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STATE OF MICHIGAN
IN THE SUPREME COURT
(On appeal from the Michigan Court of Appeals)
(Gadola, C.J., K.F. Kelly, and Mariani, J.J.)

JAN BOWERMAN,

Plaintiff-Appellant,

v

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

Defendant-Appellees.

and

BOB'S ASPHALT & PAVING, INC.,

Defendant.

Supreme Court No. 167718
Court of Appeals No.: 366338
Montcalm CC No.: 22-S-28824-NO

DEFENDANT-APPELLEE WESTVELD SERVICES, LLC'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Respectfully Submitted,

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Dated: December 5, 2024

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INTRODUCTION AND REASONS TO DENY LEAVE

This application for leave to appeal arises, in relevant part, from a premises liability action initiated by Jan Bowerman ("Plaintiff-Appellant") against Defendant-Appellee, Westveld Services, LLC ("Westveld"). Plaintiff-Appellant was a tenant of Stanton Park Apartments on the date of the accident, October 30, 2021. Whereas, Westveld was a sub-contractor hired by Red Oak Management Company, a property management company of the apartment complex, to complete concrete flat work.

Westveld completed the limited scope of its work on October 21, 2021 and left the premises. Nine days later, on October 30, 2021, Plaintiff-Appellant allegedly tripped and fell while encountering an approximately 3-inch deep "trench" on the premises while taking her trash to a nearby dumpster at the apartment complex grounds. The trench bordered freshly poured concrete, which was much lighter in color than the surrounding dark asphalt, as demonstrated below:



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Plaintiff-Appellant knew where the new concrete slab was poured and she was aware of construction work occurring on the premises because she kept detailed notes of the work being completed. She also knew that Westveld had completed its portion of the work and had left the site nearly two weeks before her alleged injury. Further, the owner of Westveld testified that he moved the trash dumpster away from the concrete flat work in order to prevent individuals from encountering the concrete flat work since there was no need for any tenants to enter that area. He also testified that he put up caution tape at some point during the period of October 14, 2021 and October 21, 2021, but that he often had difficulty with the tape staying up at job sites.

Despite this, Plaintiff-Appellant brought a claim against Westveld, labeling it as a "negligence" claim. But, importantly, Plaintiff-Appellant asserted that her injury occurred from encountering the "trench," *a condition on the land*. Plaintiff-Appellant did not assert active negligence on the part of Westveld, which makes sense as Westveld and its representatives departed the premises after completing its limited scope of work on October 21, 2021. In other words, Plaintiff-Appellant pled an action that sounds solely in premises liability.

In a March 27, 2023 opinion and order, the trial court agreed that the action sounded in premises liability. The trial court overlooked the necessary precursor to a defendant being subject to liability under a premises liability theory, i.e., whether Westveld had possession and control of the premises when the injury occurred, but it nevertheless reached the right result. Instead, the trial court held that no genuine

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issue of material fact existed because Plaintiff-Appellant's claim was precluded under the open and obvious doctrine.

Plaintiff-Appellant appealed to the Court of Appeals, where the majority (Gadola and K. F. Kelly) affirmed the trial court's ruling on alternative grounds for affirmance, concluding that Westveld was not in either possession or control of the premises at the time of Plaintiff-Appellant's alleged fall. Further, assuming the claim could even proceed forward despite the lack of possession and control by Westveld, the majority held that Plaintiff-Appellant could not sustain the elements to her premises liability claim because there was no evidence of a breach of duty by Westveld.

And as another alternative grounds for affirmance, the majority went on to address Plaintiff-Appellant's claim under an ordinary negligence theory. Ultimately, the majority concluded that there was no evidence that Westveld breached its duty to Plaintiff-Appellant because no unreasonable risk of harm was created by Westveld. And so, the majority held that, even if possession and control could be shown, there was no genuine issue of material fact that Westveld did not breach a duty owed, whether examined under a premises liability theory or an ordinary negligence theory.

The majority correctly applied settled law to the undisputed record. Therefore, this Court need not weigh in on the matter because the Court of Appeal's decision is not clearly erroneous, nor will it cause substantial injustice if left to stand. See MCR 7.305(B)(5)(a). As an initial matter, the Court of Appeal's opinion is unpublished, meaning that it is not binding under the rule of stare decisis.

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See MCR 7.215(C)(1). It is merely a "letter to the litigants." Therefore, it is not likely to affect other cases, or the larger "fabric of law" as a whole. Even if it did, the majority consistently applied this area of law as other panels have done before it. Consequently, this Court should deny leave to appeal and reject discretionary review of this matter because it lacks jurisprudential significance. See MCR 7.303(B)(1).

