RECEIVED by MSC 10/24/2024 5:31:47 PM

STATE OF MICHIGAN
IN THE SUPREME COURT
(Gadola, C.J., K.F. Kelly and Mariani, JJ.)

JAN BOWERMAN,

Plaintiff-Appellant,

v.

RED OAK MANAGEMENT CO., INC., and WESTVELD SERVICES, LLC,

Defendants-Appellees.

MSC No.

COA No. 366338

Montcalm County Circuit Court
Circuit Case No. 22-S-28824-NO

Filed under AO 2019-6

Plaintiff-Appellant's Application for Leave to Appeal

Christopher Patrick Desmond (P71493)
Ven Johnson Law, PLC

The Buhl Building
535 Griswold Street, Ste 2600
Detroit, MI 48226
313-324-8300
CDesmond@VenJohnsonLaw.com

Counsel for Plaintiff-Appellant

Date: October 24, 2024

RECEIVED by MSC 10/24/2024 5:31:47 PM

TABLE OF CONTENTS

Index of Authorities 3

Order Appealed from and Need for Review 5

Statement of the Questions Involved 10

Statement of Facts 11

Standard of Review 21

Argument 22

I. The Court of Appeals erred in concluding that there were no genuine issues of material fact regarding whether Defendant Westveld breached the duty owed to Plaintiff 22

II. The Court of Appeals erred in concluding that there were no genuine issues of material fact related to whether the common area was fit for its intended use, as required by statute 25

Conclusion and Relief Requested 30

RECEIVED by MSC 10/24/2024 5:31:47 PM

INDEX OF AUTHORITIES

Allison v AEW Capital Mgmt, LLP.,
481 Mich 419 (2008) 18, 26

Autry v Allstate Ins Co,
130 Mich App 585 (1983) 27

Benton v Dart Properties, Inc,
270 Mich App 437 (2006) 22

Bertrand v Alan Ford, Inc,
449 Mich 606 (1995) 21

Clark v Dalman,
379 Mich 251 (1967) 23

Davis v Venture One Constr, Inc,
568 F3d 570 (CA 6, 2009) 23

Estate of Trueblood v P&G Apartments, LLC.,
327 Mich App 275 (2019) 26, 28

Finazzo v Fire Equipment Co,
323 Mich App 620 (2018) 22-24

Hadden v McDermitt Apartments, LLC,
287 Mich App 124 (2010) 26

Hart v Ludwig,
347 Mich 559 (1956) 23

Kandil-Elsayed v F&E Oil, Inc,
___ Mich ___; ___ NW2d ___ (2023) (MSC No. 162907) 6, 18, 22

Lakeview Commons v Empower Yourself, LLC,
290 Mich App 503 (2010) 28

Loweke v Ann Arbor Ceiling & Partition Co, LLC,
489 Mich 157 (2011) 23

Lugo v Ameritech Corp, Inc,
464 Mich 512 (2001) 6, 18

Maiden v Rozwood,
461 Mich 109 (1999) 21

Rinaldo's Constr v Mich Bell Tel Co,
454 Mich 65 (1997) 23

Sedlecky v. Sun Communities, Inc.,
unpublished opinion of the Court of Appeals (Case No. 348520) 26

Smith v Anonymous Joint Enterprise,
487 Mich 102, 130; 793 NW2d 593 (2010) 22

Stone v Boulder Creek Apts., LLC,
unpublished opinion of the Court of Appeals (Case No. 346252) 28

Ward v Frank's Nursery & Crafts,
186 Mich App 120 (1990) 27, 29

West v Gen Motors Corp,
469 Mich 177 (2003) 22

RECEIVED by MSC 10/24/2024 5:31:47 PM

RECEIVED by MSC 10/24/2024 5:31:47 PM

ORDER APPEALED FROM AND NEED FOR REVIEW

This cause of action arises out of a trip and fall accident and an apartment complex that is specifically reserved for elderly and disabled tenants. Plaintiff, Jan Bowerman, was 75 years old at the time of the events in question. She resided at Stanton Park Apartments, in Stanton, Michigan. The apartment complex was operated by Defendant Red Oak Management.

In the fall of 2021, Red Oak contracted with Defendant Westveld Services, LLC, to perform improvements to certain areas of concrete within the common areas of the complex. Included within that work was the excavation and replacement of sidewalks and walkways, as well as the creation of a concrete pad, situated in the parking lot, which would support a trash dumpster for the residents. As is described in detail below, in creating that concrete pad, Westveld dug a trench at the front of the pad that was approximately ten feet long and that was supposed to ultimately be filled in when all of the concrete work was complete. While other trenches that were created elsewhere in the complex were filled with sand or surrounded by caution tape until they could be permanently filled with concrete, the trench in front of the concrete pad was not.

In the early hours one morning after Westveld had stopped all work at the complex, Ms. Bowerman was attempting to take her trash to the garbage dumpster. While she had walked to the dumpster during the course of the ongoing construction, she had never done so when it was dark outside. Not able to use the sidewalks that had been excavated or that were taped off, Ms. Bowerman had to take a route that led through a dark, poorly illuminated parking lot. She found herself in front of the of concrete pad, unable to see the unguarded trench that blended into the darkness. She fell as she encountered the trench and suffered serious injury.

Plaintiff brought suit as a result of the injuries caused by her fall. She alleged that Defendant Red Oak was liable for violating the terms of MCL 554.139, which requires that landlords maintain their common areas so that they are fit for their intended purposes and that a premises be maintained in reasonable repair. Plaintiff also alleged a claim of

RECEIVED by MSC 10/24/2024 5:31:47 PM

ordinary negligence against Westveld, asserting that Westveld breached its duty of reasonable care when it created the trench in question and abandoned its ordinary safety practices by failing to fill the trench or otherwise guard against falls through the use of caution tape or safety cones.

