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. 22-28824-NO

Filed under AO 2019-6

Plaintiff-Appellant's Appendix to Supplemental Brief on Appeal

- Oral Argument Requested -

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Date: July 18, 2025

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

v.

RED OAK MANAGEMENT CO., INC., WESTVELD SERVICES, LLC, and BOB'S ASPHALT PAVING, INC.,

Defendants.
_____/

CASE NO.: 2022-S-28824-NO

JUDGE: RONALD J. SCHAFER P56466

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COMPLAINT

NOW COMES Plaintiff, JAN BOWERMAN, by and through her Attorneys, JOHNSON LAW, PLC, brings the following Complaint against the Defendants RED OAK MANAGEMENT CO., INC., WESTVELD SERVICES, LLC, and BOB'S ASPHALT PAVING, INC., and states as follows:

1. Plaintiff, Jan Bowerman, is a resident of Montcalm County, Michigan.

2. Defendant Red Oak Management Co., Inc., ("Red Oak") is a Michigan corporation that does business in Montcalm County, Michigan.

3. Defendant Westveld Services, LLC, ("Westveld") is a Michigan corporation that does business in Montcalm County, Michigan.

4. Defendant Bob's Asphalt Paving, Inc., ("Bob's Asphalt") is a Michigan corporation that does business in Montcalm County, Michigan.

5. The incident which serves as the basis for this Complaint occurred in Montcalm County, Michigan.

6. The amount in controversy exceeds Twenty-Five Thousand ($25,000.00) Dollars.

7. Defendant Red Oak is the owner and/or operator of the apartment complex, Stanton Park Apartments, where the incident occurred.

8. On or about October 30, 2021, Plaintiff, Jan Bowerman, was a resident of the Stanton Park Apartments located at 200 E. First St. #20. in the City of Stanton, which was owned and operated by the Defendant Red Oak.

9. On October 30, 2021, Defendant Red Oak's pavement in front of the trash drop off, a common area, was not properly maintained by the Defendant Red Oak and at that time was in disrepair, causing a fall hazard.

10. On or about October 15, 2021, Defendants Westveld and Bob's Asphalt were responsible for pouring and paving a concrete slab in front of the trash drop off located at the Stanton Park Apartments.

11. On or about October 15, 2021, Defendants Westveld and Bob's Asphalt, did pour the concrete slab in front of the trash drop off, leaving an open trench in front of the concrete slab.

12. Defendants Red Oak, Westveld, and Bob's Asphalt, did not provide adequate guards and/or warnings and/or other measures that would prevent a trip and fall hazard created by the trench.

13. On October 30, 2021, at about 7:00 a.m., Plaintiff, Jan Bowerman, was taking her trash to the trash drop off, and while walking to the common area trash drop off of Defendant Red Oak's property, she fell into the trench, sustaining very serious injuries, including, but not limited to tri-malleolar fractures of her tibia, fibula, and talus.

CLAIM I: VIOLATION OF MCL 554.139 – DEFENDANT RED OAK

14. Plaintiff, Jan Bowerman, incorporates by reference paragraphs 1-13 herein.

15. Defendant Red Oak through the landlord/tenant relationship, and pursuant to MCL 554.139, has a duty and obligation to ensure that the premises and all common areas are fit for the use intended. This includes a duty and obligation to keep the premises in a reasonable state of maintenance and to comply with the applicable safety laws of the state.

16. Defendant Red Oak through the landlord/tenant relationship, and pursuant to MCL 554.139, has a duty and obligation to keep the premises in reasonable repair for 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 is located.

17. Defendant Red Oak breached their duty and obligation by failing to maintain the premises, and specifically by leaving a trench in front of the trash drop off which is a common area, allowing it to become a trip and fall hazard, and thus constituting negligence on its behalf.

18. As a proximate result of the Defendant Red Oak's negligence, Plaintiff, Jan Bowerman, sustained past, present and future damages, including but not limited to, tri-malleolar fractures of her tibia, fibula, and talus, physical pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyment, embarrassment, humiliation and mortification, disfigurement, disability and reasonable and necessary medical expenses.

WHEREFORE, Plaintiff, JAN BOWERMAN, requests a judgment in her favor against Defendant Red Oak, in whatever amount she is found to be entitled in excess of Twenty-Five Thousand ($25,000.00) Dollars, together with costs, interest and attorney fees.

CLAIM II: NEGLIGENCE – DEFENDANT WESTVELD

19. Plaintiff, Jan Bowerman, incorporates by reference paragraphs 1-18 herein.

20. Defendant Westveld had several duties relevant to the accident in question:

1) To correct the trench in front of the concreate slab so that it would not constitute a trip hazard;

2) To install adequate guards around the trench in front of the concreate slab so that it would not constitute a trip hazard; and

3) To install adequate warnings around the trench in front of the concreate slab so that it would not constitute a trip hazard.

21. Defendant Westveld knew and/or should have known that the trench in front of the concrete slab was dangerous and did nothing to correct and/or warn and/or guard the trench which created this danger.

22. Defendant Westveld, through their employees, had a duty and obligation to use due care for the protection of individuals such as Plaintiff, Jan Bowerman, and they breached this duty when they created a trench in front of the concrete slab which created

a trip hazard and this breach of duty constituted negligence on Defendant Westveld's behalf.

23. As a proximate result of Defendant Westveld's negligence, Plaintiff, Jan Bowerman, sustained injuries to her tri-malleolar fractures of her tibia, fibula, and talus, all of which required surgery.