Stated differently, Plaintiff-Appellant fails to establish a showing under any of the grounds listed in MCR 7.305(B), explaining why this Court should exercise its discretionary review. It is not enough to simply state that the appeal involves a jurisprudentially significant issue; rather, the court rule *mandates* that jurisprudential significance be shown. MCR 7.305(B)(3). Plaintiff-Appellant is unable to make such a showing. The larger "fabric of law" remains unaffected by this case. This is not a case of first impression, nor is there a showing of divergent or contradictory strands of caselaw, which may lead to inconsistent results post *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023).

Accordingly, for all these reasons and the reasons set forth below, Westveld respectfully requests that Plaintiff-Appellant's application for leave to appeal be denied.

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COUNTER-STATEMENT OF QUESTION PRESENTED

DID THE LOWER COURTS PROPERLY CONCLUDE THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHERE PLAINTIFF-APPELLANT CANNOT SUSTAIN THE ELEMENTS OF HER "NEGLIGENCE" CLAIM REGARDLESS OF WHETHER IT WAS BROUGHT UNDER A PREMISES LIABILITY THEORY OR AN ORDINARY NEGLIGENCE THEORY?

The trial court answered: "Yes."

The Court of Appeals majority answered: "Yes."

Defendant-Appellee Westveld Services, LLC answers: "Yes."

Plaintiff-Appellant answers: "No."

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COUNTER-STATEMENT OF FACTS

Plaintiff-Appellant, a tenant of Stanton Park Apartments, located in Montcalm, Michigan, alleges that she tripped and fell after encountering a small "trench" in the back section of the parking lot at the apartment complex.[1] At the beginning of October 2021, Westveld was hired by Defendant-Appellee Red Oak Management Co., Inc. ("Red Oak") – the property manager for the apartment complex – to demolish, remove, and replace concrete in various areas.[2] According to the owner of Westveld, Randy Westveld, this type of work is called referred to as concrete flatwork.[3]

In relevant part, the scope of Westveld's work included the demolition/removal of existing concrete where the apartment community trash dumpster was located and the installation of a new concrete slab/pad in that area.[4] To install or pour the new concrete pad, Westveld placed wood forms after the demolition and removal of existing concrete, to accommodate the subsequent pouring of the new concrete.[5] The purpose of the forms was to create a clean, flat edge for the concrete pad.[6] After the form was removed, a small trench remained, which was to be, and in fact was, later filled another sub-contractor, Bob's Asphalt and Paving ("Bob's Asphalt").[7]

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[1] **Westveld's Ex. 4**, Plaintiff's Complaint, pp 2-3, **Appx.**, pp 28-29.
[2] **Westveld's Ex. 5-B**, Deposition Testimony of Randy Westveld, **Appx.**, p 60.
[3] **Id.** at p 7, **Appx.**, p 59.
[4] **Id.** at **Appx.**, pp 59-63.
[5] **Id.** at **Appx.**, pp 60-61.
[6] **Id.** at **Appx.**, p 61.
[7] **Id.** at **Appx.**, p 62.

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The trench was about three inches deep and ran along the front edge of the concrete pad.[8] The plan was that Bob's Asphalt was to come behind Westveld within a day or two after its work was completed in order for Bob's Asphalt to fill the trench.[9] But Bob's Asphalt did not come to complete its work until 10 days after Westveld had completed its work and departed the premises. In the meantime, in the early morning hours of October 30, 2021, Plaintiff-Appellant decided to take her trash out. While walking in the parking lot on her way to the dumpster, she tripped in the trench and fell. As Plaintiff-Appellant described it,

> ….[O]nce I got in the middle of the parking lot, it was all black. I couldn't see, so I spotted the dumpster. They had moved it off the patio slab it was on. …I seen [sic] that because it had like a reflector on it, and there was some light coming from the trees from the streetlight. So I kept my eye on that dumpster, and I started walking toward it. And before … I knew it, my foot went right to the edge … right down in the hole.[10]

Plaintiff-Appellant was admittedly aware of the trench, as she described taking a specific path around the concrete pad several times prior to avoid the trench.[11] Plaintiff-Appellant explained that she took her trash out every day, but normally did it during daytime hours, and that she was aware of where the trench was located.[12])

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[8] **Id.**
[9] **Id.** at **Appx.**, p 64.
[10] **Westveld's Ex. 5-D**, Deposition Testimony of Jan Bowerman, p. 17, **Appx.**, p 77.
[11] **Id.**, p 36, **Appx.**, p 80.
[12] **Id.**, pp 62-63, **Appx.**, p 82.

