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STATE OF MICHIGAN
IN THE SUPREME COURT

JAN BOWERMAN, Plaintiff-Appellant, v. RED OAK MANAGEMENT CO, INC, and WESTVELD SERVICES, LLC, Defendants-Appellees.	MSC No. 167718 COA No. 366338 Montcalm County Circuit Court Case No. 2022-S-28824-NO Filed under AO 2019-6

DEFENDANT-APPELLEE RED OAK MANAGEMENT CO, INC'S ANSWER TO THE APPLICATION FOR LEAVE TO APPEAL OF PLAINTIFF-APPELLANT JAN BOWERMAN

AND REQUEST FOR ORAL ARGUMENT

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INTRODUCTION AND SUMMARY OF THE REASONS TO DENY THE APPLICATION FOR LEAVE TO APPEAL

This lawsuit arises out of a trip and fall incident that occurred on October 30, 2021. Plaintiff-Appellee Jan Bowerman tripped and fell due to a "trench" or depression in the parking lot at an apartment complex managed by Defendant-Appellee Red Oak Management Co, Inc.

Some concrete work had recently been performed at the apartment complex, including pouring a new cement slab, or pad, that was in front of where the garbage dumpster was located. To accommodate the work, the dumpster was moved to the west side of the slab. The subject trench spanned the north end of the slab and had been created when the cement contractor — Defendant-Appellee Westveld Services, LLC — removed the form used to pour the slab. The plan was for the trench to be filled in soon by another contractor, but that contractor became delayed.

Ms. Bowerman is a resident of the apartment complex and was a former employee of Red Oak and site manager of the apartment complex. Ms. Bowerman knew about the cement work that started around October 14, 2021. She knew about the trench, and she knew it spanned the north end of the slab. She had seen it every day when she had taken her trash out or parked her car. She also knew the dumpster was off to the west side of the slab. On October 30, 2021, in the early morning, Ms. Bowerman went to take her trash to the dumpster. She was walking west on the sidewalk toward the dumpster. She was approaching the east side of the slab. She concedes the slab was visible even though it was before sunrise. To access the dumpster, she could have walked across the slab, entirely avoiding the trench by walking south of it. Instead, she chose to step off the sidewalk and into the parking lot to walk around the trench to the north. Despite the fact that the slab was visible and she knew the trench was on the north end

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of the slab, Ms. Bowerman stepped into the end of the trench and fractured her ankle.

Ms. Bowerman brought a claim against Red Oak under only MCL 554.139. However, Red Oak has no liability under that statute. Under Michigan law, while the trench was an inconvenience, it did not render the parking lot unfit for its intended use. Ms. Bowerman knew it was there, it was avoidable, she and others had, in fact, avoided it many times before, and she otherwise had no concerns about the parking lot. The trench did not prevent tenants from parking and accessing their vehicles or accessing the dumpster. As noted above, Ms. Bowerman could have stayed on the walkway and easily avoided it. Also, Red Oak did not violate any state or local health or safety laws.

The trial court granted summary disposition for Red Oak finding that the trench did not render the parking unfit for its intended use, and the Court of Appeals affirmed. The majority noted that Ms. Bowerman "clearly knew of the trench's location," "she had successfully avoided it when taking her trash out every day for the fourteen days the trench was there," and she "was not forced to encounter the trench to access the dumpster" because there were "two entrances to and exits from the dumpster area that avoided the trench."[1] The dissent noted that there were no "visual aids" to warn of the trench. But the dissent did not appreciate that because the light gray cement slab was visible and Ms. Bowerman knew the trench spanned the north end of the slab, the slab itself was a visual aid to warn of the trench's location. The dissent also did not fully appreciate that there was another route to the dumpster that did not require her to encounter the trench. The dissent also seemed to think that, contrary

[1] *Bowerman v Red Oak Mgt Co, Inc*, unpublished opinion of the Court of Appeals, issued September 12, 2024 (Docket No. 366338), 2024 WL 4183299.

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to Michigan law, the parking lot had to be free of trip hazards to be fit for its intended purpose.

The Court of Appeals' decision was not clearly erroneous and will not cause substantial injustice. MCR 7.305(B)(5)(a). The decision likewise does conflict with a Supreme Court ruling or another decision of the Corut Appeals. MCR 7.305(B)(5)(b). Indeed, the Court of Appeals properly applied the principles set forth in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), and its progeny, to the facts of this case, and its decision is consistent with recent, factually similar decisions by other panels of the Court of Appeals. This Court should not be "left with the definite and firm conviction that a mistake has been made."[2] For the same reasons, this Court should not peremptorily reverse the decision of the Court of Appeals.

