

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

**APPENDIX TO
DEFENDANT-APPELLEE CITY OF OAK PARK'S APPEAL BRIEF**

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

PROOF OF SERVICE

GARAN LUCOW MILLER, P.C.

/s/ Christian C. Huffman

CHRISTIAN C. HUFFMAN (P66238)

JOHN J. GILLOOLY (P41948)

Attorneys for Defendant-Appellee

1155 Brewery Park Blvd, Ste. 200

Detroit, MI 48207-2641

Telephone: 313.446.5549

Email:chuffman@garanlucow.com

STATE OF MICHIGAN
IN THE SUPREME COURT

JENNIFER BUHL,

Supreme Court Case No. 160355

Plaintiff-Appellant,

Court of Appeals No. 340359

v.

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

CITY OF OAK PARK,

Defendant-Appellee.

DEFENDANT-APPELLEE'S APPENDIX

A	Enrolled House Bill No 4010	1b - 3b
B	Enrolled House Bill No. 4589	4-b - 6b
C	Enrolled House Bill No. 4686	7b - 9b
D	Defendant City of Oak Park's Reply to Plaintiff's Response to Defendant's Renewed Motion to Dismiss	10b - 30b
E	Insurance Code of 1956	31b - 32b
F	Governmental Liability for Negligence (Excerpt) - Act 170 of 1964	33b - 34b
G	House Bill No. 4686 (as introduced)	35b - 37b
H	House Bill No. 4686 (as passed)	38-b - 40b

EXHIBIT A

Act No. 205
Public Acts of 1999
Approved by the Governor
December 20, 1999
Filed with the Secretary of State
December 21, 1999
EFFECTIVE DATE: December 21, 1999

**STATE OF MICHIGAN
90TH LEGISLATURE
REGULAR SESSION OF 1999**

Introduced by Rep. Shulman

ENROLLED HOUSE BILL No. 4010

AN ACT to amend 1964 PA 170, entitled "An act to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers and paying damages sought or awarded against them; to provide for the legal defense of public officers and employees; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal certain acts and parts of acts," by amending sections 1 and 2 (MCL 691.1401 and 691.1402), section 1 as amended by 1986 PA 175 and section 2 as amended by 1996 PA 150, and by adding section 2a.

The People of the State of Michigan enact:

Sec. 1. As used in this act:

- (a) "Municipal corporation" means a city, village, or township or a combination of 2 or more of these when acting jointly.
- (b) "Political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.
- (c) "State" means the state of Michigan and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces and includes every public university and college of the state, whether established as a constitutional corporation or otherwise.
- (d) "Governmental agency" means the state or a political subdivision.
- (e) "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.
- (f) "Governmental function" is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.
- (g) "Township" includes charter township.
- (h) "Volunteer" means an individual who is specifically designated as a volunteer and who is acting solely on behalf of a governmental agency.

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

(110)

under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer.

(2) If the state transportation department contracts with another governmental agency to perform work on a state trunk line highway, an action brought under this section for tort liability arising out of the performance of that work shall be brought only against the state transportation department under the same circumstances and to the same extent as if the work had been performed by employees of the state transportation department. The state transportation department has the same defenses to the action as it would have had if the work had been performed by its own employees. If an action described in this subsection could have been maintained against the state transportation department, it shall not be maintained against the governmental agency that performed the work for the state transportation department. The governmental agency also has the same defenses that could have been asserted by the state transportation department had the action been brought against the state transportation department.

(3) The contractual undertaking of a governmental agency to maintain a state trunk line highway confers contractual rights only on the state transportation department and does not confer third party beneficiary or other contractual rights in any other person to recover damages to person or property from that governmental agency. This subsection does not relieve the state transportation department of liability it may have, under this section, regarding that highway.

(4) The duty imposed by this section on a governmental agency is limited by sections 81131 and 82124 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131 and 324.82124.

