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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. 167718

COA No. 366338

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

Filed under AO 2019-6

Plaintiff-Appellant's Supplemental Brief on Appeal

- Oral Argument Requested -

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STATEMENT OF THE QUESTIONS INVOLVED

First Question:

Whether genuine issues of material fact exist as to whether Defendant Westveld Services, LLC, breached a duty that it owed plaintiff.

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: No.

The trial court answered: No.

The Court of Appeals answered: No.

This Court should answer: Yes.

Second Question:

Whether genuine issues of material fact exist as to whether defendant Red Oak Management Co., Inc., violated MCL 554.139(1)(a).

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: No.

The trial court answered: No.

The Court of Appeals answered: No.

This Court should answer: Yes.

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INTRODUCTION

Plaintiff Jan Bowerman fell into a ten-foot long, four-to-five-inch-deep trench at her apartment complex and suffered serious injuries. She was taking out her trash; the trench was on her path to the apartment complex's dumpster.

The complex is owned and operated by Defendant Red Oak Management Co., Inc., and houses only elderly or disabled tenants. The trench was created and left by Defendant Westveld Services, LLC. Nobody disputes that there were no cones, caution tape, or any other visual aids to warn tenants of the trench at the time of Plaintiff's fall. And nobody disputes that Red Oak's elderly and disabled tenants had to traverse the area surrounding the trench to access the dumpster.

Yet the Court of Appeals majority saw no problem with this. In the majority's view, no reasonable juror could conclude Red Oak violated MCL 554.139(1)(a)—a statute that mandates lessors keep common areas, like the trash-disposal area here, fit for their intended use. The majority, relying on language from this Court's opinion in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419 (2008), held instead that the trench was a "mere inconvenience" for Red Oak's elderly and disabled tenants. In fairness, the majority was not the first panel to misconstrue *Allison*'s "mere inconvenience" language. The phrase has taken on a life of its own in Michigan's landlord-tenant jurisprudence. This Court should clarify that deeming a hazard a "mere inconvenience" isn't a get-out-of-liability-free card. Otherwise, we can do away with MCL 554.139(1)(a) all together. After all, a hazard in a common area will always "inconvenience" tenants.

It was largely the same story in the Court of Appeals when it came to Westveld. Again, in the majority's telling, no reasonable juror could conclude that a contractor that created and then left an open trench in an apartment complex's common area breached its duty to perform its work with due care. That question should have been left to a jury. Instead, the majority sorted through factual disputes to decide for itself whether the trench was unreasonably dangerous. That was an error this Court must correct.

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STATEMENT OF FACTS

A. The Apartment Complex

Defendant Red Oak Management Co., Inc. ("Red Oak") owns and operates Stanton Park Apartments in Stanton, Michigan. The complex is a 24-unit residential property for seniors over the age of 62 and those with disabilities. (App'x, p 092a).

The property is made up of a single-story L-shaped building 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 at either end of the legs (west and south) and in the corner of the L. A concrete sidewalk runs along the edge of the parking lot and in front of the building. Sidewalks extend to the three entrances.

At the southern end of the parking lot sits a concrete slab, which is intended to support a trash dumpster for residents. A concrete sidewalk 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.

Blueprints of the complex can be found at App'x, p 160a.

B. The Project

In October of 2021, cracks began to emerge in Red Oak's concrete sidewalks and dumpster slab. (App'x, p 093a). So Red Oak endeavored to remove and replace the cracked concrete with a fresh application of concrete to yield a smooth surface and remedy any trip hazards. (App'x, p 093a). It hired Defendant Westveld Services, LLC ("Westveld") to complete the project. (App'x, pp 093a-094a; 078a).

Work began on October 14, 2021. (App'x, p 095a). Westveld relocated the dumpster to a grassy area at the south edge of the parking lot—to the west of where work was to be performed—so it could work on

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the concrete slab where the dumpster typically sat. (App'x, p 081a). It then began its concrete work.

Westveld's concrete flatwork required it to create multiple trenches throughout the property. (App'x, pp 079a-081a). One such trench ran along the side of the dumpster slab that met the parking lot; it was four-to-five-inches deep and roughly ten-feet long. (App'x, pp 081a, 095a):



Westveld filled some of the trenches with sand or asphalt millings, though it left the trench abutting the dumpster slab unfilled. (App'x, pp 081a, 098a). Randy Westveld—Westveld's owner and operator—testified that he filled one of the trenches with sand because he saw a resident in a wheelchair struggling to get over the trench and "there honestly was no other way he was going to get into his residence." (App'x, p 081a). He said he "felt bad for the guy," and asked, rhetorically, "what's the guy gonna do, you know[?]" (App'x, p 082a). Nevertheless, he left the trench next to the dumpster slab unfilled because "there would have been no reason for anybody to be there in [his] eyes." (App'x, p 082a). Again, the open trench abutted the parking lot where residents

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parked their vehicles and was mere feet from the sidewalk and dumpster. But at any rate, the trenches were supposed to be filled later by another contractor, Bob's Asphalt & Paving, Inc. (App'x, p 083a).

Westveld eventually finished its work on October 21, 2021. (App'x, p 083a). The trenches still had not been filled by that point. (App'x, p 083a). So, when Westveld completed its work, it left behind the open trench abutting the concrete slab.