Also, the issue in this case is now perhaps of minimal jurisprudential significance. Prior to this Court's opinion in *Kandil-Elsayed v F&E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023), plaintiffs brought actions against landlords under MCL 554.139 to avoid the open and obvious doctrine.[3] However, in the wake of *Kandil-Elsayed*, a common law premises liability is broader and more viable than statutory claims under MCL 554.139. Such statutory claims are likely to fall by the wayside, and any ruling by this Court with respect to the MCL 554.139 is likely to be of minimal jurisprudential significance in the future.

As such, Red Oak requests that this Court deny Ms. Bowerman's application for leave to appeal.

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[2] *Pegasus Wind, LLC v Tuscola Cnty.*, __ Mich __; __ NW3d __, No. 164261, 2024 WL 1544761 (Mich, April 9, 2024) at *3.

[3] See *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006).

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COUNTER-STATEMENT OF QUESTION INVOLVED AS TO DEFENDANT RED OAK

Second Question:

Did the lower courts correctly conclude that there was no genuine issue of material fact that the parking lot was fit for its intended use where the condition at issue was known, avoidable, and simply a mere inconvenience and did not prevent tenants from parking and accessing their vehicles or accessing the dumpster?

Plaintiff-Appellant answer:	No.
Defendant-Appellee Red Oak answers:	Yes.
The Circuit Court answered:	Yes.
The Court of Appeals answer:	Yes.

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STATEMENT OF FACTS

I. The Incident

Ms. Bowerman resided at Stanton Park Apartments in Stanton for about eight years prior to the incident, having lived in apartment #20 for the last two years or so, including at the time of the October 30, 2021 incident.[4]

Before she retired in 2018, Ms. Bowerman was an employee of Red Oak for over 19 years.[5] In fact, she was the site manager at Stanton Park Apartments for nine or ten years before retiring.[6] She both lived and was the site manager at Stanton Park Apartments for about four years.

Around October 14, 2021, Defendant-Appellee Westveld Services, LLC, performed concrete work at the Stanton Park Apartments, which included pouring a new cement slab in front of the dumpster. Perhaps a lingering habit from her days as the site manager, Ms. Bowerman maintained detailed notes about the condition of the Stanton Park Apartments property even after she retired while she continued to live there. Her personal notes indicate that on October 14, the dumpster was moved to the grass area.[7] The dumpster was moved so the cement in front of it could be replaced. At the top of the next page is a picture[8] showing the location of the dumpster to the west of the slab after it was moved:

[4] Plaintiff Dep Trans at 6, Plaintiff Appx at 054a.
[5] *Id*. at 9, 054a. When citing depositions, the first number refers to the page number of the deposition, and the second number refers to the page number in Plaintiff's Appendix.
[6] Plaintiff Dep Trans at 12, Plaintiff Appx at 055a.
[7] Plaintiff Notes, Plaintiff Appx at 151a.
[8] Plaintiff Appx at 152a-153a.

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Ms. Bowerman's notes state that the sidewalks were torn out on October 14.[9] She noted that the cement company left after it started raining. She noted no signs, caution tape, or cones were put out. Her notes state that cement work resumed on October 18.

When Westveld finished its work, there was a skinny trench in front of the cement slab that was as long as the slab was wide.



[9] Plaintiff Appx at 151a.

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See Plaintiff's Appx at 154a-159a for additional photos. This trench was caused by the form Westveld used to pour the concrete.[10] The plan was for another company — Bob's Asphalt — to come after Westveld was done with its work, and Bob's Asphalt would have filled in the trench (as they ultimately did) when it performed its work.[11] However, Bob's Asphalt was delayed.[12]

The subject accident occurred on October 30, 2021, when Ms. Bowerman was taking her trash out to the dumpster. The day before, she had brussels sprouts.[13] She did not finish them all and put the rest in the trash.[14] The next morning, she got up at 6:00 a.m. and made coffee.[15] She realized the brussels sprouts in the trash were causing a terrible odor in her apartment.[16] But before taking them out, her brother, who lives in the apartment across the hall, came over for coffee for about an hour.[17] After he left, she then went to take the trash out.[18]