Sec. 2a. (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:

(a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

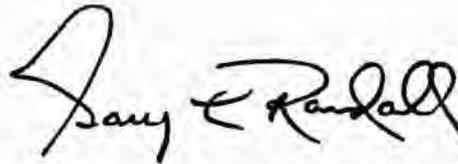
(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.

(2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.

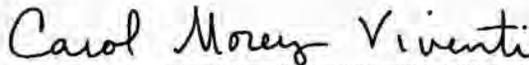
(3) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.

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

This act is ordered to take immediate effect.



Clerk of the House of Representatives.



Secretary of the Senate.

Approved _____

Governor.

EXHIBIT B

Act No. 50
 Public Acts of 2012
 Approved by the Governor
 March 13, 2012
 Filed with the Secretary of State
 March 13, 2012
 EFFECTIVE DATE: March 13, 2012

**STATE OF MICHIGAN
 96TH LEGISLATURE
 REGULAR SESSION OF 2012**

Introduced by Reps. Somerville, Opsommer, Walsh, Shirkey and Muxlow

ENROLLED HOUSE BILL No. 4589

AN ACT to amend 1964 PA 170, entitled "An act to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers, employees, and volunteers and for paying damages sought or awarded against them; to provide for the legal defense of public officers, employees, and volunteers; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal acts and parts of acts," by amending sections 1, 2, and 2a (MCL 691.1401, 691.1402, and 691.1402a), section 1 as amended by 2001 PA 131 and section 2 as amended and section 2a as added by 1999 PA 205.

The People of the State of Michigan enact:

Sec. 1. As used in this act:

- (a) "Governmental agency" means this state or a political subdivision.
- (b) "Governmental function" means an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority, as directed or assigned by his or her public employer for the purpose of public safety.
- (c) "Highway" means a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.
- (d) "Municipal corporation" means a city, village, or township or a combination of 2 or more of these when acting jointly.
- (e) "Political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.
- (f) "Sidewalk", except as used in subdivision (c), means a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel.
- (g) "State" means this state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces. State includes a public university or college of this state, whether established as a constitutional corporation or otherwise.
- (h) "Township" means a general law township or a charter township.
- (i) "Volunteer" means an individual who is specifically designated as a volunteer and who is acting solely on behalf of a governmental agency.

Sec. 2. (1) Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. Except as provided in section 2a, the duty of a governmental agency to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer.

(2) A municipal corporation has no duty to repair or maintain, and is not liable for injuries or damages arising from, a portion of a county or state highway.

(3) If the state transportation department contracts with another governmental agency to perform work on a state trunk line highway, an action brought under this section for tort liability arising out of the performance of that work shall be brought only against the state transportation department under the same circumstances and to the same extent as if the work had been performed by employees of the state transportation department. The state transportation department has the same defenses to the action as it would have had if the work had been performed by its own employees. If an action described in this subsection could have been maintained against the state transportation department, it shall not be maintained against the governmental agency that performed the work for the state transportation department. The governmental agency also has the same defenses that could have been asserted by the state transportation department had the action been brought against the state transportation department.

(4) The contractual undertaking of a governmental agency to maintain a state trunk line highway confers contractual rights only on the state transportation department and does not confer third party beneficiary or other contractual rights in any other person to recover damages to person or property from that governmental agency. This subsection does not relieve the state transportation department of liability it may have, under this section, regarding that highway.

(5) The duty imposed by this section on a governmental agency is limited by sections 81131 and 82124 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131 and 324.82124.

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

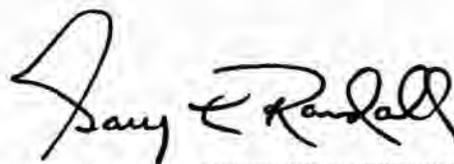
(2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the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

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

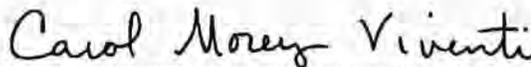
- (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
 - (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
- (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.

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

This act is ordered to take immediate effect.



