STATE OF MICHIGAN

IN THE SUPREME COURT

JENNIFER BUHL,

Plaintiff-Appellant,

V

CITY OF OAK PARK,

Defendants-Appellees.

Michigan Supreme Court
Docket No. 160355

Court of Appeals
Docket No. 340359

Oakland Circuit Court
Case No. 2017-157097-NI

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Plaintiff-Appellant Jennifer Buhl's Reply Brief

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Table of Contents

Page

Index of Authorities

Page

Cases

Index of Authorities
(continued)

Page

Statutes

Other Authorities

Introduction

The threshold question is whether the 2017 amendment to MCL § 691.1402a(5) expresses a clear, direct, and unequivocal legislative intent to overcome the century-old presumption against retroactivity for statutory amendments. It does not. That presumption applies to all statutory schemes, including the GLTA. The phrase "in a civil action" merely delineates the type of action in which a municipality may raise the open and obvious defense; it does not speak to retroactivity. Indeed, the Legislature passed the 2017 amendment with full knowledge that the Court of Appeals had previously held the 2012 amendment to MCL § 691.1402a—which contains the same "in a civil action" language—to be prospective only. The contrary reading of that language urged by the City would upend more than 100 years of this Court's jurisprudence on retroactivity, particularly for statutes of limitation.

Additionally, the City spends much of its brief on a constitutional question that is not before the Court. Ms. Buhl has not argued that retroactive application of MCL § 691.1402a(5) would be unconstitutional, and the Court has not asked the parties to brief that issue. Because the 2017 amendment to MCL § 691.1402a(5) applies prospectively, the Court need not reach the constitutional issue. For these reasons, and those stated in Ms. Buhl's opening brief, the Court of Appeals and trial court's rulings should be reversed.

Argument

I. The City's argument inverts the presumption against retroactivity.

This Court's precedent is clear: "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). "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the

context of the statute itself." *Davis v State Employees' Ret Bd*, 272 Mich App 151, 155–156; 725 NW2d 56 (2006).

The City, however, repeatedly stands that presumption on its head. For example, the City asserts that "the long-standing rule" is that retroactive intent "may be inferred" where there is an "absence of a clearly manifested legislative intent." (City's Br., at 2). That is incorrect. Retroactive intent must be "clear, direct, and unequivocal." *Davis*, 272 Mich App at 156. In the absence of "clearly manifest[ed]" legislative intent, the presumption against retroactivity demands prospective-only application. *Johnson*, 491 Mich at 429. The City likewise argues that if the Legislature wanted the 2017 amendment to MCL § 691.1402a to apply prospectively, it "would have said so." The City asserts that the amendment applies retroactively because the Legislature "manifested no such [exclusive] prospective intent." (City's Br. at 14, 16, 17). But the presumption against retroactivity requires the opposite; namely, that any silent statute is presumed to be prospective-only. A statutory amendment is retroactive only when the Legislature explicitly makes it retroactive. *Johnson*, 491 Mich at 429.

The City also seems to suggest that the presumption against retroactivity does not apply to the GLTA. The City cites no authority for its argument, and Ms. Buhl has found none. The presumption against retroactivity applies to all statutory regimes, including the GLTA.

II. The phrase "in a civil action" says nothing about retroactivity.

The City argues that the phrase "in a civil action" is a clear manifestation of the Legislature's intent that the 2017 amendment to MCL § 691.1402a applies retroactively. The City's argument is wrong for several reasons.

First, the phrase "in a civil action" simply identifies the type of proceeding to which the statutory section applies. That is, the open and obvious defense applies "in a civil action," rather than in a criminal action or an administrative proceeding. The Legislature has

used the same language in other statutes to differentiate between defenses that may be raised in civil actions as opposed to in criminal actions or administrative proceedings. MCL § 451.2503, for example, provides that a different burden of proof applies to defenses if they are raised "[i]n a civil action or administrative proceeding" than if they are raised "[i]n a criminal proceeding." *Id.* Even the portions of the GTLA cited by the City reflect this differentiation. See MCL § 691.1408(1) & MCL § 691.1408(2) (differentiating between a "civil action" and a criminal proceeding). See also MCL § 445.69(5) (differentiating between a "civil action" and a criminal proceeding); MCL § 18.227(3) & (4) (same); MCL § 4.427 (same); MCL § 445.1715(1) (same); MCL § 333.16244(1) (same); MCL § 324.30112 (same); MCL § 287.744(2) (same); MCL § 224.30 (same).

