature amended MCL 691.1402a by enacting 2016 PA 419, which became effective January 4, 2017. This amendment added the current subsection (5) to MCL 691.1402a, which provides:

> (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. [Defendant's App. 8b.]

The Legislature's enactment of 2016 PA 419 statutorily abrogated this Court's holding in *Jones v Enertel*, 467 Mich 266; 650 NW2d 334 (2002). This Court had held in *Jones* that the open and obvious doctrine is not available to municipal corporations as a defense to claims asserting that they failed to maintain sidewalks in reasonable repair. This Court reached its decision despite the fact that since its inception on July 1, 1965, the GTLA has provided in MCL 691.1412 that "[c]laims under th[e GTLA] are subject to

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[2] When the Legislature enacted 1999 PA 205 to codify the two-inch rule, MCL 691.1402a(1) only referred to sidewalks adjacent to "a county highway." (Defendant's App. 3b); *Robinson v Lansing*, 486 Mich 1, 3; 782 NW2d 171 (2010). The Legislature enacted 2012 PA 50 in order to make the two-inch rule available to municipalities with regard to "a sidewalk adjacent to a municipal, county, or state highway . . . ."

all defenses available to claims sounding in tort brought against private persons." *Id.* at 270-271.

On January 31, 2017, which was nearly one month after 2016 PA 419 became effective, Plaintiff filed a negligence lawsuit against the City, alleging that MCL 691.1402a applied to remove the cloak of immunity provided to the City by MCL 691.1407(1). (Plaintiff's App. 3a).

The City answered Plaintiff's complaint by denying that it had failed to maintain the sidewalk in reasonable repair. Moreover, the City asserted that the Legislature's enactment of 2016 PA 419 entitled the City to assert the open and obvious defense, and that the open and obvious nature of the vertical discontinuity relieved the City of any duty to repair it.[3] (Plaintiff's App. 18a-19a, 22a, 34a-35a).

The City then moved for summary disposition, arguing that Plaintiff's deposition testimony and other evidence establish that the defect in the sidewalk was open and obvious. (Plaintiff's App. 26a-44a; Defendant's App. 11b-15b). Plaintiff responded by denying that the defect was open and obvious, and also by asserting that 2016 PA 419 "does not have retroactive effect" and thus does not make the open and obvious defense available to the City. (*Id.* at 89a, 92a-105a).

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[3] See *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d (2012), quoting *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)("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.").

The Circuit Court concluded that 2016 PA 419 was intended by the Legislature to make the open and obvious defense available to municipal corporations such as the City with regard to incidents occurring before 2016 PA 419 became effective on January 4, 2017. (Plaintiff's App. 152a-160a). The Circuit Court further concluded that the defect in the sidewalk was open and obvious, and possessed no special aspects to render the open and obvious defense inapplicable. The Circuit Court therefore summarily dismissed Plaintiff's complaint. (*Id.* at 161a-170a; 172a-173a).

Plaintiff then appealed to the Court of Appeals. In a published decision, Judges Tukel and O'Brien affirmed the Circuit Court's grant of summary disposition to the City. In doing so, the Court of Appeals majority held that because 2016 PA 419 was intended by the Legislature to repudiate this Court's decision in *Jones* and return the state of the law to its pre-*Jones* existence, 2016 PA 419 applies "retroactively" "because no vested right of plaintiff was impaired by the Legislature's actions and because the Legislature's actions were remedial in nature." *Buhl v City of Oak Park*, 329 Mich App 486, 490, 519; 942 NW2d 667 (2019). The Court of Appeals also affirmed the Circuit Court's ruling that the defect in the sidewalk was open and obvious. *Id.* at 522.

Judge Letica dissented, stating her belief that the language of 2016 PA 419 indicates that the Legislature intended for it to apply prospectively only. *Id.* at 524-525 (Letica, J., dissenting). She further opined that Plaintiff's accrued cause of action is a vested right, *id.* at 525-531, and that interpreting 2016 PA 419 as having retroactive effect would result in Plaintiff being denied that right because her lawsuit would be "doomed to dismissal." *Id.* at 530.

Plaintiff then applied to this Court for leave to appeal only as to the issue of whether 2016 PA 419 applies retroactively. This Court granted Plaintiff's application.

STANDARD OF REVIEW

Whether the Legislature intended for 2016 PA 419 to apply retroactively is an issue of statutory interpretation, which this Court reviews de novo. *Brewer v AD Transp Exp*, 486 Mich 50, 53; 782 NW2d 475 (2010); *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). Whether 2016 PA 419, if retroactive, is constitutional is also a question of law that this Court reviews de novo. *Phillips v Mirac, Inc,* 470 Mich 415, 422; 685 NW2d 174 (2004). A trial court's decision to grant or deny a motion for summary disposition is similarly reviewed de novo by this Court. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

A retroactive statutory amendment is "one which takes away or impairs vested rights, creates a new liability, imposes a new duty or attaches a new disability in respect to transactions already past." *Hansen-Snyder Co v Gen Motors Corp*, 371 Mich 480, 484 (1963); *Landgraf v USI Film Products*, 511 US 244, 269; 114 S Ct 1483 (1994). That an amendment falls into one or more of these classes may render the amendment unjust or unfair. *Scott v Smart's Executors,* 1 Mich 295, 302 (1849); *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014). But, "there are many laws of a retrospective character which may yet be constitutionally passed by the state legislatures, however unjust, oppressive or impolitic they may be." *Scott, supra,* 1 Mich at 302; *Landgraf, supra,* 511 US at 267. Thus, it is only those retroactive amendments of

the first class – those impairing or taking away vested, constitutionally protected rights - that are impermissible, as "the Legislature has the power under our Constitution to abolish or modify *nonvested*, common-law [and statutory] rights and remedies." *Phillips, supra,* 470 Mich at 430 (emphasis added); *Landgraf, supra,* 511 US at 267; *Scott,* 1 Mich at 303; *Lahti v Fosterling*, 357 Mich 578, 594; 99 NW2d 490 (1959), *Romein v Gen Motors Corp*, 436 Mich 515, 526, 531; 462 NW2d 555 (1990), aff'd *Gen Motors Corp v Romein*, 503 US 181; 112 S Ct 1105 (1992). Thus, the query of whether a statutory amendment applies retroactively necessarily involves a two-pronged inquiry: (1) whether the Legislature intended for the amendment to apply retroactively, and (2) if so, whether the Legislature possessed the constitutional authority to enact that retroactive intention into law.

I. The Legislature clearly manifested an intention that 2016 PA 419 apply retroactively

As with any exercise of statutory interpretation, the first inquiry necessarily begins by examining the amendment's language to see if it clearly evinces a legislative intent that the amendment apply retroactively. *LaFontaine, supra,* 496 Mich at 38; *In re Certified Questions from US Court of Appeals for the Sixth Circuit,* 416 Mich 558, 570; 331 NW2d 456 (1982). Moreover, "courts must look to the facts and circumstances surrounding the adoption of the amendment to determine whether or not the legislature intended it to be retroactive." *Lahti, supra,* 357 Mich at 589; *Hurd v Ford Motor Co*, 423 Mich 531, 535; 377 NW2d 300 (1985). This factual and circumstantial context is formed by the statutory (as opposed to legislative) history, which includes the pre-amendment version of the statute, any prior amendments to the statute, and the language used by the

Legislature in similar statutes. *Ray v Swager*, 501 Mich 52, 80-81; 903 NW2d 336 (2017); *People v Pinkney*, 501 Mich 259, 276 n 41; 912 NW2d 535 (2018); *Johnson v Pastoriza*, 491 Mich 417, 430-431; 818 NW2d 279 (2012). It also includes any pre-amendment judicial interpretations of the statute because "'it is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation.'" *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006), quoting *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994).

If the amendment's language and its statutory history reveal a clearly manifested legislative intent for the amendment to apply retroactively, a court may not employ the oft-stated dice-loading rule that "'statutes are presumed to operate prospectively . . . .'" *Lynch, supra*, 463 Mich at 583, quoting *Franks v White Pine Copper Division*, 422 Mich 636, 670; 375 NW2d 715 (1985). This is because when the Legislature "has expressly described the statute's proper reach" there is "of course no need to resort to judicial default rules." *Landgraf, supra,* 511 US at 280; see also *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016), quoting *Koontz v Ameritech Svcs, Inc,* 466 Mich 304, 319; 645 NW2d 34 (2002)("If a statute is unambiguous, a court should not apply 'preferential or 'dice-loading'' rules of statutory interpretation.").