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Plaintiff-Appellant testified that there was a "light, a reflective light" from the other side of the street that was coming through some of the bushes and that she could "see a shadow of the dumpster."[13] Plaintiff also testified that the parking lot lights were on.[14] Plaintiff also confirmed that the concrete pad was observable, even in darkness, because of its contrast against the dark backdrop of the asphalt. Also, Randy Westveld testified that he had no trouble seeing the concrete slab in the dark. And, Eric Koch, Red Oak's construction specialist, described the trench as "so wide and so big that it was pretty obvious for sure . . . ."[15]

Mr. Koch admitted that he never asked Westveld to fill in the trenches or put up any warning indicators.[16] This was consistent with Randy Westveld's testimony that he was never instructed to fill in the trench or put up any warning tape or cones.[17] Mr. Koch also testified that the concrete pad area does not get dark enough at night to pose a danger.[18] This was because the concrete was very light in color and stood out against the black asphalt, even at night.[19] Mr. Koch further explained that the original plan was for Bob's Asphalt to come out quickly after Westveld completed its work, but Bob's Asphalt was inexplicably delayed. [20]

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[13] **Id.**, pp 37, 51, **Appx.**, pp 80-81.
[14] **Id.**, p 51, **Appx.**, p 81.
[15] **Westveld's Ex. 5-E**, Deposition Testimony of Eric Koch, **Appx.**, p 88.
[16] **Id.**, pp 24-45, **Appx.**, p 87.
[17] **Westveld's Ex. 5-C**, Deposition Testimony of Randy Westveld, pp 41-42, **Appx.**, pp 67-68.
[18] **Westveld's Ex. 5-E**, Deposition Testimony of Eric Koch, p 26, **Appx.**, p 88.
[19] **Id.**, pp 32-33, **Appx.**, p 89.
[20] **Id.**, pp 32-33, **Appx.**, p 91.

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Despite this, Randy Westveld testified that he did, in fact, take some action to make the area safer. For example, he placed the dumpster away from the construction area and the trench so there was no need for anyone to encounter the area.[21] Indeed, Plaintiff-Appellant testified consistently that the dumpster was moved away into a grass area.[22] Specifically, Randy Westveld stated that he removed the dumpster from the area "[s]o it was safe for people to dump in so they didn't have to go across the trench."[23] Additionally, he stated that he did, in fact, put up yellow caution tape at some point between October 14, 2021 and October 21, 2021, but that he routinely had issues with it blowing away or somebody tearing the tape down.[24]



[21] **Westveld's Ex. 5-B**, Deposition Testimony of Randy Westveld, pp 20, 22, 36, **Appx.**, pp 62-63, 66.
[22] **Westveld's Ex. 5-D**, Deposition Testimony of Jan Bowerman, **Appx.**, p 78.
[23] **Id**. at **Appx.**, p 66.
[24] **Id.** at pp 16-17, 26-27, 30-31, 36, **Appx.**, pp 61, 64, 65-66.

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During his deposition, indeed, Randy Westveld testified in the following way:

> [*Plaintiff's Counsel*]: And sometime, and correct me if I'm wrong, Mr. Westveld, sometime between October 14th, 2021 and October 21st, 2021, somebody put up caution tape?
>
> [*Randy Westveld*]: **Correct**.
>
> [*Plaintiff's Counsel*]: Can you give me a ballpark of when that would have happened during those two dates?
>
> [*Randy Westveld*]: **So at the end of most days, if we have some torn out, we'll caution tape that up. I don't remember exactly how this job went, but if we have that dumpster area or a sidewalk area demoed with forms set or not forms set, we're still going to caution tape it, come back the next day, take the stuff down, continue working**. [**Westveld's Ex. 5-B**, Deposition Testimony of Randy Westveld, **Appx.**, p 64; bold in original.]

Incidentally, Plaintiff-Appellant, herself, worked for Red Oak for over 19 years as a site manager – including for the Stanton Park Apartments where she was the site manager for about 9-10 years. Even after retiring, she continued to maintain "detailed notes about the condition of the property." "Plaintiff's notes indicate that on 10/14/21, the dumpster was moved to the grass area … so the cement in front of it could be replaced." Plaintiff's notes state that the sidewalks were torn out that same day.

Based upon this record, Westveld moved for summary disposition, arguing that there was no relationship between it and the Plaintiff that could give rise to a tort duty. Alternatively, Westveld argued that, to the extent Plaintiff was really trying to assert a premises liability claim against it, there was no duty because the condition

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was open and obvious. At the hearing on Westveld's motion, Westveld advanced an additional argument that, as a premises liability claim, liability could not be imposed because Westveld had no possession or control over the premises when Plaintiff-Appellant's injury occurred.[25]

The trial court took the matter under advisement and ultimately granted Westveld's motion for summary disposition by opinion and order issued May 10, 2023.[26] The trial court was not persuaded by Westveld's argument that it could not owe a duty to Plaintiff-Appellant separate from its contractual obligations to Red Oak.[27] However, the trial court concluded there was merit to Westveld's alternative argument. First, it agreed that Plaintiff-Appellant's claim was rooted in premises liability because it is a "claim based on the condition of the premises."[28] The trial court bypassed the necessary possession and control pre-cursor inquiry; instead, it quickly disposed of the case, concluding that the trench was an open and obvious condition, which precluded Plaintiff-Appellant's claim.[29]