Randy Westveld testified that he ordinarily leaves cones and tape up to warn of conditions like the trench, which he admitted was a trip hazard. (App'x, pp 080a, 084a). But his testimony was equivocal as to whether he did so here; he couldn't affirmatively answer one way or the other. (App'x, p 080a). He explained that he's had trouble with "wind" and "children" tearing the tape down in the past and has since started using "reinforce[ment] stuff" to keep tape up. (App'x, p 080a). In any event, Red Oak's "construction specialist," Eric Koch, testified that there was no tape surrounding the trench on October 21—the day Westveld finished the project—when he went to the property to inspect the job and take photographs. (App'x, p 095a). Plaintiff testified similarly, (App'x, p 057a), and her contemporaneous personal notes confirm her testimony, (App'x, p 151a).

For his part, Eric Koch admitted that the trench was a trip hazard, and it would've been a "good idea" to put up a visual aid to warn tenants of the trench. (App'x, p 095a). But he and Randy Westveld never discussed putting up any visual aids to warn tenants of the trench or the worksite. (App'x, p 094a). He also admitted that the trench should have been filled with sand or asphalt millings like the others. (App'x, p 098a).

Bob's Asphalt & Paving eventually filled the open trenches on November 10, 2021, twenty days after Westveld left the property. (App'x, p 095a).

C. Plaintiff's Fall

Plaintiff Jan Bowerman is a resident of Red Oak's Stanton Park Apartments. (App'x, p 054a). She attempted to take her trash out at roughly 7:15 a.m. on October 30, 2021, (App'x, pp 056a, 065a); the sun

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rose at 8:13 a.m. in Stanton that morning. Plaintiff was 75 years old at the time.

As Plaintiff made her way out of her apartment and towards the dumpster, she was mindful of Red Oak and Westveld's incomplete project. (App'x, p 059a). She knew there was a trench near the concrete slab and wanted to steer clear of it for her safety. (App'x, p 061a). So she stepped off the sidewalk and into the parking lot in an attempt to take a parabolic route around the trench. (App'x, pp 058a-059a). She described her trip as follows:

> 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 [sic], and I fell right down – right down in the hole. [(App'x, p 056a)].

Plaintiff lost her way in the dark parking lot and became disoriented before making her way back towards the dumpster and eventually falling in the trench. (App'x, p 058a, 061a). She explained that she "walked way out toward the middle of the parking lot . . . to stay away from that area," but she "didn't know exactly where [she] was once [she] . . . got on the blacktop." (App'x, p 059a). She just "couldn't see." (App'x, p 059a). She went on: "I knew I had to get on the parking lot and walk away from that trench and then get myself over on [the side with dumpster]." (App'x, p 059a).

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Plaintiff was "in shock" after she fell. (App'x, p 062a). She looked down at her ankle and saw that it was clearly broken. At that point she was concerned that other tenants' caregivers would be arriving soon and wouldn't see her lying in the dark parking lot. She didn't want to get hit by a car, so the 75-year-old Ms. Bowerman army crawled through the dark parking lot back towards her apartment. Once inside, she realized she couldn't reach her phone. So she crawled some more—this time to her brother's apartment (who also lived at the complex) and yelled for him to call an ambulance. (App'x, p 062a).

This photograph gives the Court a sense of how the trench appeared in the dark when Plaintiff attempted to take out her trash:



Plaintiff ultimately suffered a displaced trimalleolar fracture of her right lower leg, which had to be surgically repaired with plates and screws. She was confined to a wheelchair for sixteen weeks and was in cast for approximately five months. After the cast was removed, she was

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given a boot for eight weeks and had to use a walker for two months. (App'x, p 063a).

D. Procedural History

As a result of the events described above, Plaintiff sued Westveld and Red Oak.[1] Plaintiff alleged that Westveld was liable for negligence and that Red Oak violated its duty under MCL 554.139 to keep common areas of leased property fit for their intended use. (App'x, pp 001a-008a).

During the course of discovery, Plaintiff retained Albert Kerelis, a construction and building expert. He eventually issued a written report, opining 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 Plaintiff's fall and injury. (App'x, p 113a).

Mr. Kerelis was also deposed. His testimony makes clear that parking lots serving elderly tenants should have 0.5 candles of lighting to ensure tenant safety. (App'x, pp 121a-122a). When he completed a site investigation in conditions like those present at the time of Plaintiff's fall, however, the parking lot yielded a reading of 0.0 candles in the location of the trench. (App'x, p 123a).

Both Westveld and Red Oak moved for summary disposition at the close of discovery. Westveld argued that it couldn't be held liable for Plaintiff's injuries because it did not owe Plaintiff any duty that was separate and distinct from its contractual obligations to Red Oak. It also argued that, to the extent it did owe Plaintiff duties beyond those contractual obligations, it owed no duty here because the trench was open and obvious. (App'x, pp 011a-027a).

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[1] She also sued Bob's Asphalt & Paving, Inc., which is not a party to this appeal.

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For its part, Red Oak argued that the trench did not render the area in question unfit for its intended use, as Plaintiff could have merely avoided the hazard. It further argued that if Plaintiff's statutory claim sounded in premises liability, the trench was open and obvious. (App'x, pp 132a-150a).