Clerk of the House of Representatives



Secretary of the Senate

Approved

.....
Governor

EXHIBIT C

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

STATE OF MICHIGAN
98TH LEGISLATURE
REGULAR SESSION OF 2016

Introduced by Reps. Santana, Gay-Dagnogo and Banks

ENROLLED HOUSE BILL No. 4686

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

The People of the State of Michigan enact:

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

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

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

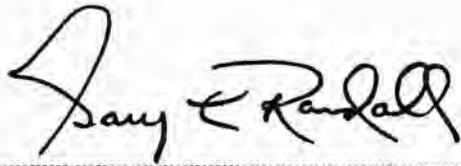
- (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
 - (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
- (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.

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

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

(234)

This act is ordered to take immediate effect.



.....
Clerk of the House of Representatives



.....
Secretary of the Senate

Approved

.....
Governor

RECEIVED by MSC 8/26/2020 3:03:13 PM

EXHIBIT D

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

JENNIFER BUHL,
Plaintiff,

Case No 17-157097-NI
Judge Phyllis McMillen

v.

CITY OF OAK PARK,
Defendant.

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

John J. Gillooly (P41948)
GARAN LUCOW MILLER, P.C.
Attorney for Defendant
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207
313.446.5501
jgillooly@garanluow.com

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

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

ARGUMENT

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

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

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

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

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

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

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

Generally, statutes and statutory amendments are presumed to operate prospectively. See *Davis v. State Emples. Ret. Bd.*, 272 Mich. App. 151, 155; 725 N.W.2d 56, 60 (2006). However, there is an exception where a statute or amendment is “remedial or procedural in nature, as long as it does not deny vested rights.” *Davis* at 158 (citations omitted). A statute is remedial or procedural in character if “it is designed to correct an existing oversight in the law or redress an existing grievance,” *Macomb Co Professional Deputies Ass'n v Macomb Co*, 182 Mich. App. 724, 730; 452 N.W.2d 902 (1990). A “vested right,” as that term is used in relation to constitutional guarantees (sic), implies an interest “which it is proper for the State to recognize and protect, and of which the individual could not be deprived arbitrarily without injustice.” *Rookledge v. Garwood*, 340 Mich. 444, 456, 65 N.W.2d 785, 791 (1954) (citation omitted).

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

/s/John J. Gillooly

GARAN LUCOW MILLER, P.C.

1155 Brewery Park Blvd. Ste. 200

Detroit, MI 48207

313.446.5501

jgillooly@garanlucow.com

P41948

Dated: August 9, 2017

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

JENNIFER BUHL,

Plaintiff,

Case No 17-157097-NI
Judge Phyllis McMillen

v.

CITY OF OAK PARK,

Defendant.

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

John J. Gillooly (P41948)
GARAN LUCOW MILLER, P.C.
Attorney for Defendant
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207
313.446.5501
jgillooly@garanlucow.com

PROOF OF SERVICE

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

Matthew Edward Bedikian, Esq.
matt@miadvocacycenter.com

/s/Monica Parent

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

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

Introduced by Reps. Santana, Gay-Dagnogo and Banks

ENROLLED HOUSE BILL No. 4686

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

The People of the State of Michigan enact:

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

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

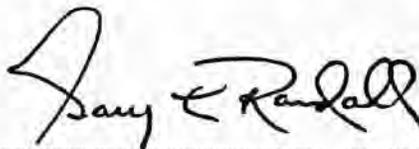
(3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:

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

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

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

This act is ordered to take immediate effect.



Clerk of the House of Representatives



Secretary of the Senate

Approved

.....
Governor

GOVERNMENTAL LIABILITY FOR NEGLIGENCE (EXCERPT)
Act 170 of 1964

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

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

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

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

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

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

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

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

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

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

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

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

Popular name: Governmental Immunity Act

Popular name: 2-Inch Rule

Received for Filing Oakland County Clerk 8/9/2017 12:31 PM

No Shepard's Signal™
As of: August 9, 2017 12:48 PM Z

Nabil Sufi v. City of Detroit

Court of Appeals of Michigan

February 17, 2015, Decided

No. 312053

Reporter

2015 Mich. App. LEXIS 272 *

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

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

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

Core Terms

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

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

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

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

Opinion

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition of plaintiff's negligence and wrongful death claims under the government tort liability act (GTLA), MCL 691.1401 et seq. We vacate

the trial court's order and remand for a determination of defendant's motion for summary disposition on the merits.