Plaintiff-Appellant then appealed the trial court's ruling, as of right, to the Court of Appeals. Following briefing and oral argument, the Court of Appeals issued a 2-1 unpublished opinion affirming the trial court's decision. The majority

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[25] **Westveld's Ex. 7**, Hearing Transcript, **Appx.**, pp 211-214.
[26] **Westveld's Ex. 1**, Opinion and Order Granting Westveld's Motion for Summary Disposition, **Appx.**, pp 2-11.
[27] **Id.** at **Appx.**, p 9.
[28] **Id.** at **Appx.**, p 10.
[29] **Id.**

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acknowledged that Plaintiff-Appellant's claim arises from a condition on the land, i.e., the trench in the parking lot, but nevertheless decided to address Plaintiff-Appellant's arguments on appeal in the context of both premises liability and ordinary negligence, providing multiple alternative grounds for affirmance.

With respect to the claim being analyzed under a premises liability theory, the majority concluded that it is clear Westveld lacked possession and control over the premises at the time of Plaintiff-Appellant's injury, and therefore, Plaintiff-Appellant's claim failed at the outset because possession and control is a precursor to a duty being implicated. Notwithstanding the lack of possession and control, the majority concluded that, based on the record, it was beyond dispute that Westveld did not breach its duty owed to Plaintiff under either a premises liability theory or ordinary negligence.

In dissent, Judge Mariani agreed with the majority that Westveld lacked possession and control over the premises, and, therefore, that it is not subject to liability under a premises liability theory. But Judge Mariani disagreed with the majority that an ordinary negligence claim could not move forward. In reaching this conclusion, Judge Mariani focused mainly on cherry-picked portions of the lower court record evidence. In doing so, Judge Mariani improperly concluded that "Westveld's conduct demonstrates [an] unreasonable risk of harm, or at least a genuine factual dispute in that regard."

Now, Plaintiff-Appellant seeks leave to appeal with this Court. Specifically, Plaintiff-Appellant asks this Court to reverse the trial court's ruling by adopting the

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reasoning of Judge Mariani in dissent. However, for the reasons discussed in more detail below, Plaintiff-Appellant is not entitled to her requested relief. As such, Westveld respectfully asks this Court to deny Plaintiff-Appellant's application for leave to appeal.

STANDARD OF REVIEW

A trial court's decision either granting or denying a motion for summary disposition is reviewed *de novo* as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). More specifically, a motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Maiden*, 461 Mich at 120.[30] Under a MCR 2.116(C)(10) motion, the moving party has the initial burden of establishing that no genuine issue of material fact warranting a trial exists, and that the law entitles the movant to judgment in his or her favor when applied to those undisputed facts. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996).

In a motion brought under MCR 2.116(C)(10), the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Educ*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the movant satisfies this initial

[30] Although Westveld originally argued that summary disposition was appropriate under both MCR 2.116(C)(8) and (C)(10), the trial court found Westveld's argument for dispositive relief under (C)(8) grounds unpersuasive. As such, Plaintiff-Appellant did not challenge that part of the trial court's May 10, 2023 opinion and order and, so, for appellate purposes, this Court's plenary review is limited to the grounds in which the trial court found dispositive relief appropriate, which was under (C)(10).

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requirement, the burden shifts to the non-moving party to introduce affidavits, depositions, admissions, or other documentary evidence via establishing that a genuine issue of material fact necessitates a jury resolution. *Id.*; *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999). Courts have described a (C)(10) hearing as "the 'put up or shut up' stage of the proceeding…." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). So, if the non-moving party fails to proffer substantive admissible documentary evidence in response to the motion, the motion is properly granted. *Smith*, 460 Mich at 455.

ARGUMENT

THE LOWER COURTS PROPERLY CONCLUDED THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHERE PLAINTIFF-APPELLANT CANNOT SUSTAIN THE ELEMENTS OF HER "NEGLIGENCE" CLAIM REGARDLESS OF WHETHER IT WAS BROUGHT UNDER A PREMISES LIABILITY THEORY OR AN ORDINARY NEGLIGENCE THEORY.

In seeking this Court's discretionary appellate review, Plaintiff-Appellant argues, generally, that the lower courts erred in concluding that Westveld is entitled to dispositive relief. More specifically with regard to the Court of Appeal's majority unpublished decision, Plaintiff-Appellant argues that the majority erred in concluding that no genuine issue of material fact exists regarding whether Westveld breached a duty owed to Plaintiff-Appellant. (Plaintiff-Appellant's Application, p 22). However, Plaintiff-Appellant's argument is misplaced for several reasons.