Plaintiff responded to both motions. She claimed that Westveld owed her a duty of ordinary care—a duty that was separate and distinct from Westveld's contractual obligations to Red Oak. Plaintiff also argued that Westveld was a mere contractor that didn't possess and control the premises, so it couldn't enjoy the benefits of the open-and-obvious doctrine. And to cover her bases, she also made clear that even if Westveld could invoke the doctrine, the trench here was not open and obvious. (App'x, pp 031a-051a). With regard to Red Oak, Plaintiff argued that the trench, paired with common area's dark lighting, rendered the area unfit for its intended use. (App'x, pp 165a-185a).

The trial court held a hearing on the motions and eventually issued a written opinion and order granting both Westveld and Red Oak summary disposition. The court rejected Westveld's contention that it didn't owe Plaintiff a separate-and-distinct duty. But it held that summary disposition was proper because the trench was open and obvious: The court concluded that despite being a mere contractor, Westveld was permitted to invoke the open-and-obvious doctrine, which precluded liability. Red Oak likewise couldn't be held liable in the trial court's view. The trench, the court concluded, didn't render the area unfit for its intended use. (App'x, pp 261a-270a).

Plaintiff appealed. Following briefing and argument, the Court of Appeals issued a 2-1 opinion affirming summary disposition in favor of both defendants. *Bowerman v Red Oak Mgmt Co*, unpublished per curiam opinion of the Court of Appeals, issued Sept. 12, 2024 (Docket No. 366338) (App'x, pp 271a-277a). The majority seemingly recognized that Plaintiff's claim against Westveld sounded in ordinary negligence since Westveld didn't have possession and control of the premises at the time of Plaintiff's injury. But the majority determined that summary disposition was nonetheless proper. In its view, no reasonable juror could conclude Westveld breached its common-law duty:

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> 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. [*Id.* at 7].

Plaintiff had the same luck when it came to her claim against Red Oak. The majority held that summary disposition of Plaintiff's statutory claim was also proper, relying primarily on this Court's decision in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419; 751 NW2d 8 (2008):

> 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). [*Bowerman*, unpub op at 5].

Judge Mariani dissented. (App'x, pp 278a-282a). In his view, genuine issues of material fact precluded summary disposition of both claims:

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> Evidence of record . . . 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.
>
> * * *
>
> [Moreover,] 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. [*Bowerman*, (MARIANI, J., dissenting) at 3, 5].

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

Plaintiff then applied for leave to appeal in this Court. The Court granted argument on the application and ordered the parties to file supplemental briefs addressing "whether genuine issues of material fact exist as to whether: (1) defendant Westveld Services, LLC, breached a duty that it owed to the plaintiff; and (2) defendant Red Oak Management Co., Inc., violated MCL 554.139(1)(a)." *Bowerman v Red Oak Mgmt Co*, __ Mich __ (2025).

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LEGAL STANDARD

Defendants moved for summary disposition under 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; 597 NW2d 817 (1999). All inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Only where the Court is satisfied there are no 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; 665 NW2d 468 (2003).

ARGUMENT

The Court ordered the parties to address two questions: (1) whether Westveld breached a duty it owed Plaintiff; and (2) whether Red Oak violated MCL 554.139(1)(a). The answer to both questions is yes.

I. Westveld breached its duty to use ordinary care in the work it performed at Red Oak's apartment complex.

A. Westveld's duty of care sounded in ordinary negligence, not premises liability.

1. This Court has deemed it a "basic rule of common law" that "every person engaged in the prosecution of any undertaking [has] an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Contractors, therefore, "have a common-law duty to perform their work with ordinary care so as not to unreasonably endanger employees of other subcontractors or anyone else lawfully on the worksite." *Finazzo v Fire*

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Equip Co, 323 Mich App 620, 634; 918 NW2d 200 (2018), citing *Clark*, 379 Mich at 261.

The Court of Appeals recognized this unremarkable principle below, holding that "Westveld had a common law duty to perform its work with ordinary care so as not to create an unreasonable risk of harm." *Bowerman*, unpub op at 7. Judge Mariani agreed. He explained that Westveld "owe[d] a duty to plaintiff under a theory of ordinary negligence, as plaintiff alleged in her complaint." *Id.* (MARIANI, J., dissenting) at 4. There is thus one point of agreement between Plaintiff, the Court of Appeals majority, and Judge Mariani: Westveld owed Plaintiff a duty of ordinary care, rooted in an ordinary-negligence theory.

Westveld is out on an island, however. It has repeatedly claimed that it didn't owe Plaintiff a duty at all. In Westveld's telling, Plaintiff's ordinary-negligence claim is really a premises-liability claim, and since Westveld didn't possess and control the premises, it cannot be held liable for Plaintiff's injuries. In a sense, it's the perfect tort: be a contractor, negligently create a hazardous condition on another's land, and then pack your bags and leave. At that point the contractor no longer possesses or controls the land, so liability can't lie in a premises-liability theory. Nor can it lie in an ordinary-negligence theory, apparently, so long as the plaintiff's injury arose from a condition on the land. Heads contractors win; tails plaintiffs lose.

Though the Court framed its first question in the context of *breach*, it's worth getting ahead of this argument for two reasons. First, some Court of Appeals panels have seemingly bought the argument. See, e.g., *Debano v McCarthy & Smith*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2023 (Docket No. 362766) (App'x, pp 284a-286a); *Miller v JP Morgan Chase Bank, NA*, unpublished per curiam opinion of the Court of Appeals, issued July 9, 2025 (Docket No. 368053) (App'x, pp 325a-330a).[2] And second, to answer whether

[2] Westveld seems to believe that the Court of Appeals majority bought that argument here as well. Only a strained reading of the Court of Appeals majority's opinion could lead to that conclusion. In any event,

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Westveld *breached* its duty, it's necessary to first define what that duty was.