Following discovery, Defendants each moved for summary disposition. Defendant Red Oak contended that the walkway that led to the dumpster was fit for its intended use and that Plaintiff was aware of the existence of the trench and simply failed to use due care prior to her fall. Westveld, for its part, asserted that it was entitled to invoke the open and obvious doctrine in response to Plaintiff's ordinary negligence claim and that said doctrine obviated any duty owed to Plaintiff under these circumstances. Over Plaintiff's opposition, the circuit court agreed and granted summary disposition to each Defendant.

Plaintiff appealed as of right. The Court of Appeals, in a 2-1 decision, affirmed the grants of summary disposition. Bowerman v Red Oak Management Co, Inc, unpublished opinion of the Court of Appeals, issued September 12, 2024 (Docket No. 336338). Most notably, the majority acknowledged that the Circuit Court erred in permitting Westveld to invoke the open and obvious doctrine where that party was not in possession or control of the premises at the time of the fall. Moreover, while this case was pending on appeal, this Court issued its opinion in *Kandil-Elsayed v F&E Oil, Inc*, ___ Mich ___; ___ NW2d ___ (2023) (MSC No. 162907), which explicitly overruled its previous decision in *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001) and dramatically changed the application of the open and obvious concept. The majority, however, held that summary disposition was nonetheless proper, reasoning that no reasonable finder of fact could conclude that Defendant Westveld breached the duty it owed to Plaintiff.

Regarding Defendant Red Oak, the majority held that the area in question was fit for its intended purpose and that Plaintiff was not entitled to any remedy under the applicable statutory authority. The majority focused not on the fact that this development is intended for the elderly and disabled and that accessing the dumpster required Plaintiff to navigate a dark parking lot that featured an unguarded, unapparent trench. Instead, the majority concluded that because

RECEIVED by MSC 10/24/2024 5:31:47 PM

Plaintiff had previously made it to the dumpster without incident in the light, the hazardous nature of the lot amounted to nothing more than a mere inconvenience that did not create a right to a cause of action.

Judge Mariani dissented in all regards. In a thorough, well-reasoned opinion, he explained that there were genuine issues of material fact that necessitated denial of both Defendants' motions. He explained that

> to reach the dumpster while avoiding the worksite and its recently poured concrete slab, tenants like plaintiff had to take a parabolic course around the concrete slab and the 10-foot trench that ran along its front side. It is undisputed that there were no visual aids installed to warn tenants of the trench's location, such as cones or caution tape. And the photographs also show that, in the dark—the time when plaintiff fell—the concrete slab was visible, but the trench itself was dark like the asphalt and difficult to see. This was further supported by the findings of plaintiff's expert, who opined that parking lots should have 0.5 foot candles of lighting in order to be considered safe for walking for tenants such as plaintiff and whose site investigation, which occurred in conditions similar to when plaintiff fell, yielded a reading of 0.0 foot candles at the location of her fall.
>
> Evidence of record thus shows that tenants of Red Oak's apartment complex like plaintiff—who were necessarily senior citizens and/or individuals with disabilities—had to navigate around the trench in order to access the dumpster without crossing the worksite. And the evidence further shows that the visibility in that area after dark was low, and that there were no visual aids to demarcate the trench from the asphalt. Given these circumstances, I believe that, at minimum, reasonable minds could differ as to whether Red Oak discharged its obligation to ensure that the trash disposal area was fit for the use intended by the parties.

RECEIVED by MSC 10/24/2024 5:31:47 PM

Turning to Westveld, Judge Mariani concluded that reasonable finders of fact could conclude that Westveld breached its duty under a negligence theory where

> Westveld was responsible for creating the trench at issue and for placing the dumpster on the grassy area neighboring the concrete slab. Testimony from Westveld's owner and operator established that the company ordinarily puts out caution tape and cones to warn of conditions like the trench but failed to do so for this trench. He also testified that the company filled in other trenches around the parking lot with sand or asphalt milling but failed to do so for this trench. And he admitted that this trench was a potential trip hazard.

Consequently, Judge Mariani would have reversed the grant of summary disposition as to both Defendants.

Pursuant to MCR 7.305(H)(1), this Court has the inherent ability to issue an order peremptorily reversing the decision of the Court of Appeals. Plaintiff respectfully submits that this Court should do so on the basis of the reasoning set forth in Judge Mariani's dissent. As is set forth in more detail below, the majority in the Court of Appeals substituted its judgment for that of a jury, resolving factual disputes and inserting its own view of reasonableness instead of recognizing that other reasonable minds could disagree. The majority failed to view the evidence in the light most favorable to Plaintiff and misapplied precedent of both this Court and the Court of Appeals when erroneously affirming the trial court. The nature of the error is evident on the surface of the opinion and reversal would be warranted and proper without an invocation of this Court's full jurisdiction.

Should this Court elect to not peremptorily reverse on the basis of the reasoning set forth in Judge Mariani's dissenting opinion, it should instead grant this application for leave to appeal to give the issues presented herein full consideration. Pursuant to MCR 7.305(B)(5), this Court may grant an application for leave to appeal where "(a) the decision is clearly erroneous and will cause material injustice, or (b) the decision conflicts with a Supreme Court decision or another decision of

RECEIVED by MSC 10/24/2024 5:31:47 PM

the Court of Appeals…" Both concepts apply in this instance. The majority decision is clearly erroneous as a result of its misapplication of both the standard of review and the binding case law relative to whether a common area was fit for its intended purpose or a party breached a duty that exists under law. That misapplication of the law has resulted in a material injustice. This is a straightforward dispute in which each of these Defendants possessed a duty under the law and are simply arguing that Plaintiff is to blame for her own injury because she was not careful enough in the moments prior to her fall. While the record in no way supports that argument, that argument is not one that should have been decided by any court as a matter of law. Peeled back to their cores, Defendants arguments here are simple comparative fault arguments. Since 1979, those arguments have been properly addressed by juries through our allocation of fault statute and jury instructions.