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I. The Court of Appeals properly concluded that Westveld is entitled to dispositive relief because it is beyond dispute that Westveld lacked control or possession of the premises at the time of Plaintiff-Appellant's injury, and therefore, is not subject to liability under a premises liability theory.

As an initial matter, Plaintiff-Appellant completely overlooks the main reason why the Court of Appeals majority found dispositive relief warranted in favor of Westveld. That is, the majority concluded that "Westveld was not in possession or control of the land at the time of the plaintiff's fall," and therefore, Westveld could not be subject to liability because "premises liability is conditioned upon the presence of both possession and control over the land."[31] See *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 600; 575 NW2d 745 (1998)).

Indeed, this is a point upon which Judge Mariani agreed in his dissent, stating, "I agree with the majority that there is no genuine issue of material fact that Westveld was not in possession and control of the trash disposal area at the time of plaintiff's injury; accordingly, Westveld did not owe a duty to plaintiff under a theory of premises liability."[32] The record evidence supports this joint conclusion reached by the Court of Appeals because the parties both testified consistently that Westveld completed its work and left the job site at least nine days prior to Plaintiff-Appellant's incident. Therefore, the Court of Appeals properly concluded that Westveld lacked possession and control of the premises, a precursor to premises liability, meaning it is not subject to liability. The analysis of Plaintiff-Appellant's claim could have ended there.

[31] **Westveld's Ex. 2**, Court of Appeals Majority Opinion, p 6, **Appx.**, p 18.
[32] **Westveld's Ex. 3**, Court of Appeals Dissenting Opinion, p 4, **Appx.**, p 4.

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II. That Plaintiff-Appellant's claim fails at the outset under a premises liability theory does not compel the case to move forward under an ordinary negligence theory because her claim is rooted exclusively in premises liability.

That is because despite the label[33] of "negligence" that Plaintiff-Appellant affixed to her claim, she pled, in substance, only a claim rooted exclusively in premises liability law. [T]he gravamen of plaintiff's action is determined by considering the entire claim." *Maiden*, 461 Mich at 135; see also *Adams v Adams*, 276 Mich App 704, 710–711; 742 NW2d 399 (2007) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.").

Importantly, Plaintiff-Appellant alleged that her injury occurred when she encountered a *condition on the land*, i.e., a trench, that she "fell into" "while walking to the common area trash drop off at Defendant Red Oak's property."[34] In other words, Plaintiff-Appellant does not assert that Westveld or any of its agents were on the premises that day, or that they did anything to cause her harm besides creating the condition on the land.

"A claim based on the condition of the premises is a premises liability claim." *Finazzo v Fire Equip Co*, 323 Mich App 620, 626; 918 NW2d 200 (2018) (citation omitted). "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." ." *Buhalis v Trinity*

[33] "Courts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 691; 822 NW2d 254 (2012).
[34] **Westveld's Ex. 4**, Plaintiff's Complaint, p 3, **Appx.**, p 29.

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Continuing Care Services, 296 Mich App 685, 692; 822 NW2d 254 (2012). As such, because Plaintiff-Appellant claims her injury occurred due to a condition on the land, her action "sounds in premises liability rather than ordinary negligence," which remains true even if Westveld created the condition that gave rise to Plaintiff-Appellant's injury. *Finazzo*, 323 Mich App at 626. Again, in order for a party to be subject to premises liability, that party must possess and control the property at issue. *Id*. at 627.

Here, Plaintiff-Appellant has repeatedly conceded that Westveld lacked possession and control over the premises. But that does not mean that Plaintiff-Appellant's claim automatically proceeds forward as an ordinary negligence claim since it fails under a premises liability theory. Plaintiff-Appellant misconstrues *Finazzo*.

Finazzo is controlling on this case. The only limited extent in which it differs is that the defendant contractor was actually onsite working while the plaintiff was injured, and so, the lack of possession and control did not preclude the plaintiff's premises liability claim at the outset. *Finazzo* not only dealt with a third party injury in the construction context, but it illustrates succinctly the key legal distinction between an alleged injury caused by a *condition of the land* as opposed to the active or affirmative conduct of an individual. In other words, it addresses the key legal distinction between a claim rooted in premises liability versus ordinary negligence.

In *Finazzo*, the plaintiff was an employee working at his place of employment *while the defendants were present* working on a construction project. *Finazzo*, 323

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Mich App at 622-623. The defendants were sub-contractors on site for the purpose of installing a fire protection system. *Id.* Sometime during the installation process, the plaintiff tripped and fell on a large electrical cable lying on the floor while the work was being performed. *Id.* The plaintiff knew the electrical cable was there. *Id.*

Despite this, the plaintiff asserted in his complaint that the defendants created the dangerous condition of the large cable lying on the floor and that their breach of duty caused him injury. *Id.* at 623. The plaintiff also tried arguing that the defendants did not possess or control the premises in an effort to avoid the application of the open and obvious doctrine. *Id.* at 624. The plaintiff sought to have the case move forward as only an ordinary negligence claim even though his injury was caused by a condition on the land.