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

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

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

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

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

¹ Ali had passed away several months after he allegedly fell on the sidewalk.

² MCL 691.1402a was amended by 2012 PA 50, effective March 13, 2012, to state that a governmental entity [*2] is "presumed to have maintained the sidewalk in reasonable repair." MCL 691.1402a(3). Whether a plaintiff has rebutted the presumption created by the amendment "is a question of law for the court." MCL 691.1402a(4).

at any time, even after the dispositive motion cutoff date. states:

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

Trial courts have general authority to set deadlines for the filing [*3] of motions. MCR 2.401(B)(2)(a)(ii). Plaintiff cites People v Grove, 455 Mich 439, 464; 566 NW2d 547 (1997), superseded on other grounds by MCR 6.310(B) as stated in People v Franklin, 491 Mich 916; 813 NW2d 285 (2012), and Kemerko Clawson, in support of its argument that the trial court had discretion to deny defendant's motion as untimely filed.

This Court interprets court rules according to the same rules applicable to statutory interpretation. CAM Constr v Lake Edgewood Condominium Ass'n, 465 Mich 549, 553; 640 NW2d 256 (2002). The guiding principle of interpretation is to give effect to the intent of the authors. Wilcoxon v Wayne Co Neighborhood Legal Services, 252 Mich App 549, 553; 652 NW2d 851 (2002). "The starting point to this endeavor is the language of the court rule." Id. Court rule language is given its plain meaning. Ligons v Crittenton Hosp, 490 Mich 61, 70; 803 NW2d 271 (2011). When that language is clear and unambiguous, the rule is enforced as written without further judicial construction or interpretation. Grievance Administrator v Underwood, 462 Mich 188, 193-194; 612 NW2d 116 (2000). In the event of a conflict between rules, a specific rule controls over a more general rule. Haliw v City of Sterling Hts, 471 Mich 700, 706; 691 NW2d 753 (2005); see, also, MCR 1.103. Further, any construction that renders some part of the rule nugatory or surplusage should be avoided. Grzesick v Cepela, 237 Mich App 554, 560; 603 NW2d 809 (1999).

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

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

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

Reading the language of subrule (D)(3) as a limit on the trial court's discretion is not out of step with Kemerko Clawson, which interpreted MCR 2.116(B)(2) and MCR 2.401(B)(2)(a)(ii). Kemerko Clawson, 269 Mich App at 349-351. MCR 2.116(D)(3) differs from subrule (B)(2) in that it explicitly states that the cutoff date in a "scheduling order entered [*5] pursuant to MCR 2.401[.]" does not prohibit the filing of summary disposition motions grounded on governmental immunity. With its focus on only governmental immunity and subject-matter jurisdiction, (D)(3) is also more specific than the scheduling order language in MCR 2.401(B)(2)(a)(ii), and is therefore controlling. Haliw, 471 Mich at 706. Moreover, governmental immunity is "not an affirmative defense but a characteristic of government . . ." Mack v Detroit, 467 Mich 186, 197 n 13; 649 NW2d 47 (2002). That characteristic does not cease to exist because a governmental defendant asserts it after the dispositive motion cutoff date. Id. Accordingly, the trial court abused its discretion in refusing to consider defendant's motion for summary disposition.³

³ Consideration of defendant's motion did not require oral argument. MCR 2.119(E)(3) grants the trial court discretion to dispense with oral argument on a contested motion. Fast Air,

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

This Court reviews [*6] a trial court's grant or denial of summary disposition de novo. Odorn v Wayne Co, 482 Mich 459, 466; 760 NW2d 217 (2008). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. Corley v Detroit Bd of Ed, 470 Mich 274, 277; 681 NW2d 342 (2004). Summary disposition should be granted if "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). In deciding a motion under subrule (C)(8), this Court accepts the allegations as true and construes them in a light most favorable to the nonmoving party. Dalley v Dykema Gossett PLLC, 287 Mich App 296, 304-305; 788 NW2d 679 (2010).