Plaintiff is cognizant that this Court is not merely an error correcting court and that it generally seeks issues of jurisprudential significance when invoking its jurisdiction. But where, as here, an opposing party's best argument is that "this case is not important enough for this Court to consider," the resulting injustice is not just harmful to the present litigants. Yes, Jan Bowerman has suffered greatly as the conduct of these Defendants and she is entitled to the relief afforded to her under the law. But equally important, where our lower courts fundamentally and obviously err, a failure to address that error will only lead to more individuals like Ms. Bowerman suffering needless injury.

For the reasons fully set forth below, Plaintiff respectfully requests that this Honorable Court peremptorily reverse the majority opinion of the Court of Appeals for the reasons set forth in the dissenting opinion. Alternatively, Plaintiff requests that this Court grant this application for leave to appeal to fully consider the arguments presented below.

RECEIVED by MSC 10/24/2024 5:31:47 PM

STATEMENT OF THE QUESTIONS INVOLVED

First Question:

Did the lower courts err in concluding that there were no genuine issues of material fact relating to whether Defendant Westveld breached the duty that it admittedly owed to Plaintiff under the law?

Plaintiff-Appellant answers: Yes.

Defendants-Appellees answer: No.

The Circuit Court answered: No.

The Court of Appeals answered: No

Second Question:

Did the lower courts err in concluding there were no genuine issues of material fact relative to whether the common areas at this apartment complex were fit for their intended purpose and were reasonably maintained, as required by our legislature?

Plaintiff-Appellant answers: Yes.

Defendants-Appellees answer: No.

The Circuit Court answered: No.

The Court of Appeals answered: No

RECEIVED by MSC 10/24/2024 5:31:47 PM

STATEMENT OF FACTS

On October 30, 2021, Ms. Jan E. Bowerman, a 75-year-old woman, was a tenant of Stanton Park Apartments located at 200 E. First St., Stanton, Michigan. Stanton Park Apartments is a 24-unit multi-family residential property for seniors over the age of 62 and those with physical disabilities. The single-story L-shaped building is located on a 2.33-acre parcel. The two legs of the building run along the north and east sides of the site. An asphalt surface parking lot is situated inside the two legs along the south and west faces of the building. Entrances are located on either end of the legs (west and south) and in the corner of the L. There is a concrete sidewalk along the edge of the parking lot and in front of the building. Sidewalks extend to the three entrances.

There is a concrete pad at the southern end of the parking lot, which is intended to support a trash dumpster for residents. There is a concrete sidewalk that connects the pad to the sidewalk in front of the building. Light posts are located along the sidewalk: two along the north leg, one in the corner, two along the east leg, one in the inside corner of the parking lot, and one next to where the sidewalk to the south entrance and the sidewalk along the edge of the parking lot meet.

Starting on or around October 14, 2021, Defendant Red Oak undertook a construction project, which involved removing and replacing sections of concrete sidewalk and replacing the concrete dumpster pad. Defendant Westveld was hired to perform the demolition, excavation, and replacement of the concrete flatwork. Westveld relocated the garbage dumpster to a grassy area at the south edge of the parking lot, to the west of the area where work was being performed. On or around October 21, 2021, nine days before this incident, Westveld completed their work and left the jobsite.

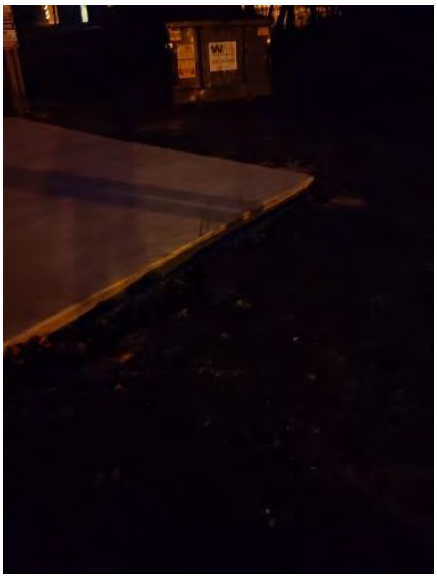
On October 30, 2021, Ms. Bowerman was taking out her trash at approximately 7:15 a.m. Sunrise in Stanton was at 8:13 a.m. on that day. While attempting to walk to the relocated dumpster, Ms. Bowerman stepped into a trench created by Westveld's excavation. She fell and was injured. Plaintiff testified as to how she fell as follows:

RECEIVED by MSC 10/24/2024 5:31:47 PM

> A. Well, that particular morning, I didn't wait. I looked out the side door, and I noticed that I could see the sidewalk. It was still dark, but there was still light on the sidewalk. I went down the sidewalk, and when I -- I knew I was going to have to go to the parking lot to miss some of the area, but – so I went out to the parking lot. And once I got in the middle of the parking lot, it was all black. I couldn't see, so then I spotted the dumpster. They had moved it off the patio slab it was on. I -- I seen that because it had like a reflector on it, and there was a little light coming from the trees from the streetlight. So I kept my eye on that dumpster, and I started walking toward it. And before -- before I knew it, my foot went right to the edge. At that time, I didn't know what it was, but it went right to the edge of that trash, and I fell right down -- right down in the hole. (Emphasis added) [App'x. p 056a.]

The area of Plaintiff's fall is depicted in the pictures below, which were taken on and around the time of the accident (App'x, pp 072a-075a). As those pictures demonstrate, while the freshly poured concrete slab was relatively visible even under low lighting conditions, the trench that Westveld created at the front of that pad essentially disappeared when darkness set it.





RECEIVED by MSC 10/24/2024 5:31:47 PM

The two photographs above were taken several days after the accident. The bottom right-hand photograph gives the reader a sense of the conditions of darkness at the time of accident. As a result of the accident, Ms. Bowerman suffered a displaced trimalleolar fracture of her right lower leg which had to be surgically repaired with plates and screws. Ms. Bowerman was confined to a wheelchair for 16 weeks and she was in cast for approximately 5 months. After the cast was removed, Bowerman was given a boot for 8 weeks and she had to use a walker for 2 months.