2. Luckily, decisions of both this Court and the Court of Appeals make that task easy. This Court has made clear that "every person engaged in the prosecution of any undertaking" must "use due care." *Clark*, 379 Mich at 261. This common-law rule "arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another." *Id.* The Court has also made clear that this duty applies with equal force to contractors. Indeed, as far back as 1967 the Court had already deemed it "well settled" that contractors have a duty to "act so as not to unreasonably endanger" others. *Id.* at 262.

The Court of Appeals has likewise applied this common-law rule. In *Finazzo v Fire Equip Co*—the very case both Westveld and the Court of Appeals majority relied heavily upon below—the court, citing the same propositions from *Clark* set forth above, determined that the defendant contractors owed the plaintiff a duty rooted in ordinary negligence. *Finazzo*, 323 Mich App at 634-636. And to be sure, the *Finazzo* plaintiff was injured by a condition on the land—a cable that was temporarily stretched across the floor of a building. *Id.* at 623. Yet the court remained undeterred by premises-liability principles in its ordinary-negligence analysis.

So too in *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). In that case, the plaintiff was injured when she slipped and fell on ice that the defendant had contracted to remove from the premises owner's property. *Id.* at 704. The defendant removed snow and ice from one portion of the premises and placed it on another portion where it melted and eventually froze on the abutting sidewalk, effectively creating a new hazard. *Id.* There again the Court of Appeals turned to *Clark* and held that the defendant owed the plaintiff an ordinary-negligence duty of care. *Id.* at 708-710. And *Osman* largely mirrors the factual scenario presented here: the

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Plaintiff expects Westveld to inject that reading into the discourse in this Court.

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defendant contractor (1) didn't possess or control the land, (2) created a hazardous condition on the land, and (3) the plaintiff was injured by that hazardous condition.

The same goes for a more recent case: *Fowlkes v Abbeys of Westland Condo Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued May 13, 2025 (Docket No. 366609) (App'x, pp 287a-294a). Though unpublished, *Fowlkes* demonstrates the proper analytical framework for claims against contractors like Westveld, as opposed to premises possessors. The *Fowlkes* plaintiff owned a condominium in a complex operated by the defendant condominium association. *Id.* at 1. She encountered a mound of snow and ice on the sidewalk while walking her dog. *Id.* As she attempted to avoid the snow and ice, she slipped and fell. *Id.* The condominium association contracted with a snow-removal company that had plowed the mound of snow and ice onto the sidewalk. *Id.* So the plaintiff sued both the condominium association and the snow-removal contractor. *Id.* She alleged premises liability, breach of contract, and negligence[3] claims against both defendants. *Id.* at 1-2.

The court held that the plaintiff's negligence claim against the association sounded in premises liability and was thus duplicative of her premises-liability claim. *Id.* at 7. The association's duty stemmed from its possession and control of the land—a duty that sounds in premises liability, not ordinary negligence. *Id.* As to the negligence claim against the contractor, however, the court held that the contractor's duty sounded in ordinary negligence. *Id.* at 8. The court explained that the "trial court erred by characterizing [the] plaintiff's claim against [the contractor] as sounding in premises liability rather than negligence." *Id.*

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[3] The Court of Appeals called the plaintiff's negligence claim a "negligent performance of a contract" claim. *Id.* at 1. They're the same thing. The court began its discussion of the negligent-performance-of-a-contract claim with the following quote from *Loweke v Ann Arbor Ceiling*, 489 Mich 157, 162; 809 NW2d 553 (2011): "To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was the proximate cause of the plaintiff's damages." This Court has also analyzed the claims interchangeably. See *Loweke*, 489 Mich 157.

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at 8. Instead, and relying heavily on *Osman*, the court determined that the contractor's "duty arose not from possession or control of the premises," but from its own negligence in creating a foreseeable risk of harm to others. *Id.* This exact framework applies here. And, again, just like *Osman*, the facts of *Fowlkes* are largely identical to this case: the contractor created a hazardous condition on the land that injured the plaintiff, but the contractor didn't possess or control the land at the time of the injury.

3. This Court has also affirmed *Clark* and *Osman*'s duty-of-care holdings in two seminal cases dealing with contractors' duty to others: *Fultz v Union-Commerce Assocs*, 470 Mich 460; 683 NW2d 587 (2004) and *Loweke*, 489 Mich 157. Both cases endeavored to clarify the circumstances in which parties to a contract owe a duty to noncontracting third parties, and both cases make clear that *Osman* is exactly such a situation. See *Fultz*, 470 Mich at 465, 468-469; *Loweke*, 489 Mich at 167. After all, *Osman*'s holding rests on "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*, 489 Mich at 170-171 (cleaned up; internal quotations omitted). That's precisely the negligence theory Plaintiff advanced here: Westveld engaged in an undertaking—repairing the concrete slab—and it failed to do so with reasonable care when it created and then left the trip-hazard trench without warning residents like Plaintiff to steer clear of it.