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

Inc v Knight, 235 Mich App 541, 550; 599 NW2d 489 (1999). The trial court should have considered defendant's motion, but did not abuse its discretion on the narrow issue of declining to hold oral argument.

⁴ In its brief on appeal defendant relies in part on an outdated and overruled summary disposition (actually summary judgment under the 1963 court rules) standard, arguing that under MCR 2.116(C)(10) the trial court can only grant a motion if the claim or the defense cannot be supported at trial because of a deficiency which cannot be overcome, citing [*7] Durant v Stahlin, 375 Mich 628; 135 NW2d 392 (1965). Yet it has been almost 15 years since the Supreme Court (1) explicitly recognized that that standard was inapplicable under the Michigan Court Rules established in 1985, and (2) reversed the cases citing to that standard. See Smith v Globe Life Ins Co, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). We recognized this point a decade ago in Grand Trunk W R, Inc v Auto Warehousing Co, 262 Mich App 345, 350; 686 NW2d 756 (2004), yet still today we frequently receive briefs that contain this outdated, overruled, and obviously inapplicable standard. Appellate counsel need either to update their brief

MCR 2.116(C)(7) permits summary disposition where the claim at issue is barred by governmental immunity. Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). "Although courts should start with the pleadings when reviewing a motion brought under MCR 2.116(C)(7), courts must also consider any affidavits, depositions, admissions, or other documentary evidence that the parties submit to determine whether there is a genuine issue of material fact." Dextrom v Wexford Co, 287 Mich App 406, 431; 789 NW2d 211 (2010) (citations omitted). When the facts are not in dispute, the question of whether the claim is barred is an issue of law for the court. Id. "But, if a question of fact [*8] exists so that factual development could provide a basis for recovery," the trial court should hold an evidentiary hearing to determine whether an exception to governmental immunity applies. Id. (Emphasis in original).

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

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

Defendant argues that the trial court [*9] erred in denying its motion for summary disposition because plaintiff cannot establish that defendant failed to

banks or their legal research methods to avoid citing to these summary judgment standards that were long ago set aside by the 1985 Court Rules that established a more intricate and different summary disposition standard.

⁵ Sidewalks were also included in the definition of "highway" as it appeared in the prior version of MCL 691.1401(e) at the time of Ali's injury. See 2001 PA 131.

maintain the sidewalk in reasonable repair. Specifically, defendant relies on the presumption created by the 2012 amendment to MCL 691.1402a. Ali's injury occurred on May 11, 2010, and plaintiff filed the complaint on November 18, 2010. At the time Ali was injured, MCL 691.1402a provided:

(1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:

(a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

(b) The defect described in subdivision (a) [*10] is a proximate cause of the injury, death, or damage.

(2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair. [See 1999 PA 205.]

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

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

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

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

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

Defendant argues that plaintiff failed to rebut the

presumption that the sidewalk was in reasonable repair because, according [*11] to defendant, photographs of the sidewalk demonstrate no vertical discontinuity. But defendant is not entitled to the statutory presumption.

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

Presumption aside, both parties implicitly suggest that this [*12] Court may resolve defendant's motion for summary disposition on the merits, even though the trial court did not do so.

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

Because the trial court ruled on defendant's motion only seven days after it was filed, much of the evidence that could have been included in the lower court record is missing. Defendant filed its motion for summary disposition on August 14, 2012, with the hearing set for September 7, 2012. Plaintiff was not required to file and serve his response to the motion until August 31, 2012.