The *Finazzo* Court expressly rejected the plaintiff's argument. It explained that even if the defendants lacked possession and control, logic follows that the defendants are then not subject to the plaintiff's premises liability claim. *Id.* at 633. The *Finazzo* Court also rejected the plaintiff's argument that since his premises liability claim fails, it must mean it proceeds forward as an ordinary negligence claim. *Id.* at 626. The *Finazzo* Court reasoned that the plaintiff's action sounded *exclusively* in premises liability because the plaintiff's injury arose from a *condition* of the property, i.e., the cable lying on the tile floor pending its installation. *Id.* The Court further noted that even though the plaintiff had alleged that the condition was created by the defendants, his argument was inconsequential because the plaintiff pled that the injury *was received* from a condition of the premises. *Id.*

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Similar to the plaintiff in *Finazzo*, Plaintiff-Appellant asserts that her injury arose from a *condition* on the land, i.e., a trench. As such, her claim arises solely in premises liability, and as a premises liability claim, Westveld was not subject to liability because Plaintiff-Appellant failed to establish Westveld had possession and control over the premises – a precursor to liability – when it left the premises nine days before Plaintiff-Appellant's incident.

And while the trial court failed to analyze and address the possession and control inquiry in its opinion and order, it otherwise concluded that the action sounded in premises liability, expressly stating that "this claim is based on the condition of the premises."[35] The Court of Appeals majority likewise recognized Plaintiff-Appellant's claim is rooted in premises liability, stating, "plaintiff's claim is based on an injury arising from a condition of the land, i.e., the trench in the parking lot."[36]

As such, the Court of Appeals properly recognized that the claim was rooted in premises liability, not ordinary negligence, and correctly held that it may affirm the trial court's grant of summary disposition for different reasons, such as for the lack of possession and control, since the trial court reached the right result.[37] See *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 449; 886 NW2d 445 (2015).

[35] **Westveld's Ex. 1**, May 10, 2023, Opinion and Order, p 9, **Appx.**, p 10.
[36] **Westveld's Ex. 2**, Court of Appeals Majority Opinion, p 6, **Appx.** 18.
[37] **Id.**

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III. Notwithstanding the lack of possession and control by Westveld, it is beyond dispute that Westveld did not breach its duty owed to Plaintiff-Appellant under either a premises liability theory or ordinary negligence theory.

Despite agreeing with the trial court that the claim is rooted in premises liability, the Court of Appeals majority continued to address the matter, concluding that alternative grounds for affirmance existed. See *Jerome v Crum*, 505 Mich 1085; 943 NW2d 143, 144 (2020) (explaining that the Court of Appeals may affirm a trial court's grant of summary disposition on independent and alternative grounds); *Boardman v Dep't of State Police*, 243 Mich App 351, 358; 622 NW2d 97 (2000) ("An appellee may generally urge alternative grounds to affirm a trial court's decision without filing a cross-appeal, even if the alternative grounds were considered and rejected in the trial court.").

In other words, the majority continued to address the matter assuming only for argument's sake that Plaintiff-Appellant's claim could proceed under either a premises liability theory or an ordinary negligence theory. As such, the majority concluded that "no genuine issue of material fact [existed] that Westveld breached a duty owed to plaintiff, [and so] her claim against Westveld fails whether examined as either a premises liability case or a negligence case."[38] Plaintiff-Appellant takes issue with this part of the majority's decision. (Plaintiff's Application for Leave to Appeal, p 22).

[38] **Westveld's Ex. 2**, Court of Appeals Majority Opinion, p 7, **Appx.** 19.

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However, with respect to the majority's conclusion as it relates to premises liability, Plaintiff-Appellant fails to address or explain why, in her view, the majority's decision cannot stand in light of *Kandil-Elsayed* and well-settled premises liability law. For that reason alone, this Court should reject Plaintiff-Appellant's argument that the Court of Appeals majority erred in concluding that no genuine issue of material fact exists that Westveld did not breach its duty owed to Plaintiff-Appellant under a premises liability theory. "Insufficiently briefed issues are deemed abandoned on appeal." *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 458; 688 NW2d 523 (2004).

Nonetheless, Plaintiff-Appellant's argument still fails. This Court in *Kandil-Elsayed* clarified that "where the evidence presented to a court concerning breach generates no question of fact [as is the case here], the issue can be decided by the judge as a matter of law. See MCR 2.116(C)(10)." *Kandil Elsayed*, 512 Mich at 112 n 2.