She turned left out of her door and walked south down the interior hallway to a door on the south end of the building.[19] This was the route she "always" took to take her trash out and to get to her car.[20] When she got to the door on the south end of the hallway, she saw that it was still dark out.[21] But "that particular morning, [she] didn't wait" to take the trash out.[22]

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[10] Randy Westveld Dep Trans at 14, 18, Plaintiff's Appx at 080a-081a.
[11] Eric Koch Dep Trans at 45-46, Plaintiff's Appx at 100a-101a.
[12] *Id*. at 46, 101a.
[13] Plaintiff Dep Trans at 16, Plaintiff Appx at 056a.
[14] *Id*.
[15] Plaintiff Dep Trans at 16, Plaintiff Appx at 056a.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*. at 15, 056a.
[21] *Id*. at 17, 056a.
[22] *Id*.

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She exited the building, turned right/west, and walked down a handicap sidewalk that leads down to the parking lot.[23] There is a sidewalk that runs north–south alongside the parking lot.[24] When Ms. Bowerman reached that sidewalk, she turned left/south.[25] The sidewalk soon turns to the right/east and slopes down toward the new cement slab.[26] She followed the sidewalk to the right/east and started walking down the sloped sidewalk toward the dumpster.[27] The dumpster was straight ahead of her on the other side of the slab.[28]

Ms. Bowerman was well aware of the previously mentioned trench in front of the slab. She testified as follows:

> Q. . . . you knew there was a trench in front of –
>
> A. Oh, yes.
>
> Q. -- that cement slab?
>
> A. Yes.[29]

She had seen the trench every day, and perhaps at nighttime as well. She testified as follows:

> Q. Had you taken your trash out to the dumpster at any point between October 14, 2021, and October 30, 2021?
>
> A. I had – I take my trash out every day, but I usually take – I always take it out during the daylight hours.[30]

There were no trenches on the lengthwise sides of the slab; there was only a trench on the front/north end.[31] The sidewalk Ms. Bowerman was

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[23] Plaintiff Dep Trans at 16, 056a. Included in Plaintiff's Appendix at 160a are blueprints of the premises to assist in seeing the path Plaintiff took. The redline, drawn by Defendant Red Oak's counsel, shows Ms. Bowerman's path based on her testimony, although the exact point she reached in the parking lot before walking toward the dumpster is unclear.
[24] *Id*. at 21, 057a.
[25] *Id*. at 16, 056a.
[26] *Id*.
[27] Plaintiff Dep Trans at 23, Plaintiff Appx at 058a.
[28] See Blueprint at Plaintiff's Appx at 160a.
[29] *Id*. at 29, 059a.
[30] *Id*. at 62, 068a.
[31] Westveld Dep Trans at 41, Plaintiff Appx at 086a.

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on sloped right down to the slab. The cement on the slab had long since cured,[32]and there was no tape signaling for people to stay off it.

However, rather than walk straight across the slab to the dumpster on the other side, Ms. Bowerman decided to step off the sidewalk and into the parking lot.[33] Although there are lights along the side of the parking lot, including within feet of where she stepped off into the parking lot,[34] Ms. Bowerman claims that once she got on the blacktop, she could not see because it was dark.[35] She claims that she did not know where she was.[36] But instead of going back onto the sidewalk, she proceeded to walk straight to the middle of the parking lot to go around the trench.[37] She claimed she walked "way out close to the — close to the entrance door," which is on the other end of the building.[38] Ms. Bowerman testified that from the middle of the parking lot she saw a streetlight and the dumpster.[39] She testified that she then "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."[40]

Aside from the trench, Ms. Bowerman had no concern about walking in the parking at that time.[41] She was not concerned about tripping on anything else.[42]

Ms. Bowerman testified that the picture[43] at the top of the next page shows "how black it was out there."[44] Yet, as Ms. Bowerman concedes, the light gray cement slab is visible and indicates the presence of the trench.

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[32] Westveld Dep Trans at 41, Plaintiff Appx at 086a.
[33] Plaintiff Dep Trans at 27, Plaintiff Appx at 059a.
[34] Plaintiff's Appx at 156a.
[35] *Id*. at 28, 059a.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 63, 068a. See also Blueprints, Plaintiff's Appx at 160a.
[39] *Id*. at 17, 056a.
[40] *Id*.
[41] *Id*. at 37, 061a.
[42] *Id*.
[43] Plaintiff's Appx at 158a.
[44] Plaintiff Dep Trans at 34, Plaintiff's Appx at 061a.