24. As a proximate result of Defendants Westveld's negligence, Plaintiff, Jan Bowerman, has sustained damages past, present and future, including but not limited to, physical pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyment, embarrassment, humiliation and mortification, disability, disfigurement, loss of earning capacity and the reasonable expenses of necessary medical care, treatment and services.

WHEREFORE, Plaintiff, JAN BOWERMAN, requests a judgment against Defendant Westveld in whatever amount she is found to be entitled, in excess of Twenty-Five Thousand ($25,000.00) Dollars, together with court costs, interest and attorney fees.

CLAIM III: NEGLIGENCE – DEFENDANT BOB'S ASPHALT

25. Plaintiff, Jan Bowerman, incorporates by reference paragraphs 1-24 herein.

26. Defendant Bob's Asphalt had several duties relevant to the accident in question:

1) To correct the trench in front of the concreate slab so that it would not constitute a trip hazard;

2) To install adequate guards around the trench in front of the concreate slab so that it would not constitute a trip hazard; and

3) To install adequate warnings around the trench in front of the concreate slab so that it would not constitute a trip hazard.

27. Defendant Bob's Asphalt knew and/or should have known that the trench in front of the concrete slab was dangerous and did nothing to correct and/or warn and/or guard the trench which created this danger.

28. Defendant Bob's Asphalt, through their employees, had a duty and obligation to use due care for the protection of individuals such as Plaintiff, Jan Bowerman, and they breached this duty when they created a trench in front of the concrete slab which created a trip hazard and this breach of duty constituted negligence on Defendant Bob's Asphalt's behalf.

29. As a proximate result of Defendant Bob's Asphalt's negligence, Plaintiff, Jan Bowerman, sustained injuries to her tri-malleolar fractures of her tibia, fibula, and talus, all of which required surgery.

30. As a proximate result of Defendants Bob's Asphalt's negligence, Plaintiff, Jan Bowerman, has sustained damages past, present and future, including but not limited to, physical pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyment, embarrassment, humiliation and mortification, disability, disfigurement, loss of earning capacity and the reasonable expenses of necessary medical care, treatment and services.

WHEREFORE, Plaintiff, JAN BOWERMAN, requests a judgment against Defendant Bob's Asphalt in whatever amount she is found to be entitled, in excess of Twenty-Five Thousand ($25,000.00) Dollars, together with court costs, interest and attorney fees.

Respectfully submitted,

JOHNSON LAW, PLC

By: _____

THOMAS W. WAUN (P34224)
MICHAEL E. FREIFELD (P48198)
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Flint, MI 48502
(810) 695-6100

Dated: March 21, 2022

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

v.

RED OAK MANAGEMENT CO., INC., WESTVELD SERVICES, LLC, and BOB'S ASPHALT PAVING, INC.,

Defendants.
_____/

CASE NO.: 2022-S-28824-NO

JUDGE: RONALD J. SCHAFER P56486

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JURY DEMAND

NOW COMES Plaintiff, JAN BOWERMAN, by and through her attorneys, JOHNSON LAW, PLC, and hereby makes demand for a jury in the above captioned matter.

Respectfully submitted,

JOHNSON LAW, PLC

By: _____
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(810) 695-6100

Dated: March 21, 2022

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,
Plaintiff,

v.

RED OAK MANAGEMENT CO., INC.
WESTVELD SERVICES, LLC and
BOB'S ASPHALT & PAVING, INC.,
Defendants.

Case No: 2022-S-28824-NO

Hon. Ronald J. Schafer

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ORDER GRANTING SUMMARY DISPOSITION TO DEFENDANT BOB'S ASPHALT & PAVING, INC.

At a session of said Court held in the Montcalm County Circuit Court, State of Michigan on the 17 day of JAN, 2022

PRESENT: Hon. Ronald J. Schafer
Circuit Court Judge

This matter having come before the Court on Defendant Bob's Asphalt & Paving, Inc.'s Motion for Summary Disposition, and the Court having reviewed submissions and being duly

advised in the premises, hereby grants Defendant Bob's Asphalt & Paving, Inc.'s Motion for Summary Disposition and dismisses Defendant Bob's Asphalt & Paving, Inc. from this action with prejudice.

This order does not resolve the last pending claim and does not close the case.

RONALD J. SCHAFER P56466

Hon. Ronald J. Schafer
Circuit Court Judge

ATTEST: A TRUE COPY

STATE OF MICHIGAN
IN THE 8TH CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

v

RED OAK MANAGEMENT CO., INC., WESTVELD SERVICES, LLC and ~~BOB'S ASPHALT & PAVING, INC.,~~

Defendants.

Case No. 2022-S-28824-NO

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DEFENDANT WESTVELD SERVICES, LLC'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) and (10)

NOW COMES Defendant Westveld Services, LLC, by counsel, Secrest Wardle, and for its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), respectfully states as follows:

1. This action arises out of a trip and fall incident where the Plaintiff, a tenant at the Stanton Park Apartments, tripped and fell in small trench in the parking lot of the apartment complex.
2. In October 2021 Defendant Westveld Services, LLC (hereinafter "Westveld") was hired by Red Oak Management (the property manager for the apartment complex) to demolish, remove and replace concrete in various areas of the apartment complex. Part of this work included demolition/removal of existing concrete and installation of a new concrete slab/pad on which the community dumpster was to be placed.
3. To install or pour the new concrete pad, Westveld placed forms after the demolition and removal of existing concrete to accommodate the subsequent pouring of the new concrete. The purpose of the forms is to create a clean, flat edge for the concrete pad.
4. After the form was removed, there was a small trench that was to be, and in fact was, later filled by former Defendant Bob's Asphalt and Paving.
5. The trench was about 3 inches deep and ran along the front edge of the concrete pad. A photograph of the concrete pad and the trench is attached as Exhibit A.
6. In the early morning hours of October 30, 2021, the Plaintiff was walking in the parking lot to take out her trash when she stepped in the trench and fell.
7. Plaintiff testified that, prior to the incident, she was well aware of the existence and location of the trench and in fact had observed it many times before her fall.
8. Plaintiff's sole liability theory against Westveld is negligence. See Count II of Plaintiff's Complaint.