Ms. Bowerman was born February 7, 1946, and has been a tenant at Stanton Park Apartments since 2013. (App'x, pp 053a-054a). She testified that although she was aware of the trench in front of the concrete pad, she never – during the time that hazard existed – took her trash out at night or in the dark. (App'x, pp 065a, 068a.) Because of the darkness and the fact she could not see the trench in front of the garbage dumpster patio, Bowerman was required to take a parabolic course to the dumpster on the grassy area. She fell near the corner of the concrete pad, as a result of the trench. (App'x, pp 058a-059a)

Randy Westveld is the owner and operator of Defendant Westveld Services, LLC. (App'x, p 078a.) Westveld Services, LLC, was hired to perform the demolition, excavation, and replacement of the concrete flatwork. During that process, trenches that were created for their wood formwork were partially filled in with sand and asphalt millings. (App'x, p 079a-080a.) Mr. Westveld testified that:

- He always puts out caution tape and cones to warn of wet cement and other similar conditions. (App'x, p 080a.)
- He created the 10 foot long trench in front of the concrete pad that caused the accident. (App'x, p 081a.)
- Westveld relocated the dumpster to a grassy area at the south edge of the parking lot and to the west of and near the area where work was being performed. (App'x, p 081a.)
- Westveld filled in most of the trenches he created at the site with sand and/or asphalt millings, with the exception of the

RECEIVED by MSC 10/24/2024 5:31:47 PM

trench in front of the garbage dumpster patio. (App'x, pp 081a-082a.)

- The trench in front of the garbage dumpster patio where Plaintiff fell was a trip hazard. (App'x, p 084a.)

- Westveld's crew used caution tape at the end of each day, but did not use any such tape when leaving the jobsite at the completion of the project. (App'x, p 083a.)

Eric Koch is a "construction specialist" for Defendant Red Oak Management. He inspects and maintains 44 properties for Defendant Red Oak. The demographic that Stanton Park Apartments serves is disabled people and people over the age of 62. He has been in the construction industry since 2003 and was a licensed general contractor in the State of Michigan at the time of the incident. (App'x, pp 091a-092a.)

Koch was responsible for hiring and managing the contractors for the concrete sidewalk and dumpster pad replacement project. He testified that there were no discussions about the use of yellow caution tape before the start of the job. (App'x, pp 093a-094a.) He explained that Westveld filled in the trenches around the sidewalks but not the trench in front of the concrete pad where the accident happened. (App'x, p 094a.)

Koch inspected the work performed by Westveld on October 21, 2021. He stated that there were no cones or yellow caution tape placed around the unfinished construction project around the garbage dumpster patio where the accident happened. (App'x, p 095a). He testified that the trench in front of the garbage dumpster was a trip hazard and that yellow caution taped needed to be placed in that area. (App'x, p 095a.) Koch testified that orange cones and caution tape would make the trench near the concrete pad more obvious to a person. (App'x, p 097a.)

Albert Kerelis' is Plaintiff's construction and building expert. His CV is located at p 102a of Plaintiff's Appendix, which explains that Kerelis is a licensed architect in the State of Michigan and eight other states and is certified by the National Council of Architectural

RECEIVED by MSC 10/24/2024 5:31:47 PM

Registration Boards (NCARB). Mr. Kerelis is a residential property manager. He has earned the certification of Accredited Residential Manager (ARM) through the Institute of Real Estate Management (IREM). Mr. Kerelis is employed as a forensic architect and property management expert by Robson Forensic, Inc. and provides investigations, analysis, reports, and testimony toward the resolution of litigation involving personal injury (slip, trip and fall incidents), construction claims, property management standards, and other architectural and property management issues.

Mr. Kerelis's report is located at p 109a of Plaintiff's Appendix. In paragraph 13 on p 113a, Kerelis opines that: 1) the trench was inconspicuous in the underlit parking lot and was a dangerous trip hazard, 2) those responsible for the construction site should have known that not guarding against or providing warnings of the hazardous condition was dangerous to residents and; 3) the failure of those responsible for the construction site to prevent residents from encountering the trench did not meet the standard of care for construction site safety and exposed residents to the dangerous condition that caused Ms. Bowerman's fall and injury.

Mr. Kerelis was deposed on January 17, 2023. In his deposition, Mr. Kerelis elaborated upon his opinions found in his report, explaining that:

- There are standards set by the Illuminating Engineering Society and ASTM International which govern how much illumination there should be to safely walk in an asphalt parking lot. (App'x, p 120a.)

- The City of Stanton in its ordinances recognizes the standards created by the Illuminating Engineering Society of North America and based upon Bowerman's age of 75 at the time of the accident, this asphalt parking must have at least 0.5 foot candles of illumination everywhere in the parking lot in order to be considered safe to walk. (App'x, pp 121a-122a.)

- The area in which the fall occurred had a 0.0 foot candle reading, confirming that the parking was under lit compared to the safety

RECEIVED by MSC 10/24/2024 5:31:47 PM

standards outlined by the Illuminating Engineering Society of North America. (App'x, p 123a.)

- Stanton City Ordinance 192 incorporates BOCA 1990 Code Section 3006.0, which states that whenever a building or structure is erected, altered, removed or demolished, the operation shall be conducted in a safe manner and suitable protection for the general public shall be provided. (App'x, p 124a.)

- Reasonable safety measures suitable to protect the public would include caution tape and traffic cones. (App'x, pp 124a-125a.)

As a result of the events described above, Plaintiff brought suit against Both Westveld and Red Oak, along with a third Defendants, Bob's Asphalt Paving, Inc, which is no longer part of this litigation and is not involved in this appeal. Count I of Plaintiffs' complaint asserted that Red Oak was liable for violating the duties created by MCL 554.139, which obligate a landlord to ensure that all common areas are fit for their intended purposes. Count II of the Complaint alleged that Westveld was liable under general principles of negligence. As will be explained below, Plaintiff did not plead that Westveld was liable under a theory of premises liability as Westveld was not the owner or possessor of the property at issue. (App'x, pp 001a-008a.)