1. The language of 2016 PA 419 clearly manifests a legislative intent that 2016 PA 419 apply retroactively

The Legislature stated in 2016 PA 419 that "[*i*]*n a civil action*, a municipal corporation . . . may assert . . . a defense that the condition was open and obvious." By prefacing the availability of the open and obvious defense to a municipality with the

phrase "in a civil action," the Legislature unambiguously manifested its intention that the municipality's ability to raise the defense does not depend on when the plaintiff's cause of action accrued. Rather, the Legislature intended the open and obvious defense to be available to a municipality in *any* civil action involving an alleged sidewalk defect. "'A' is an indefinite article, which is often used to mean 'any.'" *South Dearborn Enviro Improvement Ass'n, Inc, v Dep't of Enviro Quality*, 502 Mich 349, 368; 917 NW2d 603 (2018), quoting *Merriam-Webster's Collegiate Dictionary* (11th ed).[4] And "'[a]ny' means 'every,' 'each one of all.'" *Harrington v Interstate Bus Men's Ass'n of Des Moines,* 201 Mich 327, 330; 178 NW 19 (1920), quoting *Hopkins v Sanders*, 172 Mich 227, 237; 137 NW 709 (1912).[5] Thus, by its plain terms, the Legislature intended for 2016 PA 419 to have full retroactive effect, making the open and obvious defense available to municipalities as to civil actions that would be filed after the amendment took effect on January 4, 2017 - such as in the present case - as well as to civil actions that were already pending on January 4, 2017.[6]

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[4] See also *Robinson, supra*, 486 Mich at 26 n 6 (Young, J., concurring); *Allstate Ins Co v Freeman*, 432 Mich 656, 699; 443 NW2d 734 (1989)(opinion by Riley, C.J.); *Husted v Dobbs*, 459 Mich 500, 521; 591 NW2d 642 (1999)(Kelly, J., dissenting).

[5] See also *South Dearborn, supra,* 502 Mich at 368 n 17, quoting *Merriam-Webster's Collegiate Dictionary* (11th ed.) ("'[a]ny' means 'one, some, or all indiscriminately of whatever quantity[.]'"); *Nat'l Pride At Work, Inc v Gov of Mich,* 481 Mich 56, 77; 748 NW2d 524 (2008), quoting *Random House Webster's College Dictionary* (1991) ("'[a]ny' means 'every; all.").

[6] Because it is not at issue here, this writer will not address whether the Legislature intended for 2016 PA 419 to have "full" retroactive effect, thus enabling a municipality

The situation here is akin to that considered by this Court in *Frank's, supra,* 422 Mich 636. Therein, the Legislature amended the Workers' Disability Compensation Act[7] ["WDCA"] by enacting MCL 418.354. This statute enabled an employer to set off from WDCA benefits other specified benefits received by a disabled employee, such as social security benefits. *Id.* at 644. The Legislature stated in MCL 418.354 that "[t]his section is applicable when . . . payments are made to an employee . . . with respect to the same time period for which [other specified benefits from other sources] are also received or being received by the employee." *Id.* at 650-651. The issue presented to this Court was whether the Legislature intended for employers to be able to apply the set off when paying WDCA benefits to workers whose injuries occurred before MCL 418.354 became effective. This Court held that the plain language of MCL 418.354 clearly manifested that the Legislature so intended, stating:

> [T]his statute clearly and unambiguously requires coordination of workers' compensation and other specified benefits for all compensable periods subsequent to its effective date, regardless of when the injury occurred. The statute does not limit its application to cases where workers' compensation payments are made to an employee *for injuries incurred after its effective date, or for injuries incurred after March 31, 1982*. Nor does it contain any language indicating that it should not be applied when payments are being made *for injuries that occurred prior to March 31, 1982*. The Legislature's failure to do so leaves the section generally applicable to payments made after its effective date. In the absence of express language of limitation, "[t]his court cannot write into the statutes provisions that the legislature has not seen fit to enact." *Paselli v Utley,*

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against whom a judgment has already been obtained to file a new civil action pursuant to MCR 2.612(C)(3) seeking relief from that judgment.

[7] MCL 418.101 *et seq.*

> 286 Mich 638, 643; 282 NW 849 (1938). [*Franks, supra,* 422 Mich at 651 (emphasis in original).]

The same is, or course, true with respect to 2016 PA 419. Had the Legislature intended for the open and obvious defense to be available to municipalities *only* with regard to lawsuits premised upon injuries that occurred after 2016 PA 419 became effective on January 4, 2017, the Legislature would have said so. Nor does 2016 PA 419 contain any language indicating that the open and obvious defense should *not* be available to municipalities defending against lawsuits premised upon injuries that occurred before January 4, 2017. Rather, the Legislature broadly stated that the open and obvious defense is available to a municipality in "a [i.e., any] civil action." *Frank's, supra,* 422 Mich at 651.

As this Court went on to explain in *Frank's*, MCL 418.354 was not truly "retroactive" merely because it applied with regard to injuries that occurred before it's effective date:

> We also disagree with the board's assumption that application of the coordination of benefits provision of § 354 to workers' compensation payments for compensable periods after the effective date of the statute would constitute retrospective application simply because the liability is based upon an injury that occurred prior thereto. *Hughes v Judges' Retirement Bd*, 407 Mich 75, 86; 282 NW2d 160 (1979). As the board accurately observed at the outset of its opinion, "it is not contended that compensation benefits should be retroactively coordinated or reduced. Rather it is argued that the benefits of *all* disabled workers should be *prospectively* coordinated after the effective date of the enactment *regardless of when they were injured*."
>
> While § 354 may in some cases involve an antecedent event, such as an injury incurred prior to its effective date, by its clear language it operates only with regard to payments received and attributable to periods after its effective date. "Our [obligation] is to give effect to the plain meaning of the language used." *Selk [v Detroit Plastics Prods*, 419 Mich 1, 9; 345

> NW2d 184 (1984)]. [*Frank's, supra,* 422 Mich at 652-653 (emphasis in original).]
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> * * *
>
> As this Court indicated in *Hughes, supra*, 407 Mich [at] 86, "A statute is not regarded as operating retrospectively because it relates to an antecedent event. Merely because some of the requisites for its application are drawn from a time antedating its passage[, a law is not] retrospective." See also *Selk, supra*[419 Mich at 9.] [*Frank's, supra,* 422 Mich at 669.]

The same is true with respect to 2016 PA 419. Merely because a requisite for its application is drawn from a time antedating its effective date (i.e., the accident upon which the civil action is premised) does not make 2016 PA 419 retroactive. Rather, it operates prospectively with regard to "a civil action" filed on or after January 4, 2017, as well as with regard to "a civil action" that was already pending on January 4, 2017.

2. The retroactive legislative intent clearly manifested in the language of 2016 PA 419 is confirmed by the statutory history of 2016 PA 419

There is nothing about the context of 2016 PA 419, the rest of MCL 691.1402a, or the GTLA as a whole to indicate that the Legislature intended the phrase "in a civil action" to be restricted to only civil actions premised upon sidewalk accidents occurring after January 4, 2017. Quite the contrary, other provisions of the GTLA and the GTLA's statutory history unequivocally establish that the Legislature did not. Cf. *Johnson, supra,* 491 Mich at 430-431.

i. Other provisions of the GTLA

From the outset the Legislature showed that it knows how to make provisions of the GTLA operate only prospectively when it wants to. Upon enacting the GTLA in 1965 the Legislature stated in MCL 691.1406 that "[n]o action shall be brought [under

the public buildings exception] against any governmental agency, other than a municipal corporation[8], *except for injury or loss suffered after July 1, 1965*." (Emphasis added). Similarly the Legislature stated in MCL 691.1413 that "[n]o action shall be brought against [a] governmental agency for injury or property damage arising out of the operation of [a] proprietary function, *except for injury or loss suffered on or after July 1, 1965*." (Emphasis added). These provisions undoubtedly make clear that the Legislature knows how to make a provision of the GTLA applicable only to injuries suffered after the effective date of that provision when the Legislature wants to.

Moreover, the Legislature stated in MCL 691.1408(2) that "[w]hen a criminal action is commenced against an officer or employee of a governmental agency . . . the governmental agency may pay for, engage, or furnish the services of an attorney to . . . represent the officer or employee in the action." This sentence grants governmental agencies the discretion to directly retain and pay an attorney to represent an officer or employee in a criminal action. However, in the next sentence, the Legislature stated that "[a]n officer or employee who has incurred legal expenses *after December 31, 1975* . . . may obtain reimbursement for those expenses under this subsection." This sentence makes reimbursement for an attorney retained and paid by a governmental officer or employee, as opposed to an attorney retained and paid directly by a governmental

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[8] This, of course, was done because this Court had stripped municipalities of their immunity before the GTLA restored such immunity, meaning that municipalities had a common-law duty with regard to public buildings before the GTLA became effective. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 603-605; 363 NW2d 641 (1984)

agency, prospective only; i.e., obtainable only when an officer or employee "has incurred legal expenses *after December 31, 1975*". This, again, shows that the Legislature knows how to make a provision of the GTLA operate only prospectively when it wants to.

ii. Previous amendments to the GTLA

Before the Legislature's enactment of 1999 PA 205, which became effective on December 21, 1999, the obligation of municipalities to maintain sidewalks was governed solely by MCL 691.1402. In 1999 PA 205, the Legislature not only amended MCL 691.1402, but simultaneously created MCL 691.1402a to limit municipal liability for sidewalks installed adjacent to county highways by codifying the two-inch rule, which had been abolished at common-law. *Robinson, supra,* 486 Mich at 17-20. When it did so, the Legislature stated in Enacting Section 1 of 1999 PA 205 that "MCL 691.1401 and 691.1402, as amended by this act, and *section 2a, as added by this amendatory act, apply only to a cause of action arising on or after the effective date of this amendatory act*." (Defendant's App. 3b).