9. Westveld is entitled to summary disposition pursuant to MCR 2.116(C)(8) for the reason it did not owe Plaintiff a duty separate and distinct from its contractual obligations to Red Oak Management.

10. Alternatively, Westveld is entitled to summary disposition pursuant to MCR 2.116(C)(10) for the reason the trench was open and obvious without special aspects.

WHEREFORE, Defendant Westveld Services LLC respectfully requests this Honorable Court grant its Motion for Summary Disposition and dismiss Plaintiff's Complaint with prejudice, in addition to any other relief this Court deems fair and equitable.

SECREST WARDLE
Attorney for Defendant Westveld Services

Dated: 2/2/2023

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BRIEF IN SUPPORT OF DEFENDANT WESTVELD SERVICES LLC'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116 (C)(8) and (10)

FACTUAL BACKGROUND

In October 2021 Defendant Westveld Services, LLC (hereinafter "Westveld") was hired by Red Oak Management (the property manager for Stanton Park apartments complex) to lay concrete in the parking lot area. Exhibit B, Deposition Tr. of Randy Westveld, pp. 9-10; Exhibit C – Westveld invoices to Red Oak Management. As relevant to this case, part of this work included demolition/removal of existing concrete and installation of a new concrete pad/slab on which the community dumpster was to be placed. Westveld placed wood forms after the demolition and

removal of the existing concrete to accommodate the subsequent pouring of the new concrete. The purpose of the forms is to create a nice flat edge for the concrete pad. Exhibit B, pp. 14, 18.

After the form was removed, there was a small trench that was to be, and in fact was, later filled by former Defendant Bob's Asphalt and Paving. Exhibit B, pp. 19, 28. The trench was about 3 inches deep and ran along the front edge of the concrete pad. Exhibit B, p. 21. A photograph of the concrete pad and the trench is attached as Exhibit A. Normally, Bob's Asphalt would come within a day or two after Westveld completed its work to fill in the trenches. Exhibit B, p. 29. Here, for some reason, Bob's Asphalt came out ten days after Westveld completed its work. Exhibit B, p. 30. Westveld also moved the dumpster out of the way so that tenants would not have to walk near the trench to take out their trash. Exhibit B, p. 36.

The incident occurred on October 30, 2021, around 7 a.m. At that time, the Plaintiff was taking out her trash. Plaintiff described the following at her deposition:

> "….And once I got in the middle of the parking lot, it was all black. I couldn't see, so I spotted the dumpster. They had moved it off the patio slab it was on. I – I seen that because it had like a reflector on it, and there was some light coming from the trees from the streetlight. So I kept my eye on that dumpster, and I started walking toward it. And before – before I knew it, my foot went right to the edge……right down in the hole." Exhibit D, p. 17.

Plaintiff candidly admitted that she was aware of the presence and location of the trench in front of the concrete pad. Exhibit D, p. 29. In fact, Plaintiff testified that she took a specific path to walk around the concrete pad because she was concerned about the trenches. Exhibit D, p. 35. Her goal was to walk away from the concrete pad and to stay away from the trench. Exhibit D, p. 36. Plaintiff stated that she took her trash out every day, but normally did it during daytime hours, and that she was well aware of the presence and location of the trench. Exhibit D, p. 62.

Plaintiff testified that there was a "light, a reflective light" from the other side of the street that was coming through some of the bushes and that she could "see a shadow of the dumpster."

Exhibit D, pp. 37, 51. Plaintiff also testified that the parking lot lights were on, but explained they were "dim." Exhibit D, p. 52. Plaintiff also confirmed that the photograph attached as Exhibit A was taken shortly after her fall and that the photograph shows "how dark it was out there." Exhibit D, p. 34. The concrete pad was observable, even in darkness, because of its contrast against the dark backdrop of the asphalt. Randy Westveld testified that he had no trouble seeing the concrete slab in the dark. Exhibit B, pp. 41-42.

Incidentally, Plaintiff also worked for Red Oak Management for over 19 years as a site manager, including for the Stanton Park Apartments where she was the site manager for about 9-10 years. Exhibit D, pp. 9, 10, 12.

Eric Koch, Red Oak Management's construction specialist, hired Westveld for the concrete work and also hired Bob's Asphalt for the asphalt work. Exhibit E, p. 18. Mr. Koch admitted that he never asked Westveld to fill in the trenches or put up any warning indicators. Exhibit E, p. 24. Mr. Koch also testified that the concrete pad area does not really get that dark at night to where people cannot safely traverse it. Exhibit E, p. 26. Mr. Koch explained that darkness would not obscure one's ability to see the trench because the concrete was very light in color and stuck out against the black asphalt. Exhibit E, pp. 32-33. Mr. Koch also stated that the original plan was for Bob's Asphalt to come out quickly after Westveld completed its work but that Bob's Asphalt was for some reason delayed. Exhibit E, p. 46.