When the Legislature uses the term "in a civil action," it is simply stating that the statute applies to civil lawsuits only. For example, MCL § 4.551 and MCL § 4.552 inoculate legislators from liability "in a civil action" and from being made parties to any "administrative proceeding," but say nothing about immunity for criminal acts. *Id*. That distinction was intentional. The phrase "in a civil action" in MCL § 691.1402a(5) likewise identifies the type of proceeding in which the defense applies. It says nothing about retroactivity.

Additionally, because the phrase "in a civil action" is in the body of the statute and not in the "Enacting Section" of the underlying public act, it does not speak to retroactivity. Ordinarily, when the Legislature intends a statute to apply retroactively, it makes statements regarding retroactivity in the "Enacting Section" of the relevant Public Act.[1] For example, 2016 PA 15 provides in relevant part,

[1] According to the Legislature's website, "Enacting Section" means "Those sections of a bill which establish effective dates, repeals, tie bars, or other conditions on effectiveness of the legislation. Enacting sections appear at the end of the bill." "Glossary of Legislative Terms," Michigan Legislature, available at

> Enacting section 1. This amendatory act applies retroactively to all judgments entered after May 6, 2015.
>
> This act is ordered to take immediate effect.

Id. If the Legislature intended the January 2017 amendment to MCL § 691.1402a to apply retroactively, it would have said so explicitly in the "Enacting Section" of 2016 PA 419. But the Enacting Section contains no statement regarding retroactivity except to say that the amendment takes immediate effect. *Id*. That directive suggests the amendment is prospective-only.

Second, the City fails to identify any authority supporting its assertion that the phrase "in a civil action" is a clear, direct, and unequivocal statement of retroactive intent. Numerous cases have explained that, when the Legislature wants to make its intent clear, it knows the right words to do so. See, e.g., *Johnson*, 491 Mich at 431–432; *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001); *Davis*, 272 Mich App at 156. The phrase "in a civil action" has never been identified as a phrase that speaks to retroactivity.

In fact, when the Legislature passed the January 2017 amendment to MCL § 691.1402a, it knew that the Court of Appeals had held that an earlier amendment to MCL § 691.1402a that also contained the phrase "in a civil action" applied only prospectively. See *Moraccini v City of Sterling Hts*, 296 Mich App 387, 389 n.1; 822 NW2d 799 (2012); *Lewis v Dept of Transportation*, unpublished per curiam opinion of the Court of Appeals, issued September 10, 2013 (Docket Nos. 307672 & 311528) (App. 208a). The language of that amendment—2012 PA 50—uses the identical "in a civil action" language that the City now contends is dispositive of retroactive intent: "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 . . . ." 2012 PA 50; see MCL § 691.1402a(3). In other words, the Legislature

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http://www.legislature.mi.gov/(S(wjyh5ncj33mkt1pvwhneiosv))/mileg.aspx?page=glossary#E) (last visited October 6, 2020).

included the phrase "in a civil action" in the January 2017 amendment to MCL § 691.1402a, knowing that the courts had already held that the previous amendment to the same statute, with precisely the same language, applied only prospectively. The City's argument asks this Court to hold that, in January 2017, the Legislature used the same words to mean the opposite of what the courts had just held they meant. See *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016) (the Legislature is presumed to know existing law when it legislates).