See *MCR 2.116(G)(1)(a)(ii)*. But the trial court denied defendant's motion on August 20, 2012, before plaintiff could file a response explaining its argument or submitting evidence to support his claims. As a result, the exhibits attached to plaintiff's brief [*13] on appeal cannot be considered because they were not included in the lower court record. *In re Rudell Estate, 286 Mich App 391, 405; 780 NW2d 884 (2009)*.

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

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

/s/ Christopher M. Murray

/s/ [*14] Joel P. Hoekstra

/s/ Kurtis T. Wilder

End of Document

⁶ No factual development is necessary to consider defendant's motion on the pleadings pursuant to *MCR 2.116(C)(8)*, but reversal on this basis is not warranted. Plaintiff alleged that the sidewalk on which Ali fell was "defective, broken, uneven, and misleveled[.]" having a "vertical height differential of greater than two inches" Thus, plaintiff alleged sufficient "facts warranting the application of an exception to governmental immunity." *Codd v Wayne Co, 210 Mich App 133, 134-135; 537 NW2d 453 (1995)*.

Approved, SCAO

Original - Court
1st copy - Defendant

2nd copy - Plaintiff
3rd copy - Return

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

Court address: 1200 N. Telegraph Road, Pontiac, MI 48341
Court telephone no.: (248) 856-1000

Plaintiff's name(s), address(es), and telephone no(s):
JENNIFER BISHL

Plaintiff's attorney, bar no., address, and telephone no.:
MAC, PLLC
Matthew Bedikian (P75312)
2000 Town Center, Suite 1900
Southfield, MI 48075
248-957-0456

Defendant's name(s), address(es), and telephone no(s):
CITY OF OAK PARK

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

- You are being sued.
- YOU HAVE 21 DAYS** after receiving this summons to file a written answer with the court and serve a copy on the other party or take other lawful action with the court (28 days if you were served by mail or you were served outside this state). (MCR 2.113(C))
- If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

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

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

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

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

Family Division Cases

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

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

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

Docket no.	Judge	Bar no.
------------	-------	---------

General Civil Cases

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

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

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

Docket no.	Judge	Bar no.
------------	-------	---------

VENUE

Plaintiff(s) residence (include city, township, or village) Oakland County, Michigan	Defendant(s) residence (include city, township, or village) Oakland County, Michigan
Place where action arose or business conducted Oakland County, Michigan	

01/31/2017
Date _____
Signature of attorney/plaintiff _____

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

MC 01 (5/15) SUMMONS AND COMPLAINT MCR 2.102(B)(1); MCR 2.104, MCR 2.105, MCR 2.107, MCR 2.113(C)(2)(a), (b), MCR 3.205(A)

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

Received for Filing Oakland County Clerk 8/9/2017 12:31 PM

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

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

JENNIFER BUHL,

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

Plaintiff,

Hon.
2017-157097-NI
JUDGE PHYLLIS MCMILLEN

v.

CITY OF OAK PARK,

Defendant.

MICHIGAN ADVOCACY CENTER, PLLC

By: Matthew Edward Bedikian (P75312)

2000 Town Center, Suite 1900

Southfield, MI 48075

248.957.0456

matt@miadvocacycenter.com

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

COMPLAINT AND DEMAND FOR JURY TRIAL

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

COMMON ALLEGATIONS

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

Received for Filing Oakland County Clerk 8/9/2017 12:31 PM

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

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

4. Governmental immunity does not apply because:
 - a. MCL 691.1402a establishes Plaintiff's cause of action, with notice having been served on Defendant on June 28, 2016, in accordance with MCL 691.1404, and
 - b. The facts of this case constitute a defective sidewalk and nuisance per se, created and maintained by Defendant.
5. The sidewalk in question runs parallel to Nine Mile Road, in the City of Oak Park, Oakland County Michigan and is under the exclusive jurisdiction and direct control of the Defendant City of Oak Park.
6. At approximately 4:30 pm, Plaintiff sustained injuries when she tripped over a sidewalk located right out front of 8580 W. Nine Mile Rd., Oak Park, MI 48237. The sidewalk had a vertical discontinuity defect of more than two inches.
7. The condition of the sidewalk has deteriorated over time and was severely in need of maintenance, repairs and resurfacing, or reconstruction.
8. The Defendant had actual and constructive notice of this defect 30 days prior to the Plaintiff's fall.
9. All relevant times, Defendant had a duty created by MCL 691.1402a to maintain the sidewalk in a reasonable repair and in a condition so that it was reasonably safe and fit for public travel.