Following discovery, Westveld filed its motion for summary disposition on February 2, 2023 (beginning at App'x, p 031a). Westveld's motion argued that it was not liable because it did not owe Plaintiff any duty that was separate and distinct from its contractual obligations owed to Red Oak. Defendant further argued that to the extent that it did owe Plaintiff duties beyond those contractual obligations, it owed no duty here because the hazardous condition was open and obvious.

Defendant Red Oak filed its motion for summary disposition on February 22, 2023 (beginning at App'x, p 132a). Red Oak argued that for purposes of the statutory claim, the existence of the trench did not render the area in question unfit for its intended use, as Plaintiff could have avoided the hazard. Defendant further argued that the to the extent that the Court viewed Plaintiff's action as sounding in premises

RECEIVED by MSC 10/24/2024 5:31:47 PM

liability, the hazard open and obvious and Defendant therefore owed no duty to Plaintiff.

Plaintiff responded to Westveld on March 7, 2023 (beginning at App'x p 031a). In response, Plaintiff argued that Defendant owed Plaintiff a duty of reasonable care that was separate and distinct from its contractual duties. Plaintiff then argued that because Westveld was a mere contractor, it was not in possession or control of the premises and therefore could not shield itself with the open and obvious doctrine. Lastly, Plaintiff argued that even if Defendant could invoke the open and obvious doctrine, this hazard was not open and obvious and summary disposition was improper.

Plaintiff responded to Red Oak MSD on March 16, 2023 (beginning at App'x p 165a). In response, Plaintiff argued that summary disposition was improper regarding the statutory claim, as the trench (particularly when combined with the inadequate lighting conditions) rendered the pathway to the dumpster unfit9 for its intended purposes. Plaintiff supported that argument with expert testimony establishing that Defendant violated numerous code provisions in relation to its common areas. Plaintiff further argued that while they did not plead a premises liability claim against Red Oak, there was no scenario in which the open and obvious doctrine could operate to bar this action as the hazardous condition was not readily apparent under the conditions at issue.

The circuit court held a hearing on Defendants' motions for summary disposition on March 27, 2023 (transcript located at App'x, p 215a). The court first heard arguments regarding Red Oak's motion, followed by argument on the Westveld motion. In each argument the parties reiterated the positions from their briefs. The court did not issue a ruling from the bench and stated that it wanted to spend some additional time reviewing the arguments before it made its decision.

On May 10, 2023, the circuit court issued its opinion and order granting summary disposition to both Westveld and Red Oak. Regarding Red Oak, the court held that summary disposition was proper regarding Plaintiff's statutory claim because the law did not require that Defendant maintain the parking lot and the area near the dumpster in

RECEIVED by MSC 10/24/2024 5:31:47 PM

ideal condition. Rather, it simply had to be fit for its intended purposes. The court concluded that that area in question was fit for its intended purpose of being a parking lot. The court further concluded that none of the ordinance or code violations cited by Plaintiff precluded summary disposition as the municipality where this occurred did not adopt each of those ordinances and certain other ordinances were not implicated by these facts. Regarding Westveld, the court rejected Defendant's argument that it did not owe Plaintiff any duty separate and distinct from its contract. The court held that summary disposition was still proper, however, because the hazardous condition was open and obvious. The court concluded that despite being a mere contractor, Westveld was permitted to invoke the open and obvious doctrine and that doctrine precluded this cause of action. (App'x, pp 261a-270a.)

Following the grant of summary disposition, Plaintiff timely filed her claim of appeal. On appeal, Plaintiff argued that each Defendant was improperly granted summary disposition. Regarding Defendant Red Oak, Plaintiff asserted that there were genuine issues of material fact regarding whether the common area was fit for its intended use, as required by the applicable statutory authority. As to Westveld, Plaintiff argued that the trial court erred in extending the open and obvious doctrine to a party that was not in possession or control and the time of Plaintiff's fall. Plaintiff also argued that after the grant of summary disposition, in the trial court, this Court issued its opinion in *Kandil-Elsayed v F&E Oil, Inc*, ___ Mich ___; ___ NW2d ___ (2023) (MSC No. 162907), which explicitly overruled its previous decision in *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001). Because *Lugo* and the open and obvious doctrine formed the basis for the grant of summary disposition, Plaintiff argued that summary disposition had to be vacated (at a minimum) and that the case should be remanded for consideration in light of the new analytical framework set forth by this Court.

Following oral argument, the Court of Appeals issued its 2-1 opinion affirming the grants of summary disposition in favor of both Defendants. In holding that Red Oak was properly granted summary disposition, the majority relied on this Court's decision in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 430 (2008) and stated that

RECEIVED by MSC 10/24/2024 5:31:47 PM

> The *Allison* Court found that a lessor did not breach its duty to provide tenants reasonable access to their vehicles when it ensured entrances to and exits from the parking lot were clear. Similarly, Red Oak provided two entrances to and exits from the dumpster area that avoided the trench. Further, because plaintiff was also able to walk around the trench successfully many times, the trench was a mere inconvenience, which "will not defeat the characterization of a lot as being fit for its intended purposes." See *Allison*, 481 Mich at 430. The trial court did not err in concluding that the parking lot was fit for its intended use; it provided plaintiff with reasonable access to the dumpster, and thus Red Oak did not violate MCL 554.139(1)(a).

The majority then addressed Plaintiff's negligence claim against Westveld. First, the majority seemingly recognized that because Westveld was not in possession or control of the land at the time of the injury, the cause of action could not be properly characterized as sounding in premises liability. But, the majority then held that summary disposition was nonetheless proper, essentially concluding that no reasonable finder of fact could conclude that Westveld breached the duty it owed to Plaintiff:

> Here, Westveld had a common law duty to perform its work with ordinary care so as not to create an unreasonable risk of harm. But for many of the same reasons that the trial court found the trench to be open and obvious, defendant Westveld did not breach its general duty of ordinary care. First and foremost, plaintiff was aware of the hazard; she and others had safely accessed the dumpster for two weeks before plaintiff's fall. Plaintiff took detailed notes on the contractors' activities around the complex in the days leading up to her fall and was aware of the trench's existence and location. The concrete slab was visible even in the darkness, as is shown from the photograph plaintiff provided.