The City also fails to substantively respond to the argument that interpreting the phrase "in a civil action" as embodying a mandate about retroactivity would upend a century of this Court's statute-of-limitations jurisprudence. When a statute applies "prospectively" after its enactment, it applies only to causes of action that have not yet accrued. It does not apply to causes of action that have already accrued. *Farris v Beecher*, 85 Mich App 208, 214; 270 NW2d 658 (1978). As explained in Ms. Buhl's opening brief, this Court has held for a century that the question of retroactivity turns on the date on which a claim accrued, not on the date on which the plaintiff made it to the courthouse. (Buhl Br. at 13, 29-31). And for just as long, this Court has applied the same retroactivity principles to both statutes of limitations and defective sidewalk laws. See *Angell v City of W Bay City*, 117 Mich 685, 688–689; 76 NW 128 (1898) (amendment to defective-sidewalk ordinance did not apply retroactively, analogizing to statutes-of-limitations principles).

The City, however, argues that the January 2017 amendment to MCL § 691.1402a applies not only to causes of action that have already accrued, but also to lawsuits that were pending when the amendment was passed—and potentially also to lawsuits in which a judgment had already been entered, thereby allowing the City to "seek[] relief from . . . judgment[s]" that were previously entered. (City's Br. at 11 n.6). That is a remarkably sweeping interpretation of

the phrase "in a civil action." If this Court accepts the City's position, the Court's century-old retroactivity jurisprudence in the statute-of-limitations context will be upended.

The City addresses almost none of the cases cited in Ms. Buhl's opening brief. The decision in *Farris*, for example, explains that a "prospective" statute applies only to causes of action that accrue after the effective date of the statutory amendment, not to causes of action that accrued before the effective date of the amendment but have not yet been filed or remain pending. *Farris*, 85 Mich App at 214. The court reached this conclusion despite the fact that the relevant statutory amendment required the new limitations period to be applied in an "action": "An action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed . . ." *Id*. at 212 (quoting amendment).

Instead of confronting the authority cited by Ms. Buhl, the City relies solely upon the decision in *Franks v White Pine Copper Div, Copper Range Co*, 422 Mich 636, 650; 375 NW2d 715 (1985). But *Franks* did not involve the phrase "in a civil action." It involved an amendment to the State's workers' compensation scheme, which used different language. See *Franks*, 422 Mich at 650. This Court's decision in *Franks* therefore does not apply here. And in any event, even the justice who wrote the decision in *Franks* later recognized that its analysis employed an "incorrect methodology" and voted to reconsider the decision. *Chambers v Gen Motors Corp*, 424 Mich 1202, 1203; 389 NW2d 685 (1985) (Boyle, J., dissenting from denial of rehearing). See also *Romein v Gen Motors Corp*, 168 Mich App 444, 449–50; 425 NW2d 174 (1988) (noting reaction to *Franks*). The City has failed to identify any authority supporting its expansive interpretation of the phrase "in a civil action."

III. The *LaFontaine* factors require prospective-only application.

The City does not spend much time on the relevant retroactivity factors, likely because they all cut in favor of Ms. Buhl. A few points, however, are in order.

First, the City has not identified any "clear" and "unmistakable" statutory language directing retroactive application. As indicated above, when the Legislature wants to make an amendment apply retroactively, it knows the words to say. And as this Court has explained, "a requirement that the Legislature make its intention clear helps ensure that the Legislature itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Frank W Lynch*, 463 Mich at 587 (cleaned up). Absent that sort of explicit statement of intent, this Court appropriately presumes prospective-only application.

Second, the City argues that the January 2017 amendment to MCL § 691.1402a was not a substantive change in the law because it was intended to "clarify" rather than "substantively alter" the statute. But *People v Sheeks*, 244 Mich App 584, 590; 625 NW2d 798 (2001), on which the City relies, does not support the City's argument. In *Sheeks*, the Legislature clarified that the statutory identification of equipment used for "normal" farming operations meant equipment that was "required, designed, and intended" for farming operations. *Id*. at 590. Here, by contrast, the January 2017 amendment to MCL § 691.1402a did not simply clarify ambiguous terms; instead, it added an entirely new affirmative defense to the statute.