Randy Westveld testified that he was never instructed to fill in the trench or put up any warning tape or cones. Exhibit B, p. 32.

STANDARD OF REVIEW

Summary disposition may be sought under MCR 2.116(C)(8) on the grounds that the opposing party "has failed to state a claim on which relief can be granted." *Radke v Everett*, 442

Mich 368, 373 (1993). Such a motion tests the legal sufficiency of the Plaintiff's complaint. *Canon v Thumudo*, 430 Mich 326 (1988). The motion is to be decided on the pleadings alone, and all well-pleaded facts and reasonable inferences drawn from them are taken as true. *Bivens v Grand Rapids*, 190 Mich App 455, 457 (1991).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Universal Underwriters Group v Allstate Ins Co,* 246 Mich App 713; 635 NW2d 52 (2001). "Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed 'in the light most favorable to the party opposing the motion.'" *Id.*, quoting *Quinto v Cross & Peters Co,* 451 Mich 358; 547 NW2d 314 (1996). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters, supra.*

To survive a motion for summary disposition brought under MCR 2.116(C)(10), the plaintiff may not rest upon the mere assertions of its complaint, but must instead produce specific, admissible evidence creating a genuine issue of material fact for trial. *Sprague v Farmers Insurance Exchange*, 251 Mich App 260; 650 NW2d 374 (2002); *Taylor v Modern Engineering, Inc.,* 252 Mich App 655; 653 NW2d 625 (2002). A litigant may not successfully oppose a summary disposition motion brought under MCR 2.116(C)(10) by claiming certain evidence *might* be presented at trial, absent a showing that such proof exists and is admissible at trial. *Smith v Globe Life Insurance Company*, 460 Mich 446; 597 NW2d 28 (1999).

LEGAL ARGUMENT

1. **Plaintiff's negligence claim against Westveld fails as a matter of law because no duty was owed to the Plaintiff.**

"To establish a prima facie case of negligence, Plaintiff must prove that (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 a proximate cause of the plaintiff's damages." *Hill v Sears, Roebuck and Co,* 492 Mich 651, 660 (2012), citing *Loweke v Ann Arbor Ceiling,* 489 Mich 157, 162 (2011). As our Supreme Court noted in *Fultz v Union-Commerce Associates, supra* 470 Mich 460, 463; 683 NW2d 587 (2004) "[i]t is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff."

Here, it is undisputed that Westveld was contracted by Red Oak Management to do the concrete work. Exhibit C.

"[T]he threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Hill,* 492 Mich at 660 n 18, citing *Fultz v Union Commerce,* 470 Mich 460, 463 (2004). "It is axiomatic that there can be no tort liability unless [a] defendant[ ] owed a duty to [a] plaintiff." *Hill,* 492 Mich at 660, citing *Fultz,* 470 Mich at 463. "Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others." *Hill,* 492 Mich at 660. "However, as a general rule, there is no duty that obligates one person to aid or protect another." *Id.*

"Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law, as plaintiffs allege in this case." *Hill,* 492 Mich at 660-661. "At common law, the determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." *Id.* at 661 (citations omitted). "[T]he ultimate inquiry in determining whether a legal

duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." *Id.* Factors relevant to the determination of whether a legal duty exists include the "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Id.*

"[W]hen there is no relationship between the parties, no duty can be imposed…." *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 504-505 (2007). "[E]ven when there is a relationship between the parties, a legal duty does not necessarily exist." *Id.* Generally, without more, the fact that an injury or event is foreseeable is not sufficient to impose a duty upon the defendant. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14-15 (1999). "[R]ather, the question is whether, in light of all the relevant evidence, 'the defendant is under any obligation for the benefit of the particular plaintiff….'" *Id.*

The Supreme Court in *Fultz* examined the historical application of the concepts of misfeasance and nonfeasance in defining the contours of a tort action based on a defendant's contractual obligations. The Court in *Fultz* quoted from *Hart, supra,* where the Court had "opined that the misfeasance/nonfeasance distinction is often largely semantic and somewhat artificial," *Fultz, supra,* 470 Mich at 466 (citations omitted by *Fultz* Court). The Court in *Fultz* shifted focus from the "slippery distinction" between misfeasance and nonfeasance to a more fundamental inquiry: "[w]hether a particular defendant owes any duty at all to a particular plaintiff." *Id.* at 467. Where tort liability stems from the misfeasance of contractual obligation, the *Fultz* Court noted, both the Michigan Supreme Court and the Michigan Court of Appeals have required the "violation of a legal duty separate and distinct from the contractual obligation." *Id.* at 467, citing *Rinaldo's Constr Corp v Michigan Bell Tel Co,* 454 Mich 65, 84; 559 NW2d 647 (1997); *Ferrrett v Gen Motors Corp,* 438 Mich 235, 245; 475 NW2d 243 (1991); *Sherman v Sea-Ray Boats, Inc.,* 251 Mich App 41, 48; 649 NW2d 783 (2002).