In neither *Fultz* nor *Loweke* did the Court concern itself with premises-liability principles—probably because they were irrelevant to the negligence claims (and attendant duty discussion) against the defendant contractors. Yet both cases emanated from an injury sustained from a condition on another's land. Indeed, the facts of *Loweke* are essentially identical to *Pugno v Blue Harvest LLC*, 326 Mich App 1; 930 NW2d 393 (2018)—a Court of Appeals case in which the panel determined that the plaintiff's ordinary-negligence claim against a landowner sounded in premises liability. In *Loweke*, however, this Court held that the defendant contractor "was not relieved of its preexisting common-law duty to use ordinary care in order to avoid physical harm

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to foreseeable persons and property in the execution of its undertakings." *Loweke*, 489 Mich at 172.

If Westveld's position were correct, the *Loweke* Court could've issued a one sentence order explaining that the plaintiff's claim sounded in premises liability because his injury arose from a condition on another's land, and the defendant contractor didn't owe him a premises-liability duty. Instead, the Court correctly, albeit perhaps implicitly, noted the distinction between a claim against a contractor for negligently carrying out an undertaking, and a claim against a premises possessor emanating from their possession and control of their land. Westveld's view would ultimately render *Clark*, *Fultz*, *Loweke*, and *Osman* bad law. And it would confer immunity from liability in tort upon contractors like Westveld that create hazardous conditions on land, but don't own or possess the land. That would certainly be news to this Court.

4. In sum, "[i]n a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct, as in this case." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005) (opinion by NEFF, J.). As former Judge Talbot put it: "When an injury develops from a condition of the land, *rather than emanating from an activity or conduct that created the condition on the property*, the action sounds in premises liability." *Woodman v Kera, LLC*, 280 Mich App 125, 153; 760 NW2d 641 (2008) (emphasis added).

Westveld owed Plaintiff a duty of ordinary care. That duty emanated from its status as a contractor that engaged in an undertaking, *Clark*, 379 Mich at 261, not its status as a premises possessor or any other premises-liability principle.

B. Westveld breached its duty to perform its work with ordinary care so as not to create an unreasonable risk of harm.

As clarified above, Westveld owed Plaintiff a duty to perform its work with ordinary care to avoid unreasonably injuring Plaintiff and

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others lawfully on the premises. *Finazzo*, 323 Mich App 634. Whether it breached that duty is, at the very least, a jury question. See *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977) (explaining that the breach element of a negligence claim is typically left for the jury). It's not a particularly close call on this record.

1. Westveld created the trench at issue and moved the dumpster to a grassy area just feet from the concrete slab and trench. (App'x, p 081a). Randy Westveld, Westveld's owner and operator, testified that he ordinarily leaves cones and tape up to warn others of conditions like the trench, but he either failed to do so here, or he put up tape and it merely blew away (his testimony was somewhat unclear). Either way, Plaintiff testified that she never saw any warning device around the trench. (App'x, pp 057a, 067a). Her contemporaneous notes support her deposition testimony, (App'x, p 067a), as does the testimony of Eric Koch, Red Oak's "construction specialist," (App'x, p 095a). So at best there's a credibility dispute as to whether Westveld ever put up tape. But even if it did put up tape and the tape blew away, that still evidences negligence on Westveld's part. A jury could certainly find that putting up tape that's meant to warn of a ten-foot-long trench so haphazardly that it merely blows away is a failure to exercise due care.

What's more, Randy Westveld testified that he filled other trenches Westveld created with sand or asphalt milling. (App'x, p 081a). He failed to do so for this trench, however, because "there would have been no reason for anybody to be there in [his] eyes." (App'x, p 082a). Again, a jury could find that explanation puzzling. Westveld admitted the trench was a trip hazard. (App'x, p 084a). And rightfully so: the trench was just feet from the dumpster, and it abutted a parking lot where elderly and disabled residents parked their vehicles.

So there's ample record evidence here to create a genuine issue of material fact on the breach element of Plaintiff's negligence claim. But the Court of Appeals majority largely ignored all of it. Instead, the court determined that Plaintiff "was aware of the hazard," as "she and others had safely accessed the dumpster for two weeks before [her] fall." *Bowerman*, unpub op at 7. True, but Plaintiff had never accessed the dumpster in the dark. And the court completely disregarded Plaintiff's testimony explaining her reason for leaving the sidewalk and entering

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the parking lot in the first place. She testified that she did so *because she knew the trench was there and wanted to avoid it*. (App'x, pp 058a-061a). So Plaintiff left the sidewalk, entered the parking lot, and then lost her way in the dark. She fell in the trench only after making her way back towards the dumpster after she saw light reflecting from it. (App'x, p 056a). This is an important point. The fact that Plaintiff was led towards the dumpster from the dark parking lot only after noticing light reflecting from the dumpster demonstrates how vital something like reflective cones or tape warning her of the trench would've been. Or, better yet, had the trench been filled with sand or asphalt milling like the other trenches, Plaintiff wouldn't have fallen in it at all.