It cannot be ignored that the Legislature did not include similar language limiting the phrase "a civil action" when it enacted 2016 PA 419, given that the Legislature had specifically made MCL 691.1402a prospective only when it created MCL 691.1402a via 1999 PA 205. Had the Legislature intended for its amendment to MCL 691.1402a via 2016 PA 419 to have only prospective application, the Legislature would have said so as it did when it created MCL 691.1402a via 1999 PA 205. *Johnson, supra,* at 431-432. This establishes that, in this instance, the Legislature intended for "a" to mean "any," and not less than "any."

Similarly, as this Court explained in *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 245-246; 393 NW2d 847 (1986), the Legislature enacted 1986 PA 175 in response to this Court's decision in *Ross*, *supra*, 420 Mich 567. When it did so, the Legislature specifically stated in Enacting Section 3(1) that "[MCL 691.1401, MCL 691.1407, and MCL 691.1413], as amended by this amendatory act, . . . *shall not apply to causes of action which arise before July 1, 1986*." (Defendant's App. 34b). The Legislature simultaneously stated in Enacting Section 3(2) that "[MCL 691.140]6a . . . , as added by this amendatory act, *shall apply to cases filed on or after July 1, 1986*." (*Id*.) This, again, evinces that the Legislature knows how to make its amendments to the GTLA inapplicable to causes of action accruing before amendment's effective date, and similarly knows how to make its amendments to the GTLA applicable only to civil actions filed on or after a certain date. And, again, the fact that the Legislature manifested no such prospective intent when it enacted 2016 PA 419 clearly shows that the Legislature intended for the phrase "a civil action" to mean "any civil action," and did not intend for 2016 PA 419 to be restricted only to civil actions involving sidewalk accidents occurring after January 4, 2017.

And finally, though it does not concern a prior amendment to the GTLA itself, it should not be ignored that as part of its recent overhaul of the no-fault act[9] via 2019 PA 21 and 2019 PA 22, the Legislature amended MCL 500.3112 in response to this Court's holding in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895

[9] MCL 500.3101 *et seq*.

NW2d 490 (2017). This Court held in *Covenant* that neither the version of MCL 500.3112 in effect at that time nor any other provision of the no-fault act bestowed upon healthcare providers a statutory right to directly sue no-fault insurers. *Id.* at 195-196. In 2019 PA 21, the Legislature effectively abrogated *Covenant* by adding language to MCL 500.3112 stating that "[a] health care provider . . . may make a claim and assert a direct cause of action against an insurer". But, just as it did when it enacted 1999 PA 205 to create MCL 169.1402a, the Legislature stated in Enacting Section 1 that "Section 3112 . . . *as amended by this amendatory act*, applies to products, services, or accommodations *provided after the effective date of this amendatory act*." (Defendant's Appx. 32b). This, again, makes clear that the Legislature intends that *in the absence of other limiting language in the statute or an enacting section, or some statutory history evincing a prospective intention*, phrases such as "a civil action," "a claim," and "a direct cause of action" will be taken to mean *any* civil action, claim, or cause of action pending on or filed after the amendment's effective date - regardless of whether the events upon which the civil action, claim, or cause of action are premised occurred before the amendment's effective date.

iii. The Legislature's abrogation of this Court's decision in *Jones*

As this Court is aware, since the inception of the GTLA on July 1, 1965, MCL 691.1412 has provided: "Claims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons." In *Jones,* however, this Court held that MCL 691.1412 does make the open and obvious defense available to municipalities with regard to sidewalk claims. *Jones, supra,* 467 Mich at 267. This

Court stated three bases for its holding in this regard: First, this Court opined that MCL 691.1402(1) imposes a statutory duty on municipalities to maintain sidewalks in reasonable repair, which this Court viewed as being "a greater duty than the duty a premises possessor owes to invitees under common-law premises liability principles." *Id.* at 268-269.[10] Second, this Court opined that MCL 691.1403 reinforced its conclusion, reasoning that MCL 691.1403 "contemplates that a city may, in appropriate circumstances, be held liable for defects in a highway that are [open and obvious.]" *Id.* at 270.[11] And, finally, this Court opined that MCL 691.1412 "would have to yield to the

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[10] This writer respectfully disagrees with this Court's rationale. First, if the Legislature can impose a duty on a municipality in MCL 691.1402(1), then obviously the Legislature can state in MCL 691.1412 that such duty does not pertain if the defect in the sidewalk is open and obvious. That is, MCL 691.1402(1) and MCL 691.1412, operate *in pari materia* in the same manner that the duty of a premises possessor and the open and obvious doctrine operate together at common-law, with the open and obvious doctrine operating not as "some type of exception to the duty generally owed [], but rather as an integral part of the definition of that duty." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Second, the duty owed by a municipality with regard to sidewalks is not "greater" than the duty owed by a premises possessor at common-law. The duty of a municipality under MCL 691.1402(1) and the duty of a premises possessor at common-law are both to use "reasonable care" to make the premises over which they have possession and control "safe for the invitee's reception." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000)(internal quotations and bracketing omitted). The only difference is that, at common-law, a premises possessor can, in some circumstances, fulfill this duty by warning the invitee of the hazard in lieu of repairing it, whereas a municipality can only fulfill the duty through "reasonable repair."

[11] Again, this writer respectfully disagrees with this Court's rationale. First, just because MCL 691.1403 provides that a municipality is presumed to have knowledge of a defect if the defect was open and obvious for more than 30 days does not equate to legislative intent that the municipality necessarily be liable if it was. For one, MCL 691.1403's presumption *does not* evince that the Legislature intended that the open and

more specific statutory duty to maintain highways in reasonable repair under MCL 691.1402(1)." *Id.* at 270.[12]

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obvious doctrine would be unavailable to municipalities if the defect was open and obvious for *less than* 30 days. Similarly, even if the danger was open and obvious for more than 30 days, the fact that the municipality presumptively had knowledge of the open and obvious danger pursuant to MCL 691.1403 would *still not* subject the municipality to liability unless the danger possessed "special aspects" that created an unreasonable risk of harm. *Lugo, supra,* 464 Mich at 517; *Hoffner, supra,* 492 Mich at 461. *At best,* MCL 691.1403 merely makes it ambiguous as to whether the Legislature intended for MCL 691.1412 to make the open and obvious defense available to municipalities in actions alleging injuries arising out of an alleged defect in a sidewalk, and that ambiguity would have to be resolved in favor of the open and obvious doctrine being available because of the "basic principle of our state's jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed." *Stanton v Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002).

[12] Again, respectfully, this writer disagrees with this Court's rationale. The general/specific cannon of statutory interpretation only applies where the two statutory provisions irreconcilably conflict. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 183. As explained previously, MCL 691.1402(1) and MCL 691.1412, do not irreconcilably conflict, because they operate *in pari materia* in the same manner that the duty of a premises possessor and the open and obvious doctrine operate together at common-law, with the open and obvious doctrine operating not as "some type of exception to the duty generally owed [], but rather as an integral part of the definition of that duty." *Lugo, supra,* 464 Mich at 516 (2001). See *Robinson, supra,* 486 Mich at 8 n 4 (noting that provisions of the GTLA are *in pari materia* and "are to be taken together in ascertaining the intention of the legislature.")(internal quotations omitted). Moreover, this Court's decision in *Jones* impermissibly rendered nugatory MCL 691.1412, as MCL 691.1412 can *only* have meaning if it is read *in pari materia* with MCL 691.1402(1), MCL 691.1402a, and the other provisions of the GTLA that set forth the duties comprising the limited exceptions to governmental immunity contained therein, such as the public buildings exception contained in MCL 691.1406. Indeed, based on this Court's decision in *Jones*, the Court of Appeals has held that "the open and obvious doctrine does not apply to claims brought

2016 PA 419 was, quite obviously, an attempt by the Legislature to clarify that MCL 691.1412 was always intended to be read *in pari materia* with MCL 691.1402(1) and MCL 691.1402a(1), and thus always intended to make the open and obvious defense available to municipalities against actions concerning defects in sidewalks. Indeed, the language of 2016 PA 419 is materially indistinguishable from the language of MCL 691.1412. The only differences are non-substantive, in that the language of 2016 PA 419 clarifies that "all of the defenses available to claims sounding in tort brought against private persons," as stated in MCL 691.1412, encompasses (as its language makes clear) "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," 2016 PA 419. The Legislature's addition of this language was obviously in response to the three bases proffered by this Court for its holding in *Jones*. Thus, 2016 PA 419 was clearly intended to abrogate *Jones* and clarify that the open and obvious doctrine was always intended to be available to municipalities via MCL 691.1412.[13]

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under the public building exception to governmental immunity." *Pierce v City of Lansing*, 265 Mich App 174, 184; 694 NW2d 65 (2005). Thus, *Jones* has impermissibly "interpreted" MCL 691.1412 right out of the GTLA. See *Robinson*, *supra*, 486 Mich at 21 ("it is well established that in interpreting a statute, we must avoid a construction that would render part of the statute surplusage or nugatory.")(internal quotations and brackets omitted). See also n 28 *infra*.