Thus, the Michigan Supreme Court instructed that "the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis.' *Fultz, supra,* 470 Mich at 467. "If no independent duty exists, no tort action based on contract will lie." *Id.*

In *Loweke v Ann Arbor Ceiling & Partition Co,* 489 Mich 157; 809 NW2d 553 (2011), the Michigan Supreme Court sought to clarify *Fultz, supra,* instructing that "while the mere existence of a contract does not ordinarily provide a basis for a duty of care to a third party in tort, 'the existence of a contract [also] does not extinguish duties of care otherwise existing . . . .'" *Id.* at p 170. The Court in *Loweke* reaffirmed that a duty independent of contract may arise in several ways, such as a special relationship, statutory duties, or generally recognized common-law duties to use care in undertakings. *Id.* at 170. Therefore, the Court's goal in *Loweke* was limited to dispelling the notion that a contract created some form of "*Fultz* immunity" as to non-parties to the contract. *Id.* at 168.

The Supreme Court in *Fultz* provided the following critical passage for this Court's justification to grant Westveld's motion for summary disposition:

> [L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a 'separate and distinct' mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. *Fultz, supra* at 467.

The defendant in *Fultz* entered into a snow removal service contract with a landowner to remove snow and ice from the landowner's parking lot. *Id.* at 462. The injured plaintiff slipped and fell on snow and ice on the parking lot. *Id.* At the time of the injury, the defendant contractor had failed to plow or salt the lot in approximately 14 hours. *Id.*

The plaintiff sued the snow removal contractor for negligence. *Id.* The trial court awarded the plaintiff compensatory damages after finding the defendant contractor was negligent by failing to perform under the contract, even though it found no breach of contract. *Id.* The Court of Appeals affirmed and relied upon *Osman v Summer Green Lawn Care, Inc.*, 209 Mich App 703 (1995) to hold the defendant contractor breached its common law duty to provide the contractual snow removal services in a reasonable manner. However, the Supreme Court reversed, and held that no duty existed running from the defendant contractor to the injured plaintiff.

A third-party to a contract, such as the Plaintiff in this action, cannot recover damages for the alleged negligent performance of Westveld's contractual obligations in the absence of a "violation of a legal duty separate and distinct from the contractual obligation." *Fultz, supra* at 467. The court found the defendant contractor owed no contractual or common law duty to the plaintiff to plow or salt the parking lot that was "independent of the contract." Indeed, the continued viability of the *Fultz* defense, under circumstances similar to those presented here, was underscored in *Hill v Sears, Roebuck and Co,* 492 Mich 651, 660 (2012), as discussed above.

For these reasons, summary disposition under MCR 2.116(C)(8) is warranted.

2. Alternatively, Plaintiff's claims against Westveld are barred by the open and obvious doctrine.

A claim based on the condition of a premises is a premises liability claim. *James v Alberts*, 464 Mich 12, 18-19, 626 NW2d 158 (2001). In a premises liability action, a plaintiff must prove the following elements: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was a proximate cause of plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props Inc.*, 270 Mich App 437, 440, 715 NW2d 335 (2006)

A. The trench was open and obvious.

A premises owner or possessor owes, in general, a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). A premises owner or possessor "breaches its duty of care when it knows or should know of a dangerous condition on the premises ***of which the invitee is unaware*** and fails to fix the defect, guard against the defect, or *warn the invitee of the defect*." *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 12 (2018) (emphasis supplied). This duty, however, does not generally extend to open and obvious dangers. *Lugo,* 464 Mich at 516.

Open and obvious dangers exist "where the dangers ***are known to the invitee*** or are so obvious that the invitee might reasonably be expected to discover them...." *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360, 364 (2002) (quoting *Riddle v McLouth* Steel Products Corp., 440 Mich 85, 96 (1992)). Again, under the rules announced in both *Lugo* and *Joyce*, liability for an allegedly dangerous condition is premised first upon the invitee being unaware of the dangerous condition at the time of injury; an invitee's actual knowledge triggers no duty to warn or make safe. However, even where an invitee lacks actual knowledge, a landowner may not generally be held liable for open and obvious conditions.

With respect to open and obvious dangers, "an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id.* The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v. Burger King Corp. (On Remand),* 198 Mich App 470, 475, 499 N.W.2d 379 (1993). Because the test is objective, this Court "look[s] not to whether plaintiff should have

known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v. PMG Bldg., Inc., 227* Mich App 1, 11, 574 N.W.2d 691 (1997).

Yet, while the test for open and obvious conditions is objective, Michigan courts have demonstrated that a particular plaintiff's knowledge of facts giving rise to a dangerous condition, coupled with his or her subjective appreciation for its risk, may be relevant to determining whether a person of ordinary intelligence would have discovered the same risk under the circumstances. *Joyce*, 249 Mich App at 239-40. The Court of Appeals' decision in *Joyce* illustrates the relevance of a plaintiff's subjective knowledge upon the application of the objective open and obvious standard. *Id.*

In *Joyce*, the plaintiff was removing personal belongings from the home of one of the defendants during snowy weather when she slipped and fell on the sidewalk leading to the front door. *Id.* at 233. Prior to falling, the plaintiff testified that she was aware of the snowy conditions on the sidewalk, and even walked "very carefully" because she knew the sidewalk was "not very safe." *Id.* at 239. In fact, the plaintiff even told one of the defendants that the sidewalk was slippery, and that she had slipped twice on the sidewalk before actually falling. *Id.*

In addressing the facts of *Joyce*, the Michigan Court of Appeals held that the plaintiff's testimony "establishe[d] beyond peradventure that she saw the snow and recognized that the snow posed a safety hazard to her." The Court concluded that "[u]nder similar circumstances, an average person with ordinary intelligence would not only have seen the snowy condition of the sidewalk but would have discovered the risk of slipping on it." *Id.* "Thus, subjectively and objectively, no reasonable juror could have concluded that the condition of the sidewalk and the danger it presented was not open and obvious." *Id.*