RECEIVED by MSC 10/24/2024 5:31:47 PM

Thus, the Court of Appeals determined that each Defendant was entitled to summary disposition and there were no material disputes that necessitated a jury's resolution.

Judge Mariani dissented. As it relates to the claim against Red Oak, Judge Mariani stated that there was a genuine issue of material fact regarding whether that party violated its statutory duty imposed by MCL 554.139(1)(a). He reasoned that the intend use of the area in question was to provide access to the dumpster specifically for senior citizens and persons with disabilities, as the complex exclusively housed such tenants. He then explained that

> to reach the dumpster while avoiding the worksite and its recently poured concrete slab, tenants like plaintiff had to take a parabolic course around the concrete slab and the 10-foot trench that ran along its front side. It is undisputed that there were no visual aids installed to warn tenants of the trench's location, such as cones or caution tape. And the photographs also show that, in the dark—the time when plaintiff fell—the concrete slab was visible, but the trench itself was dark like the asphalt and difficult to see. This was further supported by the findings of plaintiff's expert, who opined that parking lots should have 0.5 foot candles of lighting in order to be considered safe for walking for tenants such as plaintiff and whose site investigation, which occurred in conditions similar to when plaintiff fell, yielded a reading of 0.0 foot candles at the location of her fall.
>
> Evidence of record thus shows that tenants of Red Oak's apartment complex like plaintiff—who were necessarily senior citizens and/or individuals with disabilities—had to navigate around the trench in order to access the dumpster without crossing the worksite. And the evidence further shows that the visibility in that area after dark was low, and that there were no visual aids to demarcate the trench from the asphalt. Given these circumstances, I believe that, at minimum, reasonable minds could differ as to whether Red Oak discharged its

RECEIVED by MSC 10/24/2024 5:31:47 PM

> obligation to ensure that the trash disposal area was fit for the use intended by the parties. West, 469 Mich at 183.

Turning to Westveld, Judge Mariani concluded that reasonable finders of fact could conclude that Westveld breached its duty under a negligence theory where

> Westveld was responsible for creating the trench at issue and for placing the dumpster on the grassy area neighboring the concrete slab. Testimony from Westveld's owner and operator established that the company ordinarily puts out caution tape and cones to warn of conditions like the trench but failed to do so for this trench. He also testified that the company filled in other trenches around the parking lot with sand or asphalt milling but failed to do so for this trench. And he admitted that this trench was a potential trip hazard.

Consequently, Judge Mariani would have reversed the grant of summary disposition as to both Defendants.

Now, for the reasons set forth below, Plaintiff respectfully requests that this Honorable Court either peremptorily reverse the opinion of the Court of Appeals and remand to the trial court for this matter to proceed to trial, or grant this application for leave to appeal to give full consideration to the issues herein.

Further facts necessary to the resolution of the issues may be included in the discussion section below.

LEGAL STANDARD

Defendant argued that summary disposition is proper pursuant to MCR 2.116(C)(10). When a motion is brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Furthermore, all inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618 (1995). Only where the Court is satisfied that there are no

RECEIVED by MSC 10/24/2024 5:31:47 PM

genuine issues of material fact and the moving party is entitled to judgment as a matter of law is summary disposition proper. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183 (2003).

In the context of MCR 2.116(C)(10), the Michigan Court of Appeals has stated that it "is liberal in finding a genuine issue of material fact," *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006), and it is well-established that factual determinations are reserved for juries, as opposed to Courts. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 130; 793 NW2d 593 (2010).

ARGUMENT

I. The Court of Appeals erred in determining there were no genuine issues of material fact relative to whether Defendant Westveld breached the duty it undisputedly owed Plaintiff

The lower courts erred in holding that Defendant Westveld was entitled to summary disposition. Briefly, in the circuit court, Westveld was granted summary disposition on the basis of the open and obvious doctrine. That grant was improper for multiple reasons- first because open and obvious is no longer a bar to recovery following the decision in *Kandil-Elsayed v F&E Oil, Inc*, ___ Mich ___; ___ NW2d ___ (2023) (MSC No. 162907) and second because the open and obvious doctrine could not even be extended to a party like Westveld, who was not the possessor of the property. Those arguments need not be addressed here, though, as the Court of Appeals concluded that summary disposition was proper for a distinct reason. According to the majority, there is no genuine issue of material fact regarding whether Westveld breached the duty it owed Plaintiff. That ruling cannot stand.

In ruling in favor of Westveld, the majority primarily relied on the decision in *Finazzo v Fire Equipment Co*, 323 Mich App 620, 634; 918 NW2d 200 (2018). In *Finazzo*, the Plaintiff was injured when he tripped on a cable that was temporarily stretched across a floor of a

RECEIVED by MSC 10/24/2024 5:31:47 PM

building as part of the process of installing a fire protection system. Id. at 622. The Plaintiff brought a premises liability claim as well as an ordinary negligence claim. The majority of the opinion deals with the application of the open and obvious doctrine, which again is not issue in this case and thus is not relevant to this application. However, the Court also held that summary disposition was proper relative to Plaintiff's ordinary negligence case because there was no evidence that the Defendant breached its duty. It was that portion of the opinion that the majority relied on, and wrongly so.

In *Finazzo*, the Court of Appeals explained that a contractor like Westveld has a duty to perform its work with reasonable care so as to avoid unreasonably endangering others. *Finazzo*, 323 Mich App at 634. It has been long (and frequently) recognized that when a party chooses to act, it has a duty to exercise reasonable care to avoid harming others. *Clark v Dalman*, 379 Mich 251, 261, 150 NW2d 755 (1967); *Rinaldo's Constr v Mich Bell Tel Co*, 454 Mich 65, 84, 559 NW2d 647 (1997). This Court has affirmed that historical principle and recognized the "'simple idea that is embedded deep within the American common law of torts . . .: if one 'having assumed to act, does so negligently,' then liability exists as to a third party for 'failure of the defendant to exercise care and skill in the performance itself.'" *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170-171 (2011), quoting *Davis v Venture One Constr, Inc*, 568 F3d 570, 575, 577 (CA 6, 2009) and *Hart v Ludwig*, 347 Mich 559, 565-566, 79 NW2d 895 (1956).