2. The majority also attempted to analogize this case to the facts of *Finazzo*, 323 Mich App 620. But *Finazzo* is easily distinguished. There, the plaintiff tripped over a visible cable stretched across a building floor. *Id.* at 623. The defendant contractors were installing a fire alarm system in the building and were preparing to install the cable in the drop-down ceiling. *Id.* at 622. The plaintiff testified that the room was "adequately illuminated"; that he could see the cable so well he could "describe its color"; that he'd been warned by the defendants of the cable's presence; that he even warned *others* of the cable's presence; and that he safely stepped over the cable numerous times before he fell. *Id.* at 636-637. The court ultimately held that the defendant contractors did not breach their duty to use due care to avoid unreasonably injuring the plaintiff. *Id.* at 637.

Finazzo is quite different from this case. Tripping over a cable in a bright room you've explicitly warned others to avoid cannot reasonably be compared to falling in a trench in the dark. Judge Mariani's dissent aptly made this point: "The [*Finazzo*] plaintiff pointed to no action by the defendant which created an unreasonable risk of harm. But here, Westveld's conduct demonstrates the unreasonable risk of harm, or at least a genuine factual dispute in that regard." *Bowerman*, (MARIANI, J., dissenting) at 5. The majority's *Finazzo* comparison thus missed the mark.

3. At bottom, the majority largely waved away the lighting factors at issue here. It essentially faulted Plaintiff—an elderly woman residing at an apartment complex reserved for the elderly and disabled—for not

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seeing the darkness-cloaked trench. Westveld is free to make that argument to a jury. But Plaintiff's comparative fault should've remained just that: a jury question. See M Civ JI 11.01; MCL 600.2959 (providing that a plaintiff's recovery shall be reduced by her percentage of comparative fault). It is simply not the role of a trial or appellate court to weed through facts and decide for itself the reasonableness of parties' conduct. That remains the role of the jury at trial. The Court of Appeals majority was wrong to conclude otherwise. Judge Mariani got it right. This Court should reverse.

II. Red Oak violated MCL 554.139(1)(a).

"MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law." *Allison*, 481 Mich at 425. Plaintiff alleged that Red Oak violated subsection (1)(a) of that statute here.

MCL 554.139(1)(a) provides: "In every lease or license of residential premises, the lessor or licensor covenants . . . [t]hat the premises and all common areas are fit for the use intended by the parties." The statute also requires that its provisions be construed liberally. MCL 554.139(3). Red Oak did not satisfy its obligation under MCL 554.139(1)(a) to provide Plaintiff a "fit" common area—especially when the statute is given the liberal construction required.

A. The apartment complex's common area was not fit for its intended use.

1. All agreed below that the area at issue here—a parking lot and an abutting trash-disposal area—was a "common area" under the statute. Everyone further agreed that tenants had to traverse this area to dispose of their trash. So there was universal agreement regarding Red Oak's statutory duty: to ensure the parking lot/trash-disposal area was fit to provide elderly and disabled tenants reasonable access to the dumpster.[4]

[4] Even though MCL 554.139(1)(a) explicitly states that a common area must be fit for the use *intended by the parties*, the Court of Appeals majority never addressed whether the fact that this complex was

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This Court has instructed that when these duty-defining elements are met, the final question becomes whether there could be "reasonable differences of opinion" as to whether the conditions made the common area unfit for its intended use. *Allison*, 481 Mich at 430; see also *Estate of Trueblood v P&G Apts, LLC*, 327 Mich App 275, 281; 933 NW2d 732 (2019). Such "differences of opinion" exist here, rendering summary disposition of Plaintiff's statutory claim improper.

2. The seminal case interpreting MCL 554.139(1)(a) is *Allison v AEW Capital Mgmt, LLP*. The plaintiff there fell after he slipped on "one to two inches of accumulated snow" in the parking lot of his apartment complex. *Allison*, 481 Mich at 423. After he fell, he noticed ice on the ground where the snow had been displaced. *Id.* So he sued the complex's management company, alleging a breach of the covenant to maintain and repair the premises under MCL 554.139(1). *Id.*

This Court construed MCL 554.139(1)(a)'s use of the word "fit" to mean "adapted or suited; appropriate." *Id.* at 429, quoting *Random House Webster's College Dictionary* (1997). The lessor in *Allison* thus had "a duty to keep [the] parking lot adapted or suited for the parking of vehicles," and the lessor could satisfy this duty "as long as the tenants [were] able to park their vehicles in the lot and have reasonable access to their vehicles." *Id.* The Court ultimately held that the lessor met its statutory duty. *Id.* at 430. In the Court's view, the accumulated snow and ice didn't prevent tenants from entering and exiting the parking lot to park and access their vehicles. *Id.* "The statute does not require," the Court made clear, "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.*

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exclusively for the elderly and disabled was relevant to the parties' intended use of the common area. Instead, when determining the intended use of the trash-disposal area, the majority largely cited *Allison*'s characterization of a parking lot's purpose. But what the parties intended in *Allison* is irrelevant to what the parties intended here. Simply put, if a landlord knows that their complex serves particular communities with particular needs, those considerations must be considered when determining whether a statutory violation has occurred.

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at 430. "Mere inconvenience of access" may not defeat the characterization of a common area being "fit" for its intended purpose. *Id.*

3. *Allison* contains language that is problematic and entirely atextual. For starters, it announced standardless quasi-holdings like the following: "While a lessor may have some [undefined] duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more [undefined] exigent circumstances than those obtaining in this case." *Id.* at 430. That quote reframed for our case would look something like this: "While a lessor may have some duty under MCL 554.139(1)(a) with regard to [open trenches] in a parking lot [and trash disposal area], it would be triggered only under much more exigent circumstances than those obtaining in this case." This reframed quote was essentially the Court of Appeals' holding below. What those "exigent circumstances" are that would trigger liability under the statute is anyone's guess. A deeper trench? A longer trench? A trench next to grass, not concrete? This Court essentially took a quintessential fact question—the unreasonableness of a hazard—decided it for itself, and then invited lower courts to do the same. And it did so despite the statute containing explicit language instructing that it be liberally construed.