Here, Plaintiff had actual knowledge of the presence and location of the trench. As a preliminary observation, under the rule articulated in *Joyce,* a condition is open and obvious if it is ***"known to the invitee*** or . . . so obvious that the invitee might reasonably be expected to discover [it]." *Joyce*, 249 Mich App at 238 (echoing the same rule stated in *Lugo*). The disjunctive "or" signals that actual knowledge of the condition is by itself sufficient to deem a condition open and obvious. This same principle was clearly annunciated in the *Lugo* decision, where the Michigan Supreme Court conditioned a landowner's duty to an invitee upon the invitee's *lack of knowledge* of the allegedly defective condition. Applied to the instant action, there can be no question that Plaintiff had actual knowledge of the condition upon which she ultimately fell.

Critically, the Plaintiff's own testimony establishes not only that she was abundantly aware of the condition, but also that she appreciated the danger it presented. Plaintiff testified that she was trying to take a route/path to avoid the trench.

B. The trench was free of special aspects.

Although generally there is no duty to protect invitees from open and obvious dangers, reasonable steps must be taken to protect invitees from harm where "special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Lugo v Ameritech Corp*,464 Mich 512, 517 (2001). When determining whether such special aspects exist, courts must "focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Id.* at 523-524.

Special aspects are found in two sets of circumstances. The condition must give rise to (1) a uniquely high likelihood of harm, or (2) cause a severe harm if the risk is not avoided. *Id.* at 519. The first of these occurs when a person cannot effectively avoid the dangerous condition. *Id.* at 518. In explaining this situation, our Supreme Court in *Lugo* provided the example of a business in which

standing water covers the only exit and traps a customer inside. *Id.* The second circumstance occurs when the open and obvious condition imposes "an unreasonably high risk of severe harm." *Id.* In *Lugo*, the Court gave the example of an unguarded thirty-foot pit in the middle of a parking lot. *Id.*

Only when "special aspects" of an open and obvious condition exist that differentiate it from a typical open and obvious risk may liability be imposed on a defendant. *Lugo*, at 518. The *Lugo* Court emphasized that liability will not be imposed "merely because a particular open and obvious condition has some potential for harm." (Emphasis added). *Id.* at 518.

Addressing the first of the special aspects, the Michigan Supreme Court has explained that "[f]or an unreasonably dangerous hazard to be 'effectively unavoidable,' it must be essentially 'inescapable.'" *Stimpson v GFI Management,* 498 Mich 927 (2015). In *Hoffner v Lanctoe,* 492 Mich 450, 454 (2012) the Michigan Supreme Court held that for a condition to be "effectively unavoidable," it must be an inherently dangerous hazard that a person is inescapably required to confront," *Hoffner,* 492 Mich at 456. *Hoffner* further explains that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be required or compelled to confront a *dangerous hazard.*" *Id.* at 469 (emphasis added).[1]

In *Joyce*, the Court of Appeals addressed whether an icy walkway was effectively unavoidable. *Id.* In that case, the plaintiff argued, in part, that the open-and-obvious condition was effectively unavoidable because the homeowner's wife had refused to provide an alternate route, refused to provide safety measures, and refused to provide a rug for traction. *Id.* at 241, 642 N.W.2d 360. In rejecting the plaintiff's argument, the Court of Appeals explained that the plaintiff could have insisted on using an alternative route or removed her personal items on another day. *Id.* at 242, 642 N.W.2d 360. The Court provided the following rationale underlying its decision:

[1] *Hoffner* also tells us that this determination cannot be made in hindsight. *Hoffner,* 492 Mich at 461-462. The fact that a serious injury occurred is not itself evidence of a special aspect. *Id.*

> [U]nlike the example in *Lugo*, Joyce was not effectively trapped inside a building so that she must encounter the open and obvious condition in order to get out. Joyce specifically testified that, after she slipped twice on the sidewalk, she walked around the regular pathway to avoid the slippery condition. Therefore, though this is a close case, Joyce's own testimony established that she could have used an available, alternative route to avoid the snowy sidewalk. While ... [the] alleged refusal [of the homeowner's wife] to place a rug on the sidewalk or allow access through the garage, if true, may have been inhospitable, *no reasonable juror could conclude that the aspects of the condition were so unavoidable that Joyce was effectively forced to encounter the condition. Id.* at 242–243.

Here, the evidence demonstrates that Plaintiff was not "required or compelled" to confront the trench. She could have waited until daylight to take out her trash. She could have taken a different route and avoided the concrete pad altogether. After all, she knew it was there and she had avoided the trench for at least 10 consecutive days. No argument can be made that Plaintiff was "trapped" or inescapably required to encounter the trench.

Turning to the second "special aspect," it is clear that the trench did not give rise to an unreasonably high risk of severe harm. Unlike the unguarded thirty-foot pit example used in *Lugo*, which would pose an extremely high likelihood of injury with only a single encounter, Plaintiff's risk here was falling from a standing position. Plaintiff's exact height is unknown. However, she allegedly fell from a standing position onto the ground. Michigan Courts have recognized that "[f]alling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot deep pit." *Corey v Davenport College of Business (on remand)*, 251 Mich App. 1, 7 (2002). Even if Plaintiff could demonstrate that the trench presented *some* risk of harm, there has been no evidence presented to suggest that this risk of harm rose to the high degree of danger required to find that a special aspect existed under the holding in *Lugo*.