As *Finazzo* states, "[g]enerally, unless the court can conclude that all reasonable persons would agree the defendant did not create an unreasonable risk of harm, whether a defendant's conduct in the particular case breached this general standard of care is a question of fact for the jury to decide." *Finazzo*, 323 Mich App at 634. Here, necessarily to its holding, the majority found that no reasonable person could conclude that Westveld created an unreasonable risk of harm. That holding is entirely unsupported by the record and amounts to the Court of Appeals placing itself in the position of a jury.

As Judge Mariani explained in his dissent regarding the risk of harm Westveld created:

RECEIVED by MSC 10/24/2024 5:31:47 PM

> Westveld was responsible for creating the trench at issue and for placing the dumpster on the grassy area neighboring the concrete slab. Testimony from Westveld's owner and operator established that the company ordinarily puts out caution tape and cones to warn of conditions like the trench but failed to do so for this trench. He also testified that the company filled in other trenches around the parking lot with sand or asphalt milling but failed to do so for this trench. And he admitted that this trench was a potential trip hazard. Viewing the record in the light most favorable to plaintiff, I believe that, at minimum, reasonable minds could differ about whether Westveld created an unreasonable risk of harm under these circumstances.

Now, compare those facts with the evidence in *Finazzo*, in which the Court of Appeals explained that:

> Plaintiff's testimony, although vague, did not dispute the testimony defendants presented. Plaintiff testified that the computer room was adequately illuminated, had a tile floor, and that he could see a 40-foot length of cabling on the floor and could describe its color; he recalled it was one-half to one inch in diameter. Plaintiff also stated that he "probably" knew the cable was on the floor before stepping on it when he went toward the door without looking at the floor. Specifically, plaintiff testified that before he fell, "I would probably assume that I did see the cable." He also acknowledged that defendants "probably told" him about the cables. When plaintiff turned to go to the door, "[he] didn't see the cables on the floor before [he] fell." [*Finazzo*, 323 Mich App at 337.]

Unlike in *Finazzo*, the present case includes admissions by Westveld that it deviated from its typical practices, such as using caution tape and filling trenches with sand, which are specifically designed to be reasonable steps that eliminate risks of harm. It also includes evidence that the area was not adequately illuminated and that the trench was particularly dangerous where its dark color blended into the darkness.

RECEIVED by MSC 10/24/2024 5:31:47 PM

Those distinctions are material and necessitated the denial of summary disposition.

In light of that record evidence described by Judge Mariani, particularly when it is taken in the light most favorable to Plaintiff, a reasonable finder of fact could conclude that Westveld breached the duty that it owed Plaintiff. And to be sure, at trial Westveld would be free to argue both that it did not breach its duty and that Plaintiff was comparatively negligent. Michigan law permits such defenses pursuant to MCL 600.2959, which provides that a Plaintiff's recovery shall be reduced by her percentage of comparative fault. That percentage of comparative fault is to be determined by the jury at the time of trial and is a feature of our standard civil jury instructions. See M Civ JI 11.01. It is not, however, the role of a trial court or the court of appeals to sit as finder of fact and determine for itself the reasonableness of the parties' conduct in the face of a record like this.

II. T The Court of Appeals erred in concluding that there were no genuine issues of material fact related to whether the common area was fit for its intended use, as required by statute

The lower courts likewise erred in determining that Red Oak was entitled to summary disposition relative to Plaintiff's statutory claim pursuant to MCL 554.139. That statute provides that:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

RECEIVED by MSC 10/24/2024 5:31:47 PM

> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

Thus, MCL 554.139 creates three (3) separate and distinct covenants in every residential lease in Michigan: (1) that the premises and all common areas are fit for use intended by the parties, (2) that the premises will be kept in reasonable repair during the term of the lease and (3) the landlord's covenant to comply with local health and safety laws. *Sedlecky v. Sun Communities, Inc.*, unpublished decision of the Court of Appeals, issued August 20, 2020 (Docket No. 348520).

In *Allison v AEW Capital Mgmt, LLP.*, 481 Mich 419, 430 (2008), as aptly summarized in *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 289 (2019),

> our Supreme Court addressed the analytical framework to be used when determining liability under MCL 554.139(1)(a). First, the court is to determine whether the area in question is a 'common area'. Then, the court is to identify the intended use of the common area. Lastly, the court must determine if there could be 'reasonable difference of opinion regarding' whether the conditions made the common are unfit for its intended use.

"While the *Allison* Court specifically referenced parking lots, the principles set forth apply to all common areas . . . ." *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130 (2010). The relevant question is whether there could be reasonable differences of opinion regarding whether the . . . [walkway] was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall. *Id.* Similar to the intended use of a sidewalk, a walkway's intended use is to walk on it to reach a destination. *Benton*

RECEIVED by MSC 10/24/2024 5:31:47 PM

v. Dart Props., 270 Mich App 437, 444 (2006). The purpose of the walkway at issue here was to provide tenants, specifically elderly and disabled individuals, reasonable access from the underlit garbage dumpster patio with the trench to plaintiff's apartment. Thus, the only remaining question is whether the presence of the trench in front of the garbage dumpster made that walkway unfit for its intended use of providing plaintiff reasonable access from the garbage dumpster patio to plaintiff's apartment under the circumstances present when plaintiff fell. *Id.* The word "fit" as used in MCL 554.139(1)(a) is defined as "adapted or suited; appropriate." *Allison*, 481 Mich at 429.