[13] In her dissent, Judge Letica argued that the Legislature's enactment of 2016 PA 419 cannot be interpreted as the Legislature clarifying that MCL 691.1412 has always made the open and obvious defense available to municipalities because 2016 PA 419 was not enacted "soon after" this Court's decision in *Jones*. *Buhl*, *supra*, 329 Mich App at 534 (Letica, J., dissenting). With all due respect to Judge Letica, her argument is

That this is so is not only made clear by reference to the language of 2016 PA 419 and the language of MCL 691.1412. Rather, it is made clear by the fact that this Court's decision in *Jones* was directly contrary to the legislative intent that has been clearly evinced in the language of the GTLA as a whole ever since the GTLA's inception. As this Court explained in *Costa v Comm'ty Emergency Med Svcs, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006):

> [W]e have repeatedly observed that governmental immunity legislation "evidences a clear legislative judgment that public and private tortfeasers should be treated differently." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000)(citation omitted). We have also observed that a "central purpose" of governmental immunity is to "prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.'" *Mack v Detroit*, 467 Mich 186, 203 n 18; 649 NW2d 47 (2002).[14]

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essentially one of legislative acquiescence, which "has been repeatedly repudiated by this Court because it is as an exceptionally poor indicator of legislative intent." *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012). Moreover, the language used by the Legislature in 2016 PA 419 removes any doubt that the Legislature was intending to clarify that MCL 691.1412 has always made the open and obvious defense available to municipalities, and that *Jones* was incorrectly decided. *Id.* at 749-750 ("sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence."). Morover, Judge Letica's argument discounts that the Legislature's delay in enacting 2016 PA 419 to correct this Court's mistake may very well be because the Legislature naturally assumed that this Court would correct its own mistake, given that during the time that *Jones* was decided this Court had several times indicated that it was duty-bound to do so. See, e.g., *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 216-217; 731 NW2d 41 (2007); *Robinson v City of Detroit*, 462 Mich 439, 467-468; 613 NW2d 307 (2000).

[14] See also *Rowland, supra*, 477 Mich at 223 n 18; See also *Ridgeway v City of Escanaba,* 154 Mich 68, 72-73; 117 NW 550 (1908)("We must say that the Legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims

This "clear legislative judgment" in the different treatment between public and private tortfeasers has never been that governmental agencies be "treated differently" by being *more* susceptible to liability than private tortfeasers through being denied defenses that are available to private tortfeasers. Rather, it has always been that governmental agencies be *less* susceptible to liability by having "all defenses available to claims sounding in tort brought against private persons" *in addition to* the other defenses and limitations set forth in the GTLA in order to fulfill a "central purpose" of the GTLA; i.e., preserving taxpayer funds.[15]

. . . . It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments."); accord *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143; 615 NW2d 702 (2000)(internal quotations omitted):

> Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. . . . Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity cannot often reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. . . . [*Id.* at 157.]

[15] As this Court aptly noted in *Forest, supra*, 402 Mich 348, 360; 262 NW2d 653 (1978):

> [T]he [GTLA] is essential to the organization of the finances of state and local government agencies in that it allows them to estimate with some degree of certainty the extent of their future financial obligations. It cannot be overlooked that no private party has a potential tort responsibility comparable to that of the government for injuries allegedly caused by defective or unsafe conditions of highways [and sidewalks].

This Court has recognized that a statutory amendment may, as 2016 PA 419 does, clearly manifest the Legislature's "desire to clarify the correct interpretation of the original statute," thus evincing what the Legislature has always intended the law to be. *Ray*, *supra*, 501 Mich at 80, quoting *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009); *Detroit v Walker*, 445 Mich 682, 697; 520 NW2d 135 (1994); *Detroit Edison Co v Dep't of Revenue,* 320 Mich 506, 520; 31 NW2d 809 (1948), quoting 1 Sutherland Statutory Construction, p 418; *Workman v DAIIE*, 404 Mich 477, 521; 274 NW2d 373 (1979)(Levin, J., concurring/dissenting); see also *Ettinger v City of Lansing*, 215 Mich App 451, 455; 546 NW2d 652 (1996); *Wortelboer v Benzie Co*, 212 Mich App 208, 217; 537 NW2d 603 (1995).

And when, as here, "the amendment indicates a legislative intent to clarify, rather than substantively alter, the existing statutory provision," it similarly manifests a clear legislative intention that the amendment have retroactive effect, since the Legislature has said what it wanted to be the law all along. *People v Sheeks*, 244 Mich App 584, 591-592; 625 NW2d 798 (2001); *Id.* at 593-594 (Zahra, J., concurring); *Workman*, *supra*, 404 Mich at 521; *Mtg Electronic Reg Systems, Inc v Pickerell*, 271 Mich App 119, 126; 721 NW2d 276 (2006); 2 Singer, Sutherland Statutory Construction (7th ed), § 41:22 ("Where an amendment merely clarifies rather than changes the meaning of the law, it may be applied retroactively because the true meaning of the statute has always been the same."); *Id.* at § 41.11 ("Under the 'curative' exception to the general rule against retroactive application of statutes, an amendment to a statute can be given retroactive effect if it is designed merely to carry out or explain the intent of the original legislation.").

Stated another way, when this occurs the statutory amendment is considered "remedial" because it was "'designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good'", *Rookledge v Garwood*, 340 Mich 444, 453; 65 NW2d 785 (1954), quoting *In re School District No. 6, Paris & Wyoming Twps*, 284 Mich 132; 278 NW 792 (1938); *Western Michigan Univ Bd of Control v State*, 455 Mich 531, 545; 565 NW2d 828 (1997), or "'abridge superfluities of former laws, [thus] remedying defects therein, or mischiefs thereof implying an intention to reform or extend existing rights.'" *Id.*, quoting 50 Am Jur, § 15, pp 33-34; see also *Macomb Co Prof Deputies Ass'n v Macomb Co*, 182 Mich App 724, 730; 452 NW2d 902 (1990)("A statute or amendment is remedial or procedural if it is designed to correct an existing oversight in the law or redress an existing grievance.").[16] As Justice (then Judge) Zahra explained in his concurrence in *Sheeks*:

> Amendments may apply retroactively where the Legislature enacts an amendment to clarify an existing statute and resolve a controversy regarding its meaning. . . . Moreover, the general rule of prospectivity does not apply to statutes or amendments that are remedial or procedural. . . . A statute is remedial or procedural if it is designed to correct an existing oversight in the law, to redress an existing grievance, or to introduce regulations conducive to the public good, or if it is intended to reform or extend existing rights. [*Sheeks, supra,* 244 Mich App at 593 (Zahra, J., concurring)(internal citations omitted.]

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[16] 2016 PA 419 is also "remedial" in the sense that, as explained in more detail *infra*, a person's right to sue governmental agencies is a statutorily-created remedy, which the Legislature clarified that it never intended to exist with regard to open and obvious dangers by enacting 2016 PA 419.

Such is what occurred here. Unlike when it enacted 1999 PA 205 to codify the two-inch rule, which was not available at common-law[17], the Legislature merely stated in 2016 PA 419 that it has always intended for the common-law open and obvious defense to be available to municipalities via MCL 691.1412. That the Legislature was intending to make a substantive change to the existing law, rather than clarify the existing law, when it enacted 1999 PA 205 is, of course, why the Legislature specifically made 1999 PA 205 prospective. But, the Legislature did not do so when it when it enacted 2016 PA 419 because it was merely clarifying that it never intended for persons to have a statutorily-created remedy against governmental agencies for injuries arising out of open and obvious dangers.

Thus, the Court of Appeals majority did not improperly create or apply a "*Brewer* restoration rule." While the Court of Appeals majority did use that phrase for the sake of brevity, the Court of Appeals majority was simply referring to the following statements from this Court's decision in *Brewer*:

> Even if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law. *Hurd[,supra,]* 423 Mich [at] 533[.].
>
> Here, 2008 PA 499 contains no language that would clearly manifest a legislative intent to apply the new jurisdictional standard retroactively. . . .
>
> * * *

[17] As this Court explained in *Robinson*, *supra*, 486 Mich at 9, this Court had abolished the common-law two-inch rule in *Rule v Bay City*, 387 Mich 281; 195 NW 849 (1972).

> 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. . . . That is, this amendment did not restore the status quo before *Karaczewski* . . . . In light of these circumstances and the text of the amendment, we simply can discern no clearly manifested legislative intent to apply the amendment retroactively. [*Brewer, supra,* 486 Mich at 56-57.]

In the above-referenced comments, this Court in *Brewer* was simply stating that because the Legislature did not merely clarify what it had always intended for MCL 418.845 to mean - but instead substantively changed the law to something different than what it had previously stated in MCL 418.845 - 2008 PA 499 was not remedial and not a legislative statement of what the Legislature had always intended the law to be. Thus, in that instance no retroactive intent could be inferred from the circumstances to substitute for the lack of express retroactive intent in 2008 PA 499. Such is not the case with 2016 PA 419, and the Court of Appeals did not err in concluding that 2016 PA 419's remedial nature (further) evinces a clear legislative intent that 2016 PA 419 apply retroactively because it is what the Legislature has always intended the law to be.