> [Indeed] the law of premises liability in Michigan has its foundation in two general precepts. First, landowners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land. Second, and as a corollary, landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land. These principles have been used to establish well-recognized rules governing the rights and responsibilities of both landowners and those who enter their land. [*Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012) (footnotes omitted).]

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached

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that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013) (quotation marks and citation omitted). With respect to the duty owed to an invitee, a landowner or possessor owes "a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land." *Kandil-Elsayed*, 512 Mich at 112.

"If the plaintiff establishes that the land possessor owed plaintiff a duty, the next step in the inquiry is whether there was a breach of that duty." *Kandil-Elsayed*, 512 Mich at 148. With regard to a court's assessment of the breach element, the *Kandil-Elsayed* "decision d[id] not alter the standard of reasonable care owed to an invitee, meaning that it's not necessary for land possessors to . . . immediately rectify hazards on their property to avoid liability." *Id.*

Instead, "a land possessor need only exercise reasonable care under the circumstances . . . ." *Id.* (emphasis in original). This means that landowners and possessors are not insurers, *id.* at 146, nor are they required to anticipate every harm that may arise as a result of the idiosyncratic characteristics of each person who may venture onto his or her land, *Hoffner*, 492 Mich at 461 n 15.

As part of the breach inquiry, whether the condition was open and obvious remains a relevant consideration and whether despite its open and obvious nature, the landowner or possessor should have anticipated harm to the invitee. *Kandil-Elsayed*, 512 Mich at 148. It is only "[i]f breach is shown, as well as causation and harm, [that] the jury should consider the plaintiff's comparative fault and reduce

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the plaintiff's damages accordingly." *Id.* at 149. In other words, if evidence supporting each element is shown, then the open and obvious nature of the condition may be considered a second time as part of the inquiry into the plaintiff's comparative fault and the plaintiff's choice to confront it. *Id.*

Here, the alleged dangerous condition, i.e., the trench, was only "around 3 inches" deep and bordered bright, lightly colored concrete that had recently been poured.[39] Just as an ordinary elevation change is not an unreasonable risk of harm, this trench was also not an *unreasonable* risk of harm. This state has long recognized that "steps and differing floor levels [are] not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Kandil-Elsayed*, 512 Mich at 123, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Indeed, the duty owed to invitees is only to protect them against "*unreasonable* risks of harm." *Bertrand*, 449 Mich at 614 (emphasis in original).

Even if the trench could constitute an unreasonable risk of harm, Westveld exercised reasonable care while it was onsite at the premises. Indeed, its duty only extends insofar as "the work [was] in his charge." *Finazzo*, 323 Mich App at 629. According to Randy Westveld, he took action to remove the dumpster from the construction area to protect the tenants because by moving the dumpster, there was no need for tenants to encounter the trench.[40] When he was asked "[w]hy would you

[39] **Westveld Ex. 5-B**, Deposition Testimony of Randy Westveld, pp 21, **Appx.**, p 62.
[40] **Id**. at pp 20, 22, 36.

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have left the dumpster in that position as seen in this picture?" Westveld responded, "So it was safe for people to dump in so they didn't have to go across the trench."[41]

Additionally, he testified that he did put yellow tape up around the trench sometime between October 14th when he started the job and October 21st when he completed the scope of his work.[42] He did this in order to alert individuals to take care in and around the trench and the freshly poured concrete slab.[43] Westveld did not fill the trench because Bob's Asphalt was supposed to come within a couple days after Westveld completed its project to fill the trench with asphalt.[44] Finally, Randy Westveld testified that he has not been back to Stanton Park Apartments since he completed his role in the project.

Under these circumstances, it is beyond dispute that Westveld acted reasonably. Importantly, Westveld was not required to anticipate each and every way that a harm may arise relating to the trench. *Hoffner*, 492 Mich at 461 n 15. Westveld took precautions that it felt best at the time while it was on the premises, which was sufficient under the law. That something more could have been done, with the benefit of hindsight, is not sufficient to prove the elements of a premises liability claim. Nor did Westveld owe a continuing duty to Plaintiff-Appellant once it completed its work and left the premises because "the work [was no longer] in his charge." *Finazzo*, 323 Mich App at 629.

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[41] **Id**. at 36.
[42] **Id**. at 20, 26-27.
[43] **Id**. at 30-31, 36.
[44] **Id**. at 29.

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Even if Westveld had not taken any action in putting up yellow caution tape, the trench was still open and obvious to a reasonable person with ordinary intelligence such that Westveld did not breach any duty owed. As can be seen by the pictures, the trench was surrounded by concrete of a different color, which was sufficient to alert a reasonable person that there may be an elevation change. At the very least, to take care in walking toward that area. Eric Koch even described the trench as "so wide and so big that it was pretty obvious for sure . . . ."[45]

Not only was the trench an open and obvious condition that an ordinary person would discover, the darkness was an open and obvious condition, itself, that would have alerted an individual to take care in where they are walking. Even despite the darkness, the concrete slab was visible, as shown in the relevant photographs. Thus, even if Westveld was considered a premises possessor for the purpose of being subject to premises liability, the condition was still open and obvious. Therefore, the Court of Appeals majority correctly still considered the open and obvious nature of the condition in analyzing the element of breach and, therefore, it correctly concluded, as an alternative ground for affirmance, that no genuine issue of material fact exists regarding whether Westveld breached a duty owed to Plaintiff-Appellant.