In any event, the rule noted in *Sheeks* applies only where "a legislative amendment is enacted soon after a controversy arises regarding the meaning of an act." *Adrian Sch Dist v Mich Pub Sch Employees Ret Sys*, 458 Mich 326, 337; 582 NW2d 767 (1998). Here, the January 2017 amendment to MCL § 691.1402a was enacted 20 years after the courts ruled that municipalities could not assert the open and obvious defense to defective-sidewalk claims. See *Walker v City of Flint*, 213 Mich App 18, 23; 539 NW2d 535 (1995). *Sheeks* does not apply.

The City similarly claims that the January 2017 amendment to MCL § 691.1402a was merely remedial rather than substantive. But the mere fact that the amendment may have

been enacted in response to *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002), does not mean that it is not a substantive change in the law. An amendment that adds an affirmative defense to a statute effects a substantive change in the statute and affects a plaintiff's substantive rights. See *Brewer v AD Transp Exp, Inc*, 486 Mich 50, 57; 782 NW2d 475 (2010); *Frank W Lynch*, 463 Mich at 585; *People v Kolanek*, 491 Mich 382, 405; 817 NW2d 528 (2012); *Macklis v Farm Bureau Gen Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued Apr 25, 2017 (Docket No. 330957), p 2. (App. 214a). Clearly, the City believes that *Jones* was wrongly decided in the first place. (City's Br. at 19-21 & nn.10-12). But the City cannot escape the fact that the Legislature changed the substance of MCL § 691.1402a.

To the extent that the City claims that the term "substantive rights" is synonymous with "vested rights," it is incorrect. (City's Br. at 29 n.18). When this Court uses different words, it generally means different things. "Substantive rights are essential rights that affect the outcome of a lawsuit and can be protected or enforced by law." *Macklis*, unpub op at 2. (App. 214a). As this Court's statute-of-limitations jurisprudence demonstrates, "substantive rights" is a broader category than "vested rights." (Buhl Br. at 12-14). "[T]he presumption against statutory retroactivity is not restricted to actions involving vested rights." *Davis*, 272 Mich App at 158. It also applies where a statute "attaches new disabilities concerning transactions or considerations occurring in the past." *Id*. The City's attempt to equate the two categories conflates *LaFontaine* factor four with factor three, just as the Court of Appeals did. (Buhl Br. at 16-18).

IV. Whether the amendment is constitutional is not at issue in this appeal.

Finally, the City spends a substantial portion of its brief attacking a straw-person argument. Ms. Buhl has not argued that retroactive application of the amendment would be unconstitutional, and this Court has not asked the parties to brief that question. The threshold

issue is whether the Legislature intended the statutory amendment to apply retroactively. The answer to that question is no, so this Court need not reach the constitutional question.

The City asserts that Ms. Buhl's brief confuses the issues by considering under the *LaFontaine* factors the effect that an amendment has on an accrued cause of action instead of treating this as a constitutional question. But this is the proper analysis. The third *LaFontaine* factor requires inquiry of whether the statutory amendment "impair[s] vested rights acquired under existing laws or create[s] new obligations or duties with respect to transactions or considerations already past." *LaFontaine Saline, Inc v Chrysler Grp, LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014). Where a statutory amendment eliminates an accrued cause of action (for example, by an amended statute of limitations), the plaintiff's substantive rights are affected under the third *LaFontaine* factor. *Davis*, 272 Mich App at 160–161. The constitutional question is a separate inquiry.

The City also incorrectly asserts that a plaintiff can never have a vested right to a claim against a governmental entity. In the City's view, immunity is a matter of right, such that the governmental entity can re-assert its immunity at any point, no matter how far litigation of an accrued cause of action has proceeded. This Court, however, has ruled precisely the opposite, holding that a plaintiff has "a vested right" in a cause of action against the State when her cause of action accrues, such that it cannot be taken away by the State's subsequent decision to re-assert immunity to limit the claim. *Minty v State*, 336 Mich 370, 394–97; 58 NW2d 106 (1953).

In any event, as explained in *Davis*, a statute does not operate retroactively even if it does not affect vested rights, so long as it "attaches new disabilities concerning transactions or considerations occurring in the past." *Davis*, 272 Mich App at 158. That is the case here.

Conclusion

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

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