3. The legislature's clearly manifested intent that 2016 PA 419 have retroactive effect cannot be ignored in favor of the presumption against retroactivity

As discussed above, the Legislature's intention that 2016 PA 419 have retroactive effect is clearly manifested in the amendment's language, and confirmed by both the statutory history and its remedial nature. As such, that retrospective legislative intent cannot be ignored in favor of the "judicial default rule[]" that amendments are presumed to operate prospectively." *Landgraf, supra,* 511 US at 280; see also *Hall, supra,* 499

Mich at 454, quoting *Koontz v Ameritech Svcs, Inc*, 466 Mich 304, 319; 645 NW2d 34 (2002). This is so even though Plaintiff asserts that 2016 PA 419 imposes upon her a "new legal burden" (which, as explained *infra*, it does not) that *Jones* incorrectly said did not exist of establishing that the allegedly dangerous condition in the sidewalk either was not open and obvious or that, if it was, the condition possessed special aspects rendering it unreasonably dangerous. *Hoffner, supra,* 492 Mich at 460-461. This is because the fact that a statutory amendment imposes a new legal burden or attaches a disability with respect to antecedent transactions merely means that the amendment has retroactive effect - *not* that it is constitutionally impermissible. *Romein, supra*, 436 Mich at 526 (stating that a retroactive amendment "will not be deemed unconstitutional simply because it imposes 'a new duty or liability based on past acts," but rather will be upheld if it meets the test of due process.). And, the fact that the statute is retroactive merely invokes a presumption that the Legislature did not intend it to so operate, which has no application where the Legislature has clearly manifested its intent in both the statutory language and statutory history that the amendment apply retroactively, *Landgraf supra,* 511 US at 280, 283; *Hurd, supra,* 423 Mich at 535, quoting 1A Sands, Sutherland Statutory Construction (4th ed) § 62.01, pp 300-301, as well as through the remedial nature of the amendment, *In re Certified Questions, supra,* 416 Mich at 571, 575, 578, quoting *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 533-534; 164 NW2d 19 (1969).[18]

[18] Even in the absence of retroactive legislative intent in the amendment's

While Plaintiff argues that this Court must consider "the effect that a statutory amendment has on an accrued cause of action," (Plaintiff's brief, 27), this argument confuses the inquiry regarding whether the Legislature intended for 2016 PA 416 to

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language or statutory history, the presumption against retroactivity does not apply when the statutory amendment is remedial or procedural in nature and does not "destroy" or "take away vested rights" (which, as will be discussed infra, 2016 PA 419 does not). *In re Certified Questions, supra,* 416 Mich at 571, 575, 578; *Romein, supra,* 436 Mich at 531; *Wylie, supra,* 293 Mich at 585-586. This Court has on occasion referred to "substantive rights." See, e.g., *Brewer,* 486 Mich at 57; *Johnson, supra,* 491 Mich at 433; *Lynch, supra,* 463 Mich at 585. However, this Court's decisions make clear that this Court was using "substantive rights" as a synonym for "vested rights." Cf. *LaFontaine, supra,* 496 Mich at 39 ("[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."), with *Johnson, supra,* 491 Mich at 433 ("This exception to the presumption of prospective application for remedial statutes is inapplicable here because the statutory amendment affects *substantive* rights."). Thus, this Court's decisions stating that "'remedial' in this context should only be employed to describe legislation that does not affect substantive rights," *Lynch, supra,* 463 Mich at 585; *Brewer, supra,* 486 Mich at 57; *Johnson, supra,* 491 Mich at 433, does not mean that a remedial statute is not remedial. Rather, it simply means that even where an amendment is remedial, if it remains unclear whether the Legislature intended for an amendment to apply retroactively and to construe the amendment as retroactive would result in the amendment affecting a vested right, this Court will construe the statute as prospective in order to avoid having to reach the issue of whether the statute is constitutional. See, *Clark v Martinez,* 543 US 371, 385; 125 S Ct 716 (2005)("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*.")(emphasis in original); *White v Gen Motors Corp,* 431 Mich 387, 407; 429 NW2d 576 (1988)(Archer, J., concurring), quoting 1A Sands, Sutherland Statutory Construction (4th ed) § 22.36, pp 300-301 ("Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment.").

apply retroactively, for which any potential effects cannot refute the Legislative intent for retroactive application evinced by the statutory language and statutory history, with the second inquiry regarding whether the Legislature's intent that 2016 PA 416 apply retroactively is constitutionally permissible (which as discussed later it is).

Plaintiff also asserts that interpreting 2016 PA 416 according to the Legislature's clearly manifested retroactive intent will "upend this Court's precedent regarding the retroactivity of [the] statutes of limitations" set forth in MCL 600.5805. (Plaintiff's brief, 29). It will not. The Legislature in MCL 600.5801(1) temporally linked a person's ability to "bring or maintain an action" to when "the claim first accrued." The Legislature did not temporally link a municipality's ability to assert the open and obvious defense to when "the claim first accrued." Instead, the Legislature made the open and obvious defense available any time there is "a civil action" against the municipality. And, Plaintiff's hypothetical regarding the Legislature's potential amendment of MCL 600.5805(1) to state that "[a] person shall not bring or maintain an action" to within a shorter time from "the claim first accrued" than MCL 600.5805(1) stated previously, again, conflates the inquiry of whether the hypothetically-amended language would clearly indicate that the Legislature intended retroactive application with the separate inquiry of whether the Legislature's intent was constitutionally permissible.

II. The Legislature's clearly manifested intention for 2016 PA 419 to apply retroactively is constitutional

Because 2016 PA 419 and its statutory history (as well as its remedial nature) evince a clearly manifested legislative intent for 2016 PA 419 to apply retroactively, the

second inquiry becomes whether retroactively applying the amendment would be unconstitutional. This is because "[a]bsent a violation of one of [the Constitution's] specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." *Landgraf, supra,* 511 US at 267; *Scott, supra,* 1 Mich at 302-303. And, "[t]he Constitution's restrictions [on retroactive legislation] are of limited scope," *Landgraf, supra,* 511 US at 267, making "the *constitutional* impediments to retroactive civil legislation . . . modest," *id.* at 272 (emphasis in *Landgraf*).

Plaintiff's claim herein appears to be that upon the happening of her accident she obtained a "property" right to sue the City that is protected by Due Process Clauses of the Michigan and United States Constitutions. Const 1963, art 1, § 17; US Const, Ams V and XIV.[19] Whether the Legislature's intention that 2016 PA 419 apply retroactively violates those provisions requires two separate considerations: (1) whether 2016 PA 419 concerns a vested right and, if so, (2) whether retroactive application of 2016 PA 419 unconstitutionally affects that vested right.

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[19] Plaintiff cannot be asserting that the provisions prohibiting the impairment of contracts apply, as Plaintiff had no contract with the City. Similarly, Plaintiff cannot be asserting that 2016 PA 419 violates the Equal Protection Clauses, since the very purpose and effect of the amendment was to ensure that Plaintiff and others like her, as well as municipal defendants, are treated *the same* as they would be if the accident occurred on private premises and the injured person was suing the premises possessor. Further, Plaintiff cannot be asserting that the Legislature's enactment of 2016 PA 419 to abrogate *Jones* violates the separation of powers provisions, since "the legislative power is the power to make law, and Congress can make laws that apply retroactively to [even] pending suits, even when it effectively ensures that one side wins." *Patchak v Zinke*, 138 S Ct 897, 905 (2018).

1. The retroactive application of 2016 PA 419 does not concern vested rights

The first inquiry is whether the statutory or common-law right allegedly affected by the amendment had "vested" before the amendment took effect and, thus, had transmogrified into a constitutionally protected right. *Phillips, supra,* 470 Mich at 430; *Landgraf, supra,* 511 US at 267; *Scott, supra,* 1 Mich at 303; *Lahti, supra,* 357 Mich at 594; *Romein, supra,* 436 Mich at 531. This is because "'[t]he due process clauses protect vested rights only, and have no reference to mere concessions or privileges which the public authorities may control, and bestow, or withhold, at will, whether the particular authorities are the federal government, a state, or a municipality'". *Sherwin v Mackie*, 364 Mich 188, 197; 111 NW2d 56 (1961), quoting 16A CJS, Constitutional Law, § 559, p 702.

"[T]he words 'vested right' is nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it." *Evans Prods Co v Fry*, 307 Mich 506, 544; 12 NW2d 448 (1943)(internal quotations omitted). Thus, "[t]he question of determining what is a vested right is always a source of much difficulty," and "[f]ew questions have troubled the courts more than the problem of what are vested rights." *Rookledge, supra,* 340 Mich at 456 (quotations omitted); *Wylie v Grand Rapids*, 293 Mich 571, 587; 292 NW2d 668 (1940). However, this Court has recognized that as "'used in relation to constitutional guarantees, [the term 'vested'] implies an interest 'which it is proper for the state to recognize and protect, and of which the individual could not be deprived arbitrarily and without injustice.'" *Rookledge, supra,* 340 Mich at 456, quoting *Los Angeles v Oliver*, 102 Cal App 299, 310; 283 P 298 (Cal App, 1929).