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Ms. Bowerman concedes in her Application that the "freshly poured concrete slab was relatively visible." (Application at 12.)

Because Ms. Bowerman was looking solely at the dumpster as she was walked across the parking lot, she stepped in front of the northwest corner of the slab and into the west edge of the trench. As a result, she fractured her right ankle. The picture on the next page,[45] taken shortly after the incident, shows a box, which she was carrying, in the location of her fall and also one of the lights only a short distance away.[46]

[45] See also Plaintiff's Appx at 073a.
[46] Plaintiff Dep Trans at 24, Plaintiff Appx at 058a.

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II. The trial court granted Red Oak's summary disposition.

The trial court granted Red Oak's motion for summary disposition pursuant to MCR 2.116(C)(10).[47] The trial court found that the parking lot was fit for its intended purpose and allowed for reasonable access to the dumpster that did not require Ms. Bowerman to encounter the trench. The trial court also held that Red Oak did not violate any applicable health or safety law. Ms. Bowerman appealed.

[47] Plaintiff Appx at 261a-270a.

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III. The Court of Appeals affirmed the trial court.

The Court of Appeals affirmed summary disposition for Red Oak. The Court observed that under the Michigan Supreme Court's precedent in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426; 751 NW2d 8 (2008), MCL 554.139(1)(a) "does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot" and that "[m]ere inconvenience of access…will not defeat the characterization of a lot as being fit for its intended purposes." *Id*. at 430. Relying on Ms. Bowerman's testimony and the photo of the trench in the darkness, the Court of Appeals held the trench was a mere inconvenience. The Court noted that she "clearly knew of the trench's location, as she had successfully avoided it when taking her trash out every day for the fourteen days the trench was there." *Id*. at 5. Ms. Bowerman was "not forced to encounter the trench to access the dumpster." *Id*. There were multiple ways to access the dumpster without encountering the trench.[48]

The dissent would have reversed.[49] The dissent is misplaced in a few respects. First, while the dissent acknowledged that "the concrete slab was visible," it further stated that "there were no visual aids installed to warn tenants of the trench's location, such as cones or caution tape." Dissent at 2. However, because Ms. Bowerman knew the slab was right behind the trench, the slab was itself a visual aid to warn of the trench's location. Second, while the dissent initially acknowledged that there were two ways to get to the dumpster, the dissent then seems to have ignored that and proceeded with its analysis under the premises that "plaintiff had to take a parabolic course around the concrete slab and the 10-foot trench that ran along its front side," which is not true — she could have walked straight

[48] Plaintiff Appx at 271a-277a.
[49] Id. at 278a-282a.

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across the slab. *Id*. at 2. Third, the dissent noted that Red Oak admitted the trench was trip hazard, but the case law is clear that the presence of a hazard does not render a common area unfit for its intended use.

ARGUMENT

I. Defendant Red Oak did not violate MCL 554.139 and was properly granted summary disposition.

A. Standard of Review

Red Oak agrees with Ms. Bowerman's statement of the legal standard with respect to motions for summary disposition under MCR 2.116(C)(10).

B. The parking lot was fit for its intended use under MCL 554.139(1)(a).

Ms. Bowerman's only cause of action against Red Oak is under MCL 554.139, which provides in relevant part as follows:

> (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 willful or irresponsible conduct or lack of conduct.

A claim under this statute is not a tort claim; it is a contract claim. As such, any references by Ms. Bowerman to tort principles is misplaced. "[A]ny remedy under the statute would consist exclusively of a contract remedy." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426; 751 NW2d 8 (2008).

By its plain language, the covenant of "fit for intended use" in (1)(a) applies to both "premises" and "common areas," but the covenant of "reasonable repair" in (1)(b) applies only to "premises," not "common

areas." *Allison* at 435. In *Allison*, the Michigan Supreme Court held that apartment complex parking lots are "common areas" under MCL 554.139(1)(a). *Id*. at 428. Accordingly, the covenant of reasonable repair in (1)(b) is not applicable to the parking lot in this case.