While Westveld did not necessarily own or occupy the premises where Plaintiff fell, Westveld may still invoke the open and obvious doctrine. In *Finazzo v. Fire Equipment Company*,

323 Mich App 620, 918 NW2d 200 (2018), the plaintiff, a security guard, injured himself when he stumbled on electrical cabling left on the floor by contractors who were installing a fire protection system. Plaintiff initiated suit against the contractor, who moved for summary disposition on the basis of the open and obvious doctrine. The trial court granted the contractor's summary disposition motion and the Court of Appeals affirmed, holding that contractors who are doing work on a premises may avail themselves of the open and obvious doctrine since they have "possessory responsibilities" for the premises. In so holding, the court in *Finazzo* recognized the principles set forth in 2 Restatement Torts, 2d § 384, which provides:

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

The court in Finazzo went onto state:

> Defendants, as contractors performing changes to the property by methods that were under defendants' control, were also ' "best able to prevent any harm to others." ' Merritt, 407 Mich. at 552, 287 N.W.2d 178, quoting Prosser, Torts (4th ed.), § 57, p. 351. So, it is appropriate to impose premises liability on defendants with respect to the work they controlled relating to changing the premises: installing electrical cabling for the fire suppressions system. 2 Restatement Torts, 2d, § 384. But the duty imposed on defendants regarding premises liability would not extend to open and obvious conditions that are effectively avoidable and do not impose an unreasonably high risk of severe harm. See *Hoffner*, 492 Mich. at 461, 821 N.W.2d 88; *Lugo*, 464 Mich. at 517-518, 629 N.W.2d 384.

CONCLUSION

In closing, Westveld did not owe the Plaintiff any legally cognizable duty. Alternatively, the trench was open and obvious, without special aspects, and the Plaintiff was well aware of its presence and location. Accordingly, summary disposition is appropriate.

WHEREFORE, Defendant Westveld Services LLC respectfully requests this Honorable Court grant its Motion for Summary Disposition and dismiss Plaintiff's Complaint with prejudice, in addition to any other relief this Court deems fair and equitable.

SECREST WARDLE
Attorney for Defendant Westveld Services

Dated: 2-2-2023

Justin L. Cole (P68139)
2025 East Beltline SE, Suite 600
Grand Rapids, MI 49546
616/285-0143 – phone
616/285-0145 – fax

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record and/or non-represented parties herein at their respective addresses as directed on the pleadings on February 2, 2023, by:

☐ US MAIL ☐ FAX ☐ HAND DELIVERY ☐ UPS ☐ FEDERAL EXPRESS ☐ OTHER ☐ E-FILING ☒ E-MAIL

Chenney Ward

Chenney Ward

Westveld Services LLC
23225 36th Ave
Ravenna, MI 49451 US
616-481-5848
abbywestveld@hotmail.com

Estimate 1256

ADDRESS
Eric Koch
Red Oak Management
PO Box 799
Cedar Springs, MI 49319

DATE	TOTAL	EXPIRATION DATE
07/21/2021	$13,500.00	08/31/2021

DATE	DESCRIPTION	AMOUNT
	Project: Stanton Concrete Work Demo and replace concrete dumpster pad, 17'x13'x8" Demo and replace concrete walkway, 60'x5'x4" Demo and replace concrete drop face sidewalk, 31'x6'x4" Demo and replace concrete drop face sidewalk, 10'x6'x4" Demo and replace concrete office entry, 134'x6'x4"	13,500.00

Terms & Conditions:
1. Total payment is due upon receipt of invoice. 1 1/2% interest per month from due date will be added to total.
2. Charges will be added for changes (verbal or otherwise) made to this estimate.
3. Westveld Services will not be held responsible for popping/flaking, cracking, heaving, settling or concrete discoloration. Evidence of construction is probable in surrounding areas.
4. When applicable, Westveld Services will contact "miss dig" to locate and mark existing utility lines that "miss dig" is capable of locating. It is the owner's responsibility to locate and mark all other underground structures, including without limitation utility lines, water lines, sewer lines, sprinkler lines, drainage systems, whether public or private. Westveld Services is not responsible

TOTAL $13,500.00

THANK YOU.

for any damages, claims, losses or other costs incurred as a result of unmarked or mis-marked underground structures, lines or systems.

Accepted By

Accepted Date

Westveld Services LLC
23225 36th Ave
Ravenna, MI 49451 US
616-481-5848
abbywestveld@hotmail.com

Invoice 1348

BILL TO
Eric Koch
Red Oak Management
PO Box 799
Cedar Springs, MI 49319

DATE	PLEASE PAY	DUE DATE
10/19/2021	$0.00	10/19/2021

DATE	DESCRIPTION	AMOUNT
10/19/2021	Project: Stanton Concrete Work Demo and replace concrete dumpster pad, 17'x13'x8" Demo and replace concrete walkway, 60'x5'x4" Demo and replace concrete drop face sidewalk, 31'x6'x4" Demo and replace concrete drop face sidewalk, 10'x6'x4" Demo and replace concrete office entry, 134'x6'x4"	13,500.00

PAID

Care and Maintenance:
1. Do not drive on concrete for at least 7 days.
2. Apply a good quality sealer and reapply as directed by the manufacture.
3. Do not apply salt to concrete. Sand can be used for traction.
4. Do not use harsh acids for stain removal.
5. Do not allow water to drain beneath your concrete.