With respect to the landlord's covenant to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located set forth in MCL 554.139(1)(b), a violation of an ordinance is evidence of negligence when the purpose of the ordinance is to prevent the type of injury and harm actually suffered. *Ward v Frank's Nursery & Crafts*, 186 Mich App 120, 135 (1990); *Autry v Allstate Ins Co*, 130 Mich App 585, 592-593(1983).

In the present case, Defendant Red Oak does not dispute that the walkway and area around the garbage dumpster patio in question were part of the premises and that the intended use of that walkway was to provide Plaintiff and other elderly and disabled residents the ability to throw out their garbage.

The facts in this case demonstrate that Defendant Red Oak through Eric Koch knew the following: (1) the trench was a trip hazard, (2) that as of October 21, 2021, there was no caution tape or cones around the trench in front of the garbage dumpster and (3) caution tape and/or cones needed to be placed in the trench area to make it more obvious to pedestrians. Albert Kerelis – Plaintiff's construction and safety expert – testified that the area around garbage dumpster patio was underlit in violation of industry standards, and that the trench in question was dangerous and violated the City of Stanton Ordinance 192, MCL 554.139(1)(a) and (b). And as Judge Mariani notes in his dissent, the trench, which was dark in color, would not have been visible in the lighting conditions faced by Plaintiff.

RECEIVED by MSC 10/24/2024 5:31:47 PM

In light of the above, according to *Hadden* and *Trueblood*, a reasonable difference of opinion regarding whether the trench in question under these circumstances made the area around the garbage dumpster patio unfit for its intended purpose. Where Plaintiff's evidence must be taken in a light most favorable to her for the purposes of this motion, reasonable minds could conclude that the trench in front of the underlit garbage dumpster patio posed a hidden danger that denied Jan Bowerman access to the garbage dumpster area to throw out her garbage thus rendering the garbage dumpster patio area and corresponding walkway unfit for its intended use. *Hadden*, 287 Mich App at 132.

Defendant relied heavily below on the fact that multiple people – including Bowerman – traversed the garbage dumpster patio area in question before and after Bowerman's fall to support its argument that the garbage dumpster area was fit for its intended purpose. The trial court was apparently persuaded by that argument, as it concluded that there were no genuine issues of material fact relating to whether the area was fit for its intended purposes. However, according to *Estate of Trueblood v P&G Apartments, LLC*., 327 Mich App 275, 291-292 (2019), such evidence is not dispositive, as such evidence:

> That others had been able to walk on the sidewalk without incident might have suggested that the sidewalk was not completely covered in ice, but it might also have suggested that the others had been walking more carefully on the sidewalk because given that plaintiff had slipped, they were aware that the sidewalk was slippery.

In other words, while it may be tempting to infer that Bowerman and others' use of the underlit garbage disposal patio area with the trench demonstrated fitness for intended use, this is neither the only reasonable inference from their usage, nor is it drawn in favor of plaintiff as required by MCR 2.116(C)(10). *Lakeview Commons v Empower Yourself, LLC*, 290 Mich App 503, 506 (2010). Interestingly, Defendant's fitness for intended use argument in the present case was rejected by the Michigan Court of Appeals when made by the Defendants in both *Stone v Boulder Creek Apts., LLC*, unpublished opinion of the Court of Appeals, issued November 26, 2019 (Docket No. 346252) and *Sedlecky v*

RECEIVED by MSC 10/24/2024 5:31:47 PM

Sun Cmtys., Inc., unpublished opinion of the Court of Appeals, issued August 20, 2020 (Docket No. 348520).

That other people managed to safely traverse this hazardous condition does not negate the fact that the premises was not fit for its intended purposes. As the Court will recall, Plaintiff's expert – Albert Kerelis – explained that the City of Stanton's impose the standards created by the Illuminating Engineering Society of North America. Under those standards, this asphalt parking lot needed at least 0.5 foot candles in order to be considered safe to walk. Instead, Kerelis recorded a reading of 0.0 candles in the area of the accident. The majority discounted that evidence, concluding instead that the photographs of the scene demonstrate that the concrete pad intended for the dumpster was adequately visible. The observation is puzzling. Plaintiff did not trip on the concrete pad. She fell in the trench, which Judge Mariani correctly noted was dark in color and not apparent in dark conditions.

Albert Kerelis also opined that Stanton City Ordinance 192 incorporates the BOCA 1990 Code Section 3006.0, which states that whenever a building or structure is erected, altered, removed or demolished, the operation shall be conducted in a safe manner and suitable protection for the general public shall be provided. Reasonable safety measures suitable to protect the public would include caution tape and traffic cones. A violation of an ordinance is evidence of negligence when the purpose of the ordinance is to prevent the type of injury and harm actually suffered. *Ward v Frank's Nursery & Crafts*, 186 Mich App 120, 135 (1990). Accordingly, there is a genuine issue of material fact that Defendant violated MCL 554.139(1)(b) and summary disposition was inappropriately granted.

Defendant's argument that its common areas were fit for their intended purposes as a matter of law should have been rejected. There is a genuine issue of material fact as to whether the pathway was fit for its intended purpose and summary disposition was improperly granted. This Court should grant the present application to correct the misapplication (and fundamental misunderstanding of this statute)

RECEIVED by MSC 10/24/2024 5:31:47 PM

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Plaintiff respectfully requests that this Honorable Court peremptorily reverse the majority opinion of the Court of Appeals for the reasons set forth in the dissenting opinion. Alternatively, Plaintiff requests that this Court grant this application for leave to appeal to fully consider the issues presented above.

Respectfully submitted,

Ven Johnson Law, PLC

/s/ Christopher P. Desmond (P71493)
535 Griswold Street, Ste 2600
Detroit, MI 48226
313-324-8300
CDesmond@VenJohnsonLaw.com

Counsel for Plaintiff-Appellant

Date: October 24, 2024

RECEIVED by MSC 10/24/2024 5:31:47 PM

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 8,530 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

/s/ Christopher P. Desmond (P71493)
535 Griswold Street, Ste 2600
Detroit, MI 48226
313-324-8300
CDesmond@VenJohnsonLaw.com