4. The Court's use of the phrase "mere inconvenience" has also spawned problems in the lower courts. The majority used the phrase below to describe the trench at issue here. *Bowerman*, unpub op at 5 ("because plaintiff was able to walk around the trench successfully many times, the trench was a mere inconvenience. . . ."). But as Judge Mariani noted, the phrase's analytical role is limited: "If an area meets [MCL 554.139(1)(a)'s] statutory criteria, then a plaintiff cannot override that fact simply by identifying a mere inconvenience they faced; that was the point *Allison* used the phrase to illustrate." *Id.* (MARIANI, J., dissenting) at 3.

That's the correct interpretation of *Allison*. In invoking the phrase, *Allison* attempted to convey that plaintiffs may not use the term as a *sword* to render a fit common area unfit, simply because of some "mere inconvenience." The Court never intended the term to be construed as a *shield* for defendants to escape liability by characterizing

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an unfit common area as merely inconvenient. Yet the Court of Appeals has largely interpreted the phrase to mean exactly that. See, e.g., *Herrera v Sun Troy Villa, LLC*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 19, 2023 (Docket No. 361852) (App'x, pp 295a-303a) (describing a sidewalk "in poor condition, with cracks and gaps typical of worn pavement" with "a large height differential between two adjacent concrete slabs spanning the width of the sidewalk, and large cracks on the elevated slab" as a mere inconvenience because the tenant could've "step[ped] over" the defect); *Estate of Trueblood*, 327 Mich App 275 (interpreting *Allison*'s "mere inconvenience" language to require a sidewalk be *completely* covered with ice to render it unfit because, otherwise, a tenant could just "walk around it."); *Thiel v Pines at Cloverlane, LLC*, unpublished per curiam of the Court of Appeals, issued June 27, 2024 (Docket No. 366096) (App'x, pp 304a-310a) (same); but see *Branch v D & S Prop Mgmt, LLC*, unpublished per curiam opinion of the Court of Appeals, issued Dec. 26, 2019 (Docket No. 345882) (GLEICHER, J., concurring in part and dissenting in part) (App'x, pp 319a-324a) ("But the presence of snow and ice on a sidewalk . . . *does* render the sidewalk potentially unfit, even if a tenant could trek through grass, bushes, or slide over a frozen lake to avoid walking on it.").

Any time a common area is unfit it will surely "inconvenience" tenants. So, if the phrase is read the way the Court of Appeals has largely interpreted it, a lessor can essentially never violate MCL 554.139(1)(a)—the lessor can simply say the unfit area is just an inconvenience. But again, that will almost always be true. Unless an entire common area has somehow been reduced to mere rubble, there will always likely be *some* part of the common area that's fit for its intended use.

Consider an example. Say there's two sidewalks in an apartment complex. One is in complete disrepair; the concrete is crumbled and riddled with elevation changes. The second has a clean surface with no discernable defects. The first sidewalk leads directly from the complex's front door to the bus stop. The second, non-defective sidewalk begins directly outside the complex's side door, runs around the entire perimeter of the complex, and then eventually ends at the bus stop. The

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intended use of both sidewalks is, of course, walking. A tenant attempts to traverse the defective sidewalk to catch the bus rather than taking the roundabout alternative route, falls, and is injured.

The analysis under the statute for such a case would be simple:

(1) Is the defective sidewalk a common area? Yes. *Benton v Dart Props*, 270 Mich App 437, 442-443; 715 NW2d 335 (2006).

(2) Is the crumbled, defective sidewalk fit for its intended use—i.e., walking? No. See *Estate of Trueblood*, 327 Mich App 275.

(3) Therefore, MCL 554.139(1)(a) has been violated.

The fact that there's a second sidewalk that's fit for its intended use doesn't render the sidewalk that's unfit suddenly fit. A common area is either fit or it's not. The tenant's choice to try their luck with the first sidewalk may factor into their comparative fault, but it doesn't cure the sidewalk's defects and absolve the lessor of liability. To read *Allison*'s "mere inconvenience" language any other way takes the reader outside the statutory text. It also resurrects and grafts onto the statute a special-aspects/effectively-unavoidable requirement, which has already been abandoned at common law in the premises-liability context. See *Kandil-El Sayed v F & E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023). And it fundamentally violates the statute's directive that its provisions be construed liberally. MCL 554.139(3).[5]

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[5] To be sure, it doesn't matter that in this hypothetical the two sidewalks may be considered two separate "common areas." Suppose instead there's a ten-step staircase in an apartment complex. Two of the steps are defective and thus hazardous. Just as the *Herrera* plaintiff could've "step[ped] over" the defect in the sidewalk—or a plaintiff confronting a sidewalk that isn't *completely* covered with snow and ice could "walk around" the snow and ice, *Estate of Trueblood*, 327 Mich App, 291—a plaintiff confronting the defective steps could, in theory, just step over them. Having to do so might be "inconvenient" for the plaintiff, but the plaintiff would still—again, in theory—be able to reasonably access the top of the staircase. In this example, *part* of a *single* common area is fit for its intended use: there's just one staircase, and some of its steps are not defective. But those fit steps do not cure the unfit steps. There's no