Thus, "[w]hen a party, as in this case, avers that a statute has invested him with a right against another in the nature of a personal charge, which a repeal of the statute before judgment cannot impair, he takes it upon himself to show that the right was vitalized by some personal equity underlying the law, or arising upon it." *Bay City & East Saginaw R Co v Austin*, 21 Mich 390, 413 (1870); *Rookledge, supra,* 340 Mich at 457. To make such a showing, the plaintiff must establish "something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws." *Cusick v Feldpausch*, 259 Mich 349, 352; 243 NW2d 226 (1932), quoting 2 Cooley, Constitutional Limitations (8th ed), p 749.[20] Rather, "the party's reliance on the preexisting state of the law should be considered," and the party must show that their "reliance on the [preexisting state of the law] was reasonable." *Romein, supra,* 436 Mich at 530.

Here, Plaintiff bases her assertion that she possessed a "vested" right to sue the City on this Court's statement in *In re Certified Questions* that "once a cause of action accrues – *i.e.*, all the facts become operative and are known - it becomes a 'vested right'".

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[20] This, naturally, is because it is foreseeable that the law may change, as every citizen knows that "[o]f primary importance to the viability of our republican system of government is the ability of elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation." *Studier v Michigan Public School Employee's Retirement Bd,* 472 Mich 642, 660; 698 NW2d 350 (2005); *Harsha v Detroit*, 261 Mich 586, 590; 246 NW 849 (1933)("The legislative power is the authority to make, alter, amend, and repeal laws.").

416 Mich at 573[21]. (Plaintiff's brief, 14). The City, of course, does not dispute that *In re Certified Questions* says this, or that this Court has so stated in other decisions. See *Cusick, supra,* 259 Mich at 353 ("[A] statutory right of action for damage to person or property, which has accrued, is a vested right, and likewise to be protected."); *Minty v State of Mich*, 336 Mich 370, 389; 58 NW2d 106 (1953). But, the City believes that Plaintiff's reliance on these statements is misplaced.

It is true that, as a general matter, for statute of limitations purposes a "claim accrues at the time the wrong upon which the claim is based was done" (i.e., when the defendant's breach harmed the plaintiff). MCL 600.5827; *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017). However, the fact that a claim may have "accrued" for statute of limitations purposes only answers the question of *when* a cause of action may become a "vested" property right protected by the Due Process Clauses. It does not answer the question of whether that claim is *capable of* becoming a "vested" property right subject to constitutional protection.[22] This is because the fact that a plaintiff may

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[21] Notably, the Defendant therein "conceded that plaintiff's right became 'vested' when his cause of action accrued." *In re Certified Questions*, 416 Mich at 576-577. Further, even if the right had been "vested," this Court obviously did not believe that this made the right immutable, as this Court proceeded to hold that the statute therein could have retroactive effect, despite the "vested" right, despite the fact that the statute did not become effective until after the Plaintiff had already filed suit, and despite the fact that the statute therein merely stated an "effective date" with no other statutory language or statutory history indicating a clearly manifested legislative intent that the statute apply retroactively.

[22] Statutes of limitation are, of course, are intended to "prevent stale claims and relieve defendants of the protracted fear of litigation," *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998)(quotation omitted),

have been harmed by what the plaintiff alleges was the breach of a legal duty under pre-existing law *does not* answer the questions of whether: (1) the nature of the particular tort claim alleged can be said to have "vested" for constitutional purposes, or (2) whether the plaintiff "acted in [reasonable] reliance on [pre-existing] law" and would have "altered their conduct if they had anticipated" that the law would be changed. *Romein, supra*, 436 Mich at 527, 530.

As to the first consideration, Plaintiff's argument that she obtained a "vested" cause of action for constitutional purposes simply because her claim may have "accrued" fails to take into account that the City is a governmental agency, and that "governmental immunity is a characteristic of government." *Mack, supra*, 467 Mich at 198.[23] And, unlike the ability to maintain a premises liability claim against a private individual, the ability to maintain a premises liability cause of action against a municipality is not

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which is why they "accrue" at "the time the wrong upon which the claim is based was done". This "accrual" date for statute of limitations purposes has nothing to do with whether the Legislature intended to create a "vested" right for constitutional-protection purposes. Indeed, it can hardly be imagined that when it enacted MCL 600.5827 the Legislature was intending to define not only when someone could file suit, but also the circumstances giving rise to a constitutional claim against the government.

[23] Plaintiff asserts in her brief that "the open and obvious defense – is an affirmative defense". (Plaintiff's brief, 13). Respectfully, with regard to a governmental agency such as the City, governmental immunity is not an affirmative defense. Rather, it is a characteristic of government that cannot be waived and which must be pled in avoidance of. *Mack, supra,* 467 Mich at 197-203; see also *Odom, supra,* 482 Mich 459 at 478-479 ("A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity.").

"deeply rooted in this Nation's [or this State's] history and tradition."[24] *Washington v Glucksberg*, 521 US 702, 720-721; 117 S Ct 2258 (1997)(internal quotations omitted); *People v Kevorkian*, 447 Mich 436, 475-476; 527 NW2d 714 (1994). Indeed, at common law governmental agencies, including municipalities, were immune from tort suits for injuries suffered when the governmental agency was engaged in a governmental function. *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008); *Ross, supra*, 420 Mich at 596-606. Although this Court abolished common-law governmental immunity for municipalities in 1961, the Legislature restored that immunity when it enacted the GTLA just four years later in 1965. Accordingly, "the right to recover for injuries arising from the lack of repair to sidewalks, streets, highways, and so forth [*i*]*s purely statutory*." *Rowland, supra*, 477 Mich at 205, 212 (emphasis added), citing *Moulter v Grand Rapids*, 155 Mich 165, 168-169; 118 NW 919 (1908). It is thus "discretionary with the Legislature whether it w[ill] confer upon injured persons a right of action." *Id.*[25];

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[24] Even a person's right to maintain a premises liability against a private individual with regard to open and obvious dangers cannot be said to have been "deeply rooted" in the history of Michigan law given that our common law has always imposed upon Michigan citizens a duty to themselves notice open and obvious dangers when going about, *Pentz v Wetsman*, 269 Mich 496, 500; 257 NW 735 (1934), quoting *Blankertz v Mack & Co*, 263 Mich 527, 533; 248 NW 889 (1933); *Rice v Goodspeed Real Estate Co*, 254 Mich 49, 55; 235 NW 814 (1931)("One is required to make reasonable use of his faculties of sight, hearing, and of intelligence to discover dangerous conditions to which he is or he may become exposed."), and the fact that Michigan did not replace the doctrine of contributory negligence with the doctrine of comparative negligence until 1979. *Placek v City of Sterling Heights*, 405 Mich 638, 650; 275 NW2d 511 (1979).

[25] This Court stated in *Moulter*:

McCahan, supra, 492 Mich at 736 (emphasis added)("[T]he government may *voluntarily* subject itself to liability".). Accordingly, when the Legislature has exercised its discretion to pull back the veil of governmental immunity and confer a cause of action, that cause of action "'sprang from the kindness and grace of the legislature. And it is the general rule that that which the legislature gives, it may take away.' A statutory [cause of action], 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, supra,* 340 Mich at 457 (emphasis added), quoting *Wylie, supra,* 293 Mich at 588; see also *Forest v Parmalee,* 402 Mich 348, 356 n 3; 262 NW2d 653 (1978) ("We reject outright the contention that we are dealing with a fundamental right" when someone sues under the GTLA.); *Romein, supra,* 436 Mich at 532; *Hanes v Wadey,* 73 Mich 178, 180-181; 41 NW 222 (1889)(emphasis added)(noting that a statutorily created remedy *does not qualify as a vested right* because every citizen is on notice that it "derives its validity from positive enactment of the legislature, and is liable always to be modified, altered, or repealed by the same power that created it.")[26].

> The right to recover for injuries arising from want of repair of sidewalks, etc., is a purely statutory one in this state. It being optional with the Legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose. Whether the limitations imposed are reasonable or unreasonable in such cases are questions for the Legislature, and not for the courts. [*Moulter, supra,* 155 Mich at 168-169.]

[26] See also *Bauerman v Unemployment Ins Agency,* 503 Mich 169, 195; 931 NW2d 539 (2019)(McCormack, C.J., concurring):

As to the second consideration, it cannot be said that before January 4, 2017, Plaintiff or any other citizen would have been acting in reasonable reliance on *Jones* and would have altered their conduct if they had anticipated that 2016 PA 419 would be enacted to abrogate *Jones*. *Romein, supra,* 436 Mich at 527, 530.