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

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

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

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

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

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

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

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

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

- a. fracturing of the left ankle;
- b. physical pain and suffering;
- c. loss of social, household, and recreational activities;
- d. mental anguish;
- e. medical expenses past, present, and future;
- f. out of pocket incident related expenses;
- g. wage loss or actual future loss of earnings;
- h. and other damages, injuries, and consequences related to the accident and that develop during the course of discovery.

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

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian
Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
2000 Town Center, Suite 1900
Southfield, MI 48075
248-957-0456
matt@miadvocacycenter.com

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

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: January 31, 2017

Respectfully Submitted,
MICHIGAN ADVOCACY CENTER, PLLC

/s/ Matthew Bedikian

Matthew Edward Bedikian (P75312)
Attorneys for Plaintiff
2000 Town Center, Suite 1900
Southfield, MI 48075
248-957-0456
matt@miadvocacycenter.com

Received for Filing Oakland County Clerk 8/9/2017 12:31 PM

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

EXHIBIT E

THE INSURANCE CODE OF 1956 (EXCERPT)
Act 218 of 1956

500.3112 Persons to whom personal protection insurance benefits payable; claim to recover overdue benefits; discharge of insurer's liability.

Sec. 3112. Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his or her death, to or for the benefit of his or her dependents. A health care provider listed in section 3157 may make a claim and assert a direct cause of action against an insurer, or under the assigned claims plan under sections 3171 to 3175, to recover overdue benefits payable for charges for products, services, or accommodations provided to an injured person. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled to the benefits, the insurer, the claimant, or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:

(a) To the dependents of the injured person, the personal protection insurance benefits accrued before his or her death without appointment of an administrator or executor.

(b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

History: Add. 1972, Act 294, Eff. Mar. 30, 1973;—Am. 2019, Act 21, Imd. Eff. June 11, 2019.

Compiler's note: Enacting section 1 of Act 21 of 2019 provides:

"Enacting section 1. Section 3112 of the insurance code of 1956, 1956 PA 218, MCL 500.3112, as amended by this amendatory act, applies to products, services, or accommodations provided after the effective date of this amendatory act."

Popular name: Act 218

Popular name: Essential Insurance

Popular name: No-Fault Insurance

EXHIBIT F

GOVERNMENTAL LIABILITY FOR NEGLIGENCE (EXCERPT)
Act 170 of 1964

691.1401 Definitions.

Sec. 1. As used in this act:

- (a) "Governmental agency" means this state or a political subdivision.
- (b) "Governmental function" means an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority, as directed or assigned by his or her public employer for the purpose of public safety.
- (c) "Highway" means a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.
- (d) "Municipal corporation" means a city, village, or township or a combination of 2 or more of these when acting jointly.
- (e) "Political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.
- (f) "Sidewalk", except as used in subdivision (c), means a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel.
- (g) "State" means this state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces. State includes a public university or college of this state, whether established as a constitutional corporation or otherwise.
- (h) "Township" means a general law township or a charter township.
- (i) "Volunteer" means an individual who is specifically designated as a volunteer and who is acting solely on behalf of a governmental agency.

History: 1964, Act 170, Eff. July 1, 1965;—Am. 1986, Act 175, Imd. Eff. July 7, 1986;—Am. 1999, Act 205, Imd. Eff. Dec. 21, 1999;—Am. 2001, Act 131, Imd. Eff. Oct. 15, 2001;—Am. 2012, Act 50, Imd. Eff. Mar. 13, 2012.