Finally, even assuming for argument's sake that Plaintiff-Appellant's claim sounded in ordinary negligence, she did not establish a prima facie case for Westveld's liability. "Contractors have a common-law duty to perform their work with ordinary care so as not to unreasonably endanger employees of another subcontractors or

[45] **Westveld Ex. 5-E**, Deposition Testimony of Eric Koch, p 26, **Appx.**, 88.

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anyone else lawfully on the worksite." *Finazzo*, 323 Mich App at 634. "To establish a prima facie case of negligence, plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Id*. at 635 (citation omitted). These are principle points of law governing a contractor's duty in the tort context. See *In re Sprenger's Estate*, 337 Mich 514, 523; 60 NW2d 436 (1953) (stating that a rule of stare decisis refers to principles of points of law and not to factual situations existent in cases where such principles apply)

Plaintiff-Appellant takes issue with the majority's reliance on *Finazzo* in reaching its conclusion that Westveld did not breach a duty owed to Plaintiff-Appellant. Plaintiff-Appellant claims that the portion of the *Finazzo* opinion the majority relied upon is the section that addressed the application of the open and obvious doctrine, but this is not true. The majority clearly cited to the section of the *Finazzo* opinion that addresses ordinary negligence. This is evident by its pincite to page 637, which is contained within the section of the *Finazzo* opinion addressing the Plaintiff-Appellant's ordinary negligence claim.

Additionally, Plaintiff-Appellant completely overlooks the part of the *Finazzo* opinion that addresses whether a contractor breached its duty under an ordinary negligence claim, stating, "many of the same reasons that the [condition] was an open and obvious hazard" are relevant. *Finazzo*, 323 Mich App at 637. It is equally relevant because "[t]he reasonableness of the defendant's conduct must be weighed against the principles that persons lawfully on the site must use good judgment and

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common sense for their own safety and factors such as the potential degree of harm and whether the risk at issue is known." *Id.* at 635 (citations omitted).

Here, Westveld took measures while it was still on site to prevent injury to others. It moved the dumpster away from the work area so there was no need for anyone to encounter the trench or the concrete slab. Plaintiff-Appellant admitted that the dumpster was moved and that she successfully traversed to the dumpster several times prior to her injury without coming into contact with the trench.

Further, Westveld put yellow caution tape up at some point during the October 14th to October 21st time span. That it was not there nine days after Westveld departed the premises does not diminish Westveld's efforts while "the work [was still] in [its] charge." *Id.* at 629. Moreover, it is beyond dispute that the trench was not very deep, and so, it did not pose an unreasonable risk of harm. Not only that, but Plaintiff-Appellant knew where the trench was and saw the lightly colored concrete slab.

With Plaintiff-Appellant having the benefit of knowledge of the trench's location and its close proximity to the newly poured concrete slab, the visible concrete slab served effectively as a warning sign for Plaintiff-Appellant to take care in where she was walking. Accordingly, the majority properly reviewed the record evidence as a whole before concluding that no reasonable person could find that Westveld breached its duty to Plaintiff-Appellant even under an ordinary negligence theory. In doing so, the majority properly applied governing law that has been consistently applied by other panels of the Court of Appeals. See, e.g., *Debano v Flooring Edge*,

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unpublished per curiam opinion of the Court of Appeals, issued June 22, 2023 (Docket No. 362766)[46]; *Moss v Joe Young Excavating*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2020 (Docket No. 350948).[47] Therefore, there is no reason for this Court to weigh in on this matter and Plaintiff-Appellant's application must be denied.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant-Appellee, Westveld Services, LLC, respectfully requests that this Court deny Plaintiff-Appellant's application for leave to appeal.

Respectfully submitted,

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Dated: December 5, 2024

[46] **Westveld's Ex. 8**, **Appx.**, pp 234-236.
[47] **Westveld's Ex. 9**, **Appx.**, pp 238-241.

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned appellate counsel for Defendant-Appellee, Westveld Services, LLC, certifies the foregoing document has been prepared in compliance with the formatting and word-count limitations as set forth below:

Court Rule	Pleading Type	Word Limitation	Word Count
MCR 7.305(A)(1) and MCR 7.212(B)(1)	Answer to Application for Leave to Appeal	16,000	6,406

Respectfully submitted,

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