In *Allison*, the Court explained that the duties under (1)(a) are "less onerous" than the duties under (1)(b). The Court explained that with regard to potholes in parking lots, a lessor may arguably have to fill a pothole to comply with (1)(b) but would arguably not have to do that to comply with (1)(a). *Id*. at 433.

Whether a common area is fit for its intended use depends on the primary intended use of the common area at issue, not just any use. In *Allison*, the Court explained that a "parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id.* at 629. In contrast, the primary intended use of a sidewalk is walking. *Benton v Dart Properties, Inc,* 270 Mich App 437, 444; 715 NW2d 335 (2006). Accordingly, as a matter of logic, one court has observed that "a condition that renders a sidewalk unfit for use may not have the same effect on a parking lot." *Solomon v Blue Water Vill E, LLC*, unpublished opinion of the Court of Appeals, issued July 29, 2010 (Docket No. 291780), 2010 WL 2977334, p *3.

The *Allison* Court further stated that MCL 554.139(1)(a) "does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot." *Id*. at 430. "Mere inconvenience of access … will not defeat the characterization of a lot as being fit for its intended purposes." *Id*.

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In *Spitz v Occidental Dev, LLC*, unpublished opinion of the Courts of Appeals, issued Nov 24, 2020 (Docket No. 351082), 2020 WL 6938048,[50] the Court addressed a factually similar situation. In *Spitz*, the plaintiff was walking on the sidewalk at his apartment complex when he stepped in a depression on the sidewalk and fractured his right foot. The plaintiff had known the depression was there, and he had walked around or over it multiple times before. He sued the defendant landlord under MCL 554.139. The Court held, relying on *Allison*, that the depression was a mere inconvenience because the plaintiff could have walked around it, as he had previously done so multiple times. Accordingly, the sidewalk was not unfit for its intended purpose, and the defendant was entitled to summary disposition.

Recently, in *Herrera v Sun Troy Villa, LLC*, unpublished opinion of the Court of Appeals, issued October 19, 2023 (Docket No. 361852), 2023 WL 6937774,[51] the Court held that a raised concrete slab that was part of a sidewalk did not render the sidewalk unfit for its intended purpose and affirmed summary disposition for the defendant on the plaintiff's claim under MCL 554.139(1)(a). The sidewalk was "in poor condition, with cracks and gaps …." *Id*. at *1. There was "large height differential between two adjacent concrete slabs spanning the width of the sidewalk, and large cracks on the elevated slab." *Id*. The plaintiff "admitted that she had walked over the same sidewalk approximately a dozen times before, and 'was aware of the condition of the sidewalk at the time of the incident,' but 'never realized how large the gap was between the two flags of pavement.'" *Id*. The plaintiff also testified that "her neighbor had previously complained about the

[50] Plaintiff's Appx at 161a-164a. Although *Spitz* is unpublished, it is cited not for a proposition of law but rather as an illustration of the application of the law to similar facts, which the Court may consider persuasive.

[51] Defendant's Appx at Exhibit A. Although *Herrera* is unpublished, it is cited not for a proposition of law but rather as an illustration of the application of the law to similar facts, which the Court may consider persuasive.

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sidewalk's condition to defendant's office 'at least a couple of times because of a couple incidents of others tripping on the same sidewalk,' and that she was aware that her elderly neighbor, and two family members of neighbors, had tripped on the same sidewalk." *Id*. Moreover, the "[p]laintiff's expert opined that the height differential was a known trip-and-fall hazard, and that the subject sidewalk's condition was 'hazardous and unsafe to pedestrians using the sidewalk.'" *Id*. at *2. Despite all this, the Court held that "there could be no reasonable differences of opinion" that the sidewalk was fit for its intended use. *Id*. at *3, citing *Allison*, *supra* at 430. Even though the plaintiff in that case was forced to confront the hazardous condition, she could have simply stepped over it, as she had repeatedly done in the past. Accordingly, the sidewalk was not unfit for its intended purpose.[52]

Similar to *Spitz* and *Herrera*, Ms. Bowerman knew about the trench directly in front of the light gray slab. She documented the trench in her notes. It had been there for more than a week. She saw it every time she took her trash out, which was every day. On October 30, there was nothing that prevented her from walking around the trench. When she went to take her trash out that day, she knew about the trench, and she could have walked straight down the wheelchair ramp and straight across the slab to the dumpster. However, she specifically selected a path via the parking lot to walk around the trench. However, because she was looking solely at the dumpster, and not toward the area of the trench, including the visible light gray cement slab that she knew was directly behind the trench, she stepped into very west end of the trench. Moreover, while the conditions in *Spitz* and *Herrera* were on the sidewalk, for which the defendant had a more

[52] Despite granting summary disposition under (1)(a), the Court reinstated the plaintiff's claim under (1)(b) because it was prematurely dismissed because the defendant had not moved to dismiss any such claim and the trial court had not yet considered the merits of the claim.