Compiler's note: Section 3 of Act 175 of 1986 provides:

"(1) Sections 1, 7, and 13 of Act No. 170 of the Public Acts of 1964, as amended by this amendatory act, being sections 691.1401, 691.1407, and 691.1413 of the Michigan Compiled Laws, shall not apply to causes of action which arise before July 1, 1986.

"(2) Section 6a of Act No. 170 of the Public Acts of 1964, as added by this amendatory act, shall apply to cases filed on or after July 1, 1986."

In *Hyde v. University of Michigan Regents*, 426 Mich 223 (1986), the Supreme Court stated that "1986 PA 175 was enacted, effective July 1, 1986." Act 175 was approved by the Governor July 6, 1986, and filed with Secretary of State July 7, 1986.

Enacting section 1 of Act 205 of 1999 provides:

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

Enacting section 1 of Act 131 of 2001 provides:

"Enacting section 1. The provisions of this amendatory act do not limit or reduce the scope of a governmental function as defined by statute or common law."

Popular name: Governmental Immunity Act

EXHIBIT G

HOUSE BILL No. 4686

June 4, 2015, Introduced by Reps. Santana, Durhal, Byrd, Gay-Dagnogo, Banks and Garrett
and referred to the Committee on Judiciary.

A bill to amend 1964 PA 170, entitled

"An act to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers, employees, and volunteers and for paying damages sought or awarded against them; to provide for the legal defense of public officers, employees, and volunteers; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal acts and parts of acts,"

by amending section 2a (MCL 691.1402a), as amended by 2012 PA 50.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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

1 maintain the sidewalk in reasonable repair.

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

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

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

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

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

19 (5) **IN A CIVIL ACTION, A MUNICIPAL CORPORATION THAT HAS A DUTY**
20 **TO MAINTAIN A SIDEWALK UNDER SUBSECTION (1) MAY ASSERT, IN ADDITION**
21 **TO ANY OTHER DEFENSE AVAILABLE TO IT, ANY DEFENSE AVAILABLE UNDER**
22 **THE COMMON LAW WITH RESPECT TO A PREMISES LIABILITY CLAIM,**
23 **INCLUDING, BUT NOT LIMITED TO, A DEFENSE THAT THE CONDITION WAS**
24 **OPEN AND OBVIOUS.**

25 (6) ~~(5)~~—A municipal corporation's liability under subsection
26 (1) is limited by section 81131 of the natural resources and
27 environmental protection act, 1994 PA 451, MCL 324.81131.

EXHIBIT H

HOUSE BILL No. 4686

June 4, 2015, Introduced by Reps. Santana, Durhal, Byrd, Gay-Dagnogo, Banks and Garrett and referred to the Committee on Judiciary.

A bill to amend 1964 PA 170, entitled

"An act to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers, employees, and volunteers and for paying damages sought or awarded against them; to provide for the legal defense of public officers, employees, and volunteers; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal acts and parts of acts,"

by amending section 2a (MCL 691.1402a), as amended by 2012 PA 50.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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

HOUSE BILL No. 4686

1 maintain the sidewalk in reasonable repair.

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

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

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

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

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

19 **(5) IN A CIVIL ACTION, A MUNICIPAL CORPORATION THAT HAS A DUTY**
20 **TO MAINTAIN A SIDEWALK UNDER SUBSECTION (1) MAY ASSERT, IN ADDITION**
21 **TO ANY OTHER DEFENSE AVAILABLE TO IT, ANY DEFENSE AVAILABLE UNDER**
22 **THE COMMON LAW WITH RESPECT TO A PREMISES LIABILITY CLAIM,**
23 **INCLUDING, BUT NOT LIMITED TO, A DEFENSE THAT THE CONDITION WAS**
24 **OPEN AND OBVIOUS.**

25 (6) ~~(5)~~ A municipal corporation's liability under subsection
26 (1) is limited by section 81131 of the natural resources and
27 environmental protection act, 1994 PA 451, MCL 324.81131.