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5. One final note about *Allison*. Though not at issue in that appeal, the Court announced that any damages for a lessor's breach of MCL 554.139(1)(a) "would consist exclusively of a contract remedy." *Allison*, 481 Mich at 425-426. This damages pronouncement was clearly dicta. See *id.* n 3 ("Although the nature and extent of plaintiff's remedy are not at issue in this case. . . ."); *id.* at 448 (CAVANAGH, J., dissenting) (explaining that the *Allison* majority unnecessarily reached several issues, rendering them dicta). It was also wrong.

The principal disagreement between the *Allison* majority and dissent on this issue was over the application of § 357 of the Second Restatement of Torts. That provision permits the recovery of personal-injury damages if an injury stems from the breach of a lease's covenant to repair.[6] The majority said it didn't apply because the breach of a lease covenant is a breach of contract, not a tort. The dissent noted that the Restatement provision "is not merely contractual[;] although it is founded upon on a contract[,] it is a tort duty." *Id.* at 449 (CAVANAGH, J., dissenting), quoting 2 Restatement Torts, 2d, § 357, comment c.

This back-and-forth was pointless: the Court had already adopted § 357 and applied it to a claim alleging that a lessor breached its covenant to repair. See *Mobil Oil Corp v Thorn*, 401 Mich 306; 258 NW2d 30 (1977). So there should've been no debate on this issue. There was already binding caselaw holding that a plaintiff asserting a breach-of-the-covenant-to-repair claim is entitled to full damages for their injury. And MCL 554.139(1) is, after all, just a statutorily mandated residential lease covenant. *Allison*, 481 Mich at 425-426. Plaintiff only raises this issue now to ensure that this Court doesn't inadvertently extend *Allison*'s contract-only-remedy mistake here.

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discernable reason why a court couldn't apply the above-cited "mere inconvenience" caselaw to summarily dispose a claim brought by this hypothetical plaintiff under MCL 554.139(1)(a).

[6] The Restatement provision states: "A lessor of land is subject to liability for physical harm caused to his lessee . . . if the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair." 2 Restatement Torts, 2d, § 357(a).

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6. So what does all this mean for this case? It means that the majority's assertion that "Red Oak provided two entrances to and exits from the dumpster area that avoided the trench" is wholly irrelevant. *Bowerman*, unpub op at 5. Alternate routes don't change the fact that a parking lot with an open trench that obscures elderly and disabled tenants' access to a dumpster—i.e., the area's "intended use"—is unfit for that purpose. It also means that the majority erred by using the phrase "mere inconvenience" to explain that Plaintiff had previously avoided the trench when taking out her trash (never at night, however). That Plaintiff or other tenants previously navigated the hazard doesn't render the common area unhazardous. *Estate of Trueblood*, 327 Mich App at 292. This Court has long adhered to the principle that an absence of accidents isn't probative of a party's negligence. *Larned v Vanderline*, 165 Mich 464, 468; 131 NW 165 (1911) ("it would not be competent to prove an absence of accidents as tending to show an absence of negligence."). And finally, the above discussion means that on remand, Plaintiff should be entitled to full damages for her injury.

7. With *Allison*'s landmines out of the way, the analysis here is straightforward. Red Oak's dumpster was placed in a grassy area on the side of the concrete slab opposite the side to which the sidewalk connected. A sidewalk connects the building and the concrete slab. Accordingly, to access the dumpster from the building, tenants could follow the sidewalk to the concrete slab and then reach the dumpster one of two ways: They could either walk across the slab and across the grass; or they could walk into the parking lot and around the slab. (App'x, p 160a). But tenants that wanted to avoid the recently-poured concrete slab and unfinished construction project in its entirety—which was by no means an unreasonable wish—really only had the latter, parking lot option. Red Oak's elderly and disabled tenants were thus required to take a parabolic route around a construction worksite with a ten-foot-long, four-to-five-inch-deep trench to take out their trash.

Red Oak's construction specialist testified that there were no visual aids like cones or tape surrounding the worksite to help tenants navigate the trench. (App'x, p 095a). He also admitted that the trench was a trip hazard, and it would've been a "good idea" to put up a visual

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aid to warn tenants of the trench. (App'x, p 095a). Photographs show that the trench was not visible in the dark. (App'x, p 075a). That notion is supported by Plaintiff's construction and building expert, who opined that parking lots servicing elderly tenants like Plaintiff should have 0.5 candles of lighting to ensure tenant safety. (App'x, pp 121a-122a). The parking lot here, however, yielded a reading of 0.0 candles at the location of and in conditions similar to Plaintiff's fall. (App'x, p 123a).

This evidence plainly establishes a fact question as to whether Red Oak's common area was fit for its intended use. The Court of Appeals majority dismissed it all in favor of its own interpretation of a single photograph. *Bowerman*, unpub op at 5. That was an error that this Court must reverse.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, the Court should reverse the Court of Appeals' decision affirming the trial court's grant of summary disposition to Defendants Westveld and Red Oak.

Respectfully submitted,

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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 8,982 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.

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