First of all, as the Court of Appeals majority correctly noted, "it is inconceivable that [Plaintiff] would have acted differently if she had known that eight months later the Legislature would make the open and obvious danger doctrine applicable to any slip and fall that might occur on that day," and thus "in no way could she have reasonably relied on the existing state of the law". *Buhl, supra,* 329 Mich App at 504. That this is undoubtedly true is reinforced by the fact that the open and obvious doctrine is premised upon the realization that "those who come onto [land under the possession and control of another] exercise common sense and prudent judgment." *Hoffner, supra,* 492 Mich at 459. Although on the date of the accident the open and obvious doctrine, under *Jones*, may not have applied to absolve the City of a duty to maintain the sidewalk in reasonable repair, comparative negligence principles *did* apply to impose upon Plaintiff herself the duty to notice and avoid the open and obvious danger presented by the vertical discontinuity in the sidewalk. *Mann v St Clair Co Rd Comm'n*, 470 Mich 347, 351 n 2;

> The *Rowland* and *McCahan* plaintiffs' substantive claims (for personal injuries resulting from a defective highway condition in *Rowland*, and for automobile tort liability in *McCahan*) existed only by legislative grace—there is no constitutional guarantee of safe roads or payment of personal injury benefits. The state enjoys broad immunity from suit unless it waives its immunity by creating a statutory right of action; the Legislature may place whatever conditions it wishes on rights of its own creation . . . . And courts shouldn't undermine those legislatively created conditions. [*Id.*]

681 NW2d 653 (2004); MCL 600.6304; MCL 600.2959. Indeed, Michigan's common-law has long been "'definitely committed to the holding that one going about in public places or semipublic places'" must "'use the care that an ordinarily careful person would have used in like surroundings,'" and that "'[i]f he fails [to do so] . . . and in consequence sustains injury, he must bear his own misfortune.'" *Pentz, supra,* 269 Mich at 500, quoting *Blankertz, supra,* 263 Mich at 533. This means that "[o]ne is required to make reasonable use of his faculties of sight, hearing, and of intelligence to discover dangerous conditions to which he is or he may become exposed." *Rice v Goodspeed Real Estate Co*, 254 Mich 49, 55; 235 NW 814 (1931).

Moreover, 2016 PA 419 was introduced as 2015 HB 4686 on June 4, 2015 – nearly a year before Plaintiff's accident. (Defendant's App. 36b). And, it had already been passed by the House of Representatives on December 10, 2015 – nearly four months before Plaintiff's accident. (Defendant's App. 39b). Thus, the Legislature notified Plaintiff and every other Michigan citizen via the process set forth in Const 1963, art 6 that the open and obvious defense may soon be available to municipalities.

Even aside from that, Plaintiff cannot claim that she "reasonably relied" on this Court's holding in *Jones,* which disregarded the plain language of MCL 691.1412. As this Court explained in *Rowland,* "any statutory reliance analysis has to be considered in light of the plain language of the statute." 477 Mich at 216. And, as this Court explained in *Robinson, supra,* 462 Mich at 439:

> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence

> of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Id.* at 467-478; *Rowland, supra,* 477 Mich at 216-217.]

Thus, even though *Jones* may have been the state of the law at the time of Plaintiff's accident, Plaintiff cannot claim to have reasonably relied on *Jones* or expected that it would remain the law after her fall.[27] Rather, as this Court explained in *Robinson*, Plaintiff should have fully expected when conducting herself on the date of the accident that if she fell on the sidewalk and later sued the City that *Jones* may be overruled and the open and obvious doctrine applied.[28]

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[27] It should also, of course, be noted that even during the four year period between when this Court abolished governmental immunity for municipalities and the Legislature adopted the GTLA to restore such immunity, municipalities were *not* more prone to liability than private landowners, because municipalities could still assert the same defenses as private landowners. The fact that *Jones* rendered a governmental unit more prone to liability than a private person is a unique anomaly in the history of Michigan's jurisprudence that in and of itself should have signaled its inherent unreliability.

[28] This Court could, of course, avoid altogether the issue of whether 2016 PA 419 is retroactively applicable and simply overrule *Jones* - which is clearly what the

2. Even if it affected vested rights, the Legislature's clearly manifested intent that 2016 PA 419 apply retroactively is constitutional

Because Plaintiff had no vested property right, her cause of action against the City is not constitutionally protected. *Rafaeli, LLC v Oakland Co*, __ Mich __, __; __ NW2d __ (2020); *Sherwin, supra*, 364 Mich at 197; *Murphy-Dubay v Dep't of Lic & Reg Affairs*, 311 Mich App 539, 558; 876 NW2d 598 (2015); *WA Foote Mem Hosp v Dep't of Public Health*, 210 Mich App 516, 524 (1995). But even if it was, the Legislature's intent that 2016 PA 419 apply retroactively passes constitutional muster.

i. The Legislature's clearly manifested intent that 2016 PA 419 apply retroactively is rationally related to a legitimate legislative purpose

The GTLA represents "economic or social regulation legislation." *Rowland, supra*, 477 Mich at 207. "A rational basis standard of review governs this Court's scrutiny of the legitimacy of social and economic legislation." *Romein, supra*, 436 Mich at 525[29]; *Phillips, supra*, 470 Mich at 434; *Downriver Plaza Grp v City of Southgate*, 444

Legislature would prefer that this Court do. Even though by enacting 2016 PA 419 the Legislature has addressed the problem caused by *Jones* with regard to a municipality's duty to repair sidewalks, *Jones*' having read MCL 691.1412 out of the GTLA (meaning that, technically, no common-law defense that would be available to a private person is available to any governmental agency or employee with regard to any of the duties imposed by the GTLA) is going to require that the Legislature make similar amendments to MCL 691.1406 (public buildings), MCL 691.1407(4) (hospitals), MCL 691.1407 (2) (gross negligence of governmental officers, employees, members, and volunteers), etc.

[29] *Romein, supra*, 436 Mich at 526, quoting *Usery v Turner Elkhorn Mining Co*, 428 US 1, 15; 96 S Ct 2882 (1976):

Mich 656, 666-668; 513 NW2d 807 (1994); *Forest, supra,* 402 Mich at 356 n 3 ("We reject outright the contention that we are dealing with a fundamental right and therefore should employ the 'strict scrutiny' equal protection test" with regard to a claim under the GTLA.). Under the rational basis standard, "'[t]he retroactive aspects of [the] legislation, as well as the prospective aspects, must meet the test of due process'; a legitimate legislative purpose furthered by rational means." *Gen Motors Corp, supra,* 503 US at 191, quoting *Pension Benefit Guaranty Corp v R A Gray & Co,* 467 US 717, 730; 104 S Ct 2709 (1984). Stated differently, "[t]his highly deferential standard of review requires a challenger to show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *Phillips, supra,* 470 Mich at 433, 435-436 (internal quotations and citations omitted); *Romein, supra,* 436 Mich at 525. This "does not test the 'wisdom, need or appropriateness of the legislation . . . .'" *Id.* at 434, quoting *Crego v Coleman,* 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, the only inquiry is whether the Legislature's decision finds support in "'any set of facts, either known or

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> To apply a stricter standard of review to a workers' compensation statute simply because it operates retroactively would put the judiciary in the business of "allocat[ing] the interlocking economic rights and duties of employers and employees upon workmen's compensation principles" although this is a task within the province of the Legislature.

This same rationale applies, of course, to judicial review of the GTLA. Simply because 2016 PA 419 operates retroactively does not justify applying a higher standard of review than the rational basis test, because to do so would put this Court in the business of allocating the interlocking economic rights and duties of municipalities (and their taxpayers) and persons injured by open and obvious defects in municipal sidewalks upon governmental immunity principles, although such task is within the province of the Legislature.

which could reasonably be assumed, even if such facts may be debatable.'" *Id.* at 435, quoting *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003).

To the extent that 2016 PA 419 applies "prospectively" to make the open and obvious defense available to municipalities with regard to sidewalk injuries occurring after January 4, 2017, there can be no doubt that 2016 PA 419 is the result of a rational, non-arbitrary, and legitimate Legislative purpose: to make a defense that is available to non-governmental premises possessors equally available to municipalities – who unlike private persons are required to maintain hundreds or even thousands of miles of sidewalks - thereby "prevent[ing] a drain on [municipal] financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity," *Costa, supra,* 475 Mich at 410, as well as by protecting municipalities against potential judgments, having to pay increased insurance premiums, and from having to expend taxpayer funds to repair even open and obvious defects in sidewalks. See also *Mack, supra,* 467 Mich at 203 n 18; *Rowland, supra,* 477 Mich at 223 n 18; *Nawrocki, supra,* 463 Mich at 156; *Forest, supra,* 402 Mich at 360; *Ridgeway, supra,* 154 Mich at 72-73. Indeed, the constitutionality of the broad immunity conferred by the GTLA has been continuously upheld.[30] And, of course, if the GTLA's broad immunity is

[30] See, e.g., *Forest, supra,* 402 Mich 348; *Wojtasinski v City of Saginaw,* 74 Mich App 476, 477; 254 NW2d 71 (1977)("Plaintiff first argues that the immunity statute is violative of the due process and equal protection clauses of the U.S. and Michigan Constitutions. This Court has consistently rejected the argument."); *Knight v City of Tecumseh,* 63 Mich App 215, 220; 234 NW2d 457 (1975)("[P]laintiffs contend that the defense of immunity deprives plaintiffs of due process and equal protection of the law. This same constitutional attack of Michigan's governmental immunity statute. . . has been made and rejected on several occasions in the recent past."); *White v Detroit,* 74 Mich

constitutional, it must also be constitutional for the GTLA to provide defenses with respect to the few areas where the government has voluntarily subjected itself to liability. See *McCahan, supra,* 492 Mich at 736 ("[B]ecause the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed.").