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onerous duty, the condition, in this case, was in the parking lot, for which Defendant Red Oak had a less onerous duty.

In *Allison*, the Court recognized that "tenants must walk across a parking lot in order to access their vehicles. However, plaintiff did not show that the condition of the parking lot, in this case, precluded access to his vehicle." *Id*. at 430. Similarly, in this case, Ms. Bowerman has not shown that the trench precluded access to her vehicle or to the dumpster. Moreover, other than the trench, Ms. Bowerman had no concerns about walking into the parking lot, even in the dark, which indicates that the parking lot was fit for its intended purpose. While the trench was a known, visible and avoidable inconvenience, it did not render the parking lot unfit for its intended purpose.

C. The fact that Plaintiff and others successfully avoided the trench on other occasions shows that the trench was an avoidable inconvenience that did not render the parking lot unfit for its intended purposes.

Ms. Bowerman argues that the fact that she — and others — had repeatedly and successfully avoided the known trench prior to this one time is irrelevant to whether the parking lot was fit for its intended use. However, the cases relied upon by Plaintiff for this proposition, i.e., *Estate of Trueblood v P&G Apartments, LLC*,[53] *Stone v Boulder Creek Apts, LLC*,[54] *Hadden v McDermitt Apartments, LLC*,[55] and *Sedlecky v Sun Communities, Inc*,[56] are all distinguishable because they all involved conditions that were unavoidable. In *Estate of Trueblood*, the defendant was denied summary disposition where there was evidence that the parking lot was completely covered in ice because "a sidewalk completely covered in ice is not fit for

[53] 327 Mich App 275; 933 NW2d 732 (2019).
[54] Unpublished per curiam opinion of the Court of Appeals, issued Nov 26, 2019 (Docket No. 346252)(Plaintiff Appx at 210a-214a).
[55] 287 Mich App 124, 132; 782 NW2d 800 (2010).
[56] Unpublished per curiam opinion of the Court of Appeals, issued Aug 20, 2020 (Docket No. 348520)(Plaintiff Appx at 203a-209a).

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its intended use because it does not present a '[m]ere inconvenience of access;' anyone walking on a sidewalk completely covered in ice would be forced to walk on ice, and there is no way to simply walk around it." *Id*. at 291 (citations omitted). In *Stone*, the defendant was similarly denied summary disposition where there was "snow and ice … completely covering the landing and 10 to 12 step stairway" that caused the plaintiff to slip and fall. *Id*. at *1 (emphasis added). In *Hadden*, the defendant was denied summary disposition where the plaintiff slipped on icy stairs that "denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use." In *Sedlecky*, the only stairs into the mobile home community pool did not have a handrail or slip-resistant tread, making them unfit for their intended use. In these cases, the common areas were unfit for their intended purposes because the dangerous conditions were all unavoidable and denied access, and the fact that some people had managed to avoid injury despite being were forced to encounter them did not mean the conditions were not dangerous or that the common areas were fit.

In this case, however, the fact that Ms. Bowerman and other elderly and disabled tenants at the apartment complex had safely avoided the trench for more than a week is relevant to the issue of the avoidability of the trench and the fact that it did not deny access to vehicles or the dumpster. Unlike in the cases relied upon by Ms. Bowerman, the subject condition did not completely cover the parking; it was limited to one very specific — known — location, i.e., directly in front of the light gray cement slab. The trench did not deny Ms. Bowerman, or any other disabled or elderly tenant, access to the dumpster. She was not forced to encounter the trench to access her car or the dumpster. She could have avoided it by walking to the north of it, as she was doing. Or she could have avoided it to the south, a wheel chair accessible route, by going down the sidewalk

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and across the cement slab to the dumpster on the other side, as there were no trenches on the east and west sides of the slab. Significantly, Ms. Bowerman had no other concerns with the parking lot, even in the dark.