To the extent that 2016 PA 419 applies "retroactively" to make the open and obvious defense available to municipalities with regard to sidewalk injuries occurring before January 4, 2017, two additional considerations are required. First, "[t]he retroactive aspect of [the] legislation must meet the burden of due process," which "'is met by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" *Romein, supra,* 436 Mich at 528, quoting *Pension Benefit Guaranty Corp, supra*, 467 US at 730. Second, "[t]he justification for retrospective legislation must take into account the possibilities that the parties acted in reliance on [the former] law and that they may have altered their conduct" if they had known that the amended legislation would be enacted. *Id.* at 527. Here, as discussed thoroughly above, neither Plaintiff nor any person who tripped over an open and obvious defect in a municipal sidewalk can credibly have acted in reliance on *Jones*' holding that the open and obvious defense was unavailable to municipalities, if for no other reason than that

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App 545, 547; 254 NW2d 572 (1977); *Anderson v Detroit*, 54 Mich App 496, 499-500; 221 NW2d 168 (1974); *McNees v Scholley*, 46 Mich App 702, 708-709; 208 NW2d 643 (1973).

comparative negligence principles require "one going about in public places," *Pentz, supra,* 269 Mich at 500, "to make reasonable use of his faculties of sight, hearing, and of intelligence to discover dangerous conditions to which he is or he may become exposed," *Rice, supra,* 254 Mich at 55.[31] And, of course, the same legitimate, rational, and non-arbitrary Legislative purpose for 2016 PA 419, as well as its intention to do away with the *Jones* anomaly, supports the Legislature's clearly manifested intent that it apply retroactively.

ii. The Legislature's clearly manifested intent that 2016 PA 419 apply retroactively does not attach a new disability with respect to transactions or considerations already past

As discussed previously, whether a statutory amendment attaches a new disability with respect to transactions or considerations already past merely affects whether the amendment was intended by the Legislature to be retroactive. But where, as here, the Legislature's intent that 2016 PA 419 apply retroactively is clearly manifested in its

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[31] See also *Pension Benefit Guarantee Corp, supra,* 467 Mich at 731-732, wherein the United States Supreme Court rejected the contention that the retroactive legislation at issue therein violated due process for lack of notice. In doing so, the Court stated that it had "doubts . . . that retroactive application of the [legislation] would be invalid under the Due Process Clause for lack of notice *even if it was suddenly enacted by Congress without any period of deliberate consideration*," *id.* at 731-732 (emphasis added). Here, as discussed previously, 2015 HB 4686 was introduced into the House of Representatives nearly a year before Plaintiff's accident, went through the entire constitutionally-mandated process, and in fact had already been passed by the House of Representatives nearly four months before Plaintiff's accident. (Defendant's App. 36b, 39b). Thus, 2016 PA 419 was not "suddenly enacted," and Plaintiff has no basis to make any procedural due process assertion.

language, its statutory history, and its remedial nature, the fact that it may attach a new disability with respect to transactions or considerations already past has no bearing on whether it is constitutional. See *Romein, supra,* 436 Mich at 526, quoting *Usery, supra,* 428 US at 16 (Retroactive social or economic legislation "will not be deemed unconstitutional simply because it imposes 'a new duty or liability based on past acts'".); *Landgraf, supra,* 511 US at 283 ("[I]f applied here, th[e] provision would attach an important new legal burden to [the defendant's] conduct", and thus "is the kind of provision that does not apply to events antedating its enactment *in the absence of clear congressional intent*.")(emphasis added). Here, as discussed above, both the language of 2016 PA 419 and its statutory history evince a clearly manifested legislative intent that the open and obvious defense be available to municipalities with respect to *any* accident, even those occurring before its effective date, and that clearly manifested legislative intent is constitutional because it is rationally related to a legitimate government interest.

Nonetheless, even if it were relevant to the constitutional issue, 2016 PA 419 does *not* attach a new disability with respect to transactions or considerations already past. As discussed above, regardless of whether the open and obvious defense was available to the City on the date of Plaintiff's accident, Plaintiff already had her own duty to "to make reasonable use of h[er] faculties of sight, hearing, and of intelligence to discover dangerous conditions to which [s]he is or [s]he may become exposed." *Rice*, *supra*, 254 Mich at 55. Moreover, before the enactment of 2016 PA 419, Plaintiff was already required to plead in avoidance of governmental immunity. *Mack, supra,* 467 Mich at 190. Since Plaintiff filed her complaint after 2016 PA 419 became effective, she could

easily have pled in avoidance of the City's immunity by alleging in her complaint either that the vertical discontinuity was not open and obvious, or that it possessed "special aspects" making it unreasonably dangerous. *Hoffner, supra*, 492 Mich 460-461. And, even if Plaintiff had filed her complaint before 2016 PA 419 became effective, upon its enactment she could have moved to amend her complaint pursuant to MCR 2.118(A)(2).

iii. The Legislature's clearly manifested intent that 2016 PA 419 apply retroactively does not abolish or destroy Plaintiff's cause of action

Again, as discussed previously, this consideration only affects whether legislative intent for retroactive application may be inferred when neither the amendment's language, its statutory history, nor its remedial nature clearly manifest such intention. Thus, in *In re Certified Questions*, 416 Mich 558, this Court merely considered whether the statute at issue could be construed as having been intended by the Legislature to apply retroactively where the "statute contain[ed] no specific language indicating either retrospective or prospective application." *Id.* at 571. Thus, reasoning that because the statute did not abolish the plaintiff's cause of action (i.e., was not one of the only class of "Rule Three Cases" concerning the abolition of "vested rights" that would necessitate this Court addressing the constitutional issue), and similarly could be construed as remedial (i.e., a "Rule Four Case"), this Court held that legislative intent for retroactive application could properly be inferred. Accordingly, there being no abolition of any "vested right," there was no need for this Court to address the issue of whether retroactive application of the statute would be constitutionally permissible if, in fact, the statute had abolished the plaintiff's cause of action. If there had been a need for this Court to address that issue,

this Court undoubtedly would have held the Legislature's intent for retroactive application constitutional under the rational basis test. *Downriver Plaza Group, supra,* 444 Mich 656; *Romein, supra,* 436 Mich 515; *Gen Motor Corp, supra,* 503 US at 191-192.

Nonetheless, even if it were necessary to address the issue, the simple fact of the matter is that the Court of Appeals' majority correctly held that "[t]he 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." *Buhl, supra,* 329 Mich App at 497. This is not a situation like *Minty, supra,* 336 Mich 370, where the Legislature enacted a statute stating that it was "waiv[ing] its immunity from liability for the torts of its officer and employees and consent[ing] to have its liability for such torts determined in accordance with the same rules of law as apply to an action . . . against an individual," *id.* at 382-383, quoting 1943 PA 237, and then after an injury occurred and suit was filed repealed the statute and resurrected its immunity, thereby completely barring the cause of action, *id.* at 382. Rather, MCL 691.1402a was an exception to municipal corporation immunity before 2016 PA 419 was enacted, and it remains an exception to municipal corporation immunity since 2016 PA 419 was enacted. The only difference is that since 2016 PA 419 was enacted persons injured by defects in municipally-maintained sidewalks must now plead and prove that the defect either was not open and obvious or that, if it was, that the defect possessed "special aspects" rendering it unreasonably dangerous despite its open and obvious nature. *Hoffner, supra,* 492 Mich at 460-461. Had Plaintiff herein done so, then her action would have continued. But she did not

dispel or disprove the evidence proffered by the City establishing both that the vertical discontinuity was open and obvious and that it possessed no special aspects. Thus, her lawsuit failed not because of 2016 PA 419, but because Plaintiff failed "to make reasonable use of h[er] faculties of sight, hearing, and of intelligence to discover dangerous conditions to which [s]he is or [s]he may become exposed," *Rice, supra*, 254 Mich at 55, whilst "going about in public places," *Pentz, supra*, 269 Mich at 500.

CONCLUSION & RELIEF REQUESTED

WHEREFORE, Defendant-Appellee City of Oak Park respectfully requests that this Honorable Court affirm the decision of the Court of Appeals majority.

Respectfully submitted,
GARAN LUCOW MILLER, P.C.

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Dated: August 26, 2020

STATE OF MICHIGAN

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JENNIFER BUHL,

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v.

CITY OF OAK PARK,

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DEFENDANT-APPELLEE'S APPENDIX

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PROOF OF SERVICE

Proof of Service: I certify that a copy of **DEFENDANT-APPELLEE CITY OF OAK PARK'S APPEAL BRIEF** and this **PROOF OF SERVICE** were served on the following as indicated below:

Date of Service: August 26, 2020

Signature: /s/Nancy Kachman

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