This case is factually much more like *Spitz* and *Herrara* than any case cited by Ms. Bowerman. Notably, *Spitz* cited *Trueblood* in granting the defendant summary disposition because the depression in the sidewalk was only a mere inconvenience. See also *Bowman v Walker*, 340 Mich App 420, 433 (2022)(summary disposition for the defendant was affirmed as to the plaintiff's MCL 554.139(1)(a) claim because the plaintiff had "only shown that the sidewalk had some ice and snow on it, which at most indicated that there was inconvenience of access or that the patio was not in peak condition.")

In *Trueblood*, the Court stated that "*Allison* stands for the proposition that a plaintiff must present more evidence than simply the presence of ice or snow and someone falling." *Id*. at 291-292. Similarly, it is not enough in this case for Ms. Bowerman to present evidence of the presence of the known trench and her falling.

D. Plaintiff's lighting argument is a red herring.

Ms. Bowerman's claim that the parking lot was underlit is red herring. First, her expert admitted that that no state or local law required the parking lot to have any specific amount of lighting.[57] Second, she did not fall because the parking lot was underlit. What is now a significant part of her case was not even alleged in her Complaint. Moreover, her expert admitted that he has no evidence that the amount of light he says there should have been would have prevented this accident.[58] This is because Ms. Bowerman did not fall due to lighting. The pictures show that it was clearly

[57] Kerelis Dep Trans at 33-35, Plaintiff Appx at 122a-123a.
[58] *Id*. at 37, 123a.

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not "complete darkness,"[59] as Ms. Bowerman claims it was. Her expert acknowledged that it was not pitch black at night and that he did not have to use a flashlight to see where he was going in the parking lot when he took his measurements.[60] The picture that Ms. Bowerman testified shows the lighting conditions at the time of the incident[61] confirms that it was not so dark because the light gray cement slab is plainly visible in the photo. The front edge (or face) of the slab is visible indicating the existence of a height differential, i.e., the trench, which she already knew was there. Her expert admitted that he could see the edge of the slab and that that was indicative of a height differential.[62]

Ms. Bowerman concedes the "concrete slab was relatively visible," but says that is irrelevant because she "did not trip on the concrete pad."[63] But she misses the point. She knew the trench was directly in front of this visible concrete slab, so the concrete slab was effectively a warning sign. All she had to do was keep an eye on and stay clear of the north end of the concrete slab — or better yet stay on the sidewalk and walk directly across the slab — to safely access the dumpster.

Accordingly, Ms. Bowerman fell because, as she admits, she was not looking. Had she been looking, she would have avoided it, just as she and everyone else who had traversed the parking lot did during the week or so the trench existed before the incident.

Accordingly, the parking lot was fit for its intended purpose, and the lower courts property granted Red Oak summary disposition as to Ms. Bowerman's claim under MCL 554.139(1)(a).

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[59] Plaintiff Dep Trans at 36, 061a.
[60] Kerelis Dep Trans at 20-23, Plaintiff Appx at 119a-120a.
[61] Plaintiff's Appx at 158a.
[62] Kerelis Dep Trans at 38, Plaintiff Appx at 124a.
[63] Plaintiff's Application at 12, 19.

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E. Defendant Red Oak did not violate any Michigan or City of Stanton health or safety laws under MCL 554.139(1)(b).

Ms. Bowerman argues that Red Oak violated illuminance standards set forth by Illuminating Engineering Society of North America (IES). However, MCL 554.139(1)(b) does not impose liability for the mere violation of an engineering society's standards; it imposes liability for the violation of state or local law. Accordingly, unless the illuminance standards were incorporated into or adopted by the law, a violation of the standard is not a violation of MCL 554.139(1)(b).

Ms. Bowerman has not explained to this Court what Michigan or local law incorporates or adopts the IES standards.[64] Rather, she argues, without citation, that the City of Stanton "recognizes" them. But, recognizing their existence is not the same as adopting or incorporating them.

It is true that § 3.26(f) of Stanton's Zoning Ordinance mentions the IES.[65] But, as Ms. Bowerman's expert conceded,[66] that section applies only to "Commercial and Industrial zones and for all non-residential uses," while this case involves residential property. Also, § 3.26(f) only refers to the IES "measurement standards," not illuminance standards. In other words, the City of Stanton has not adopted any IES illuminance standards for residential property use, and it has only incorporated the IES measurement standards for commercial and industrial zones and non-residential uses. Moreover, as Ms. Bowerman's expert conceded at his deposition, the City of Stanton's rules regarding lighting set maximum, not

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[64] By failing to cite any authority or provide any analysis, plaintiff has abandoned this argument on appeal. See *Traverse City Record-Eagle v Traverse City Area Pub Sch Bd of Educ*, 337 Mich App 281, 296; 975 NW2d 104 (2021) ("When a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned") (quotation marks and citation omitted).

[65] https://stantononline.com/wp-content/uploads/2019/01/Stanton-Zoning-Ordinance-190109-2.pdf.

[66] Kerelis Dep Trans at 28, Plaintiff Appx at 121a.

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minimum, limits for how bright lights can be; that is, they are concerned about too much light.[67]

Ms. Bowerman also argues that Red Oak violated BOCA 1990 Code § 3006.0, which her expert claims is incorporated into Stanton's Rental Housing Ordinance. However, it is up to the Court, not her engineering expert to determine whether § 3006.0 is incorporated into the Rental Housing Ordinance. Again, she has not explained to the Court where and how § 3006.0 is incorporated into Stanton's ordinance, and therefore, the argument is abandoned. *Traverse City Record-Eagle* at 296.

Only six sections of the Rental Housing Ordinance[68] refer to the building code.[69] None of them reference § 3006.0. None of them address the type of circumstances at issue in this case. For example, § 1.123 requires compliance with the building code with respect to exterior stairs, porches and railings. Section 1.124 requires the provision of interior stairs and handrails as required by the building code.

Moreover, the plain language of § 3006.0 does not apply to this case. Section 3006.0 only applies to "buildings and structures," but the area where Ms. Bowerman fell was not a building or structure; it was a surface parking lot. Stanton's Rental Housing Ordinance defines structure as:

> 38. Structure: Anything constructed or erected, such as a building, which requires location on the ground, or attachment to something having location on the ground, except wall, fences, ornamental landscape features, driveways and sidewalks.[70]

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[67] Kerelis Dep Trans at 27-28, Plaintiff's Appx at 121a (the City's "lighting standards are really more about not letting light spill off of a property;" Chapter 17 of the Zoning Ordinance "doesn't really inform me too much about what the lighting should be. It's really more about what they don't want. It's really more about that they don't want light spilling out from an area into another. They're concerned about light pollution.")

[68] Plaintiff Appx at 186a-202a; See also City of Stanton, Ordinance No. 192 – Rental Housing, Administration – City of Stanton (stantononline.com).

[69] Sections 1.103, 1.108, 1.123, 1.132 and 1.134.

[70] Plaintiff Appx at 199a-200a.

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The definitions of "basic structural elements" and "structural alterations" support the conclusion that a surface parking lot is not a "structure:"

> 3. Basic Structural Elements: The parts of a building which provide the principal strength, including but not limited to, plates, studs, joists, rafters, stringers, stairs, sub-flooring, flooring, sheathing, lathing, roofing, siding, window frames, door frames, porches, railings, eaves, chimneys, flashing, masonry, and all other essential components.
>
> * * *
>
> 37. Structural Alterations: Any change in the supporting members of a building or structure, such as bearing walls, columns, beams or girders.[71]

As such, the trial court correctly held that a parking lot is like a driveway and sidewalk and is not a structure. Ms. Bowerman has cited no case in which any court applied BOCA § 3006.0 to a surface parking lot.

Accordingly, Red Oak did not violate any Michigan or City of Stanton health or safety law, and the lower courts correctly granted Red Oak summary disposition as to Ms. Bowerman's claim under MCL 554.139(1)(b).

CONCLUSIONS AND RELIEF REQUESTED

For the reasons discussed above, Defendant-Appellee Red Oak requests that this Court deny Plaintiff's application.

Respectfully submitted:

Date: November 20, 2024 By: 

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[71] Plaintiff Appx at 198a-199a.

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CERTIFICATE OF WORD COUNT

This Answer contains 6,328 words. This word count excludes the words in the title page, table of contents, index of authorities, statement of the basis of jurisdiction statement of the questions involved, signature block, listing of counsel at the end of the brief, certificate of compliance, proof of service, exhibits and appendices but includes the words in footnotes in non-excluded sections and any words contained in embedded graphics. The filer relied on the word count of the word-processing system used to prepare this brief.

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