PAYMENT	13,500.00
TOTAL DUE	$0.00

THANK YOU.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

v.

CASE NO.:22-S-28824-NO

JUDGE: RONALD J. SCHAFER

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

Defendants.
_____/

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_____/

PLAINTIFF'S RESPONSE
TO DEFENDANT WESTVELD SERVICES, LLC'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10)

NOW COMES Plaintiff, JAN BOWERMAN, by and through her attorneys, JOHNSON LAW, PLC, responds to Defendant Westveld Services LLC.'s Motion for Summary Disposition brought pursuant to MCR 2.116(C)(8) and (10) as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted, however, the trench and/or ditch was 10 feet long and 4 inches deep.

5. Admitted, however, the depth of the trench was approximately 4 inches.

6. Admitted.

7. Admitted that Plaintiff was aware of the trench/ditch in **daylight** hours, however, this accident occurred **before sunrise on October 30th** and, as will be demonstrated in this Brief, the parking lot was poorly illuminated according to Plaintiff's expert – Albert Kerelis.

8. Admitted.

9. Denied for the reason that, pursuant to *Clark v. Dalman*, 379 Mich. 251, 261(1967) and *Loweke v. Ann Arbor Ceiling & Partition Co. LLC*, 489 Mich. 157, 169-170 (2011), **a common law duty imposed on every person engaged in the prosecution of any undertaking must use due care or govern his actions as not to unreasonably endanger the person or property of others.**

10. Denied for the reason that the open and obvious doctrine does not apply to these circumstances.

WHEREFORE, Plaintiff requests that this Court deny Defendant Westveld Services LLC.'s MCR 2.116(C)(8) and (10) Motion for Summary Disposition in its entirety.

Respectfully submitted,

By: _____

THOMAS W. WAUN (P34224)
MICHAEL E. FREIFELD (P48198)
140 E. 2ND STREET, STE. 201
Flint, MI 48502 T: (810) 695-6100

Dated: March 7, 2023

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT WESTVELD SERVICES, LLC'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10)

INTRODUCTION

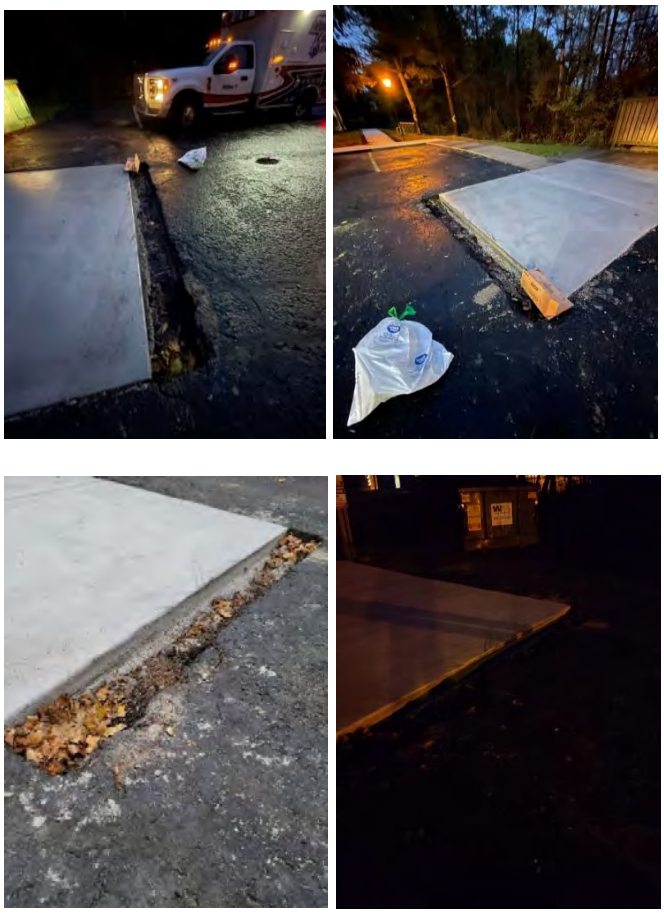
On October 30, 2021, Ms. Jan E. Bowerman, a 75 year old woman, was a tenant of Stanton Park Apartments located at 200 E. First St., Stanton, Michigan. **Stanton Park Apartments is a 24-unit multi-family residential property for seniors over the age of 62 and those with physical disabilities.** The single-story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

On October 30th, while taking out her trash out at approximately 7:15 a.m., an hour before sunrise (sunrise in Stanton was at 8:13 a.m. on that day), she stepped into a trench created by the excavation for a recently poured concrete slab, fell, and was injured. Specifically, at her deposition on page 17 of Exhibit 1, Plaintiff testified as to how he fell as follows:

> A. Well, that particular morning, I didn't wait. I looked out the side door, and I noticed that I could see the sidewalk. **It was still dark**, but there was still light on the sidewalk. I went down the sidewalk, and when I -- I knew I was going to have to go to the parking lot to miss some of the area, but – so I went out to the parking lot. **And once I got in the middle of the parking lot, it was all black.** I couldn't see, so then I spotted the dumpster. They

> had moved it off the patio slab it was on. I -- I seen that because it had like a reflector on it, and there was a little light coming from the trees from the streetlight. So I kept my eye on that dumpster, and I started walking toward it. And before -- before I knew it, my foot went right to the edge. At that time, I didn't know what it was, but it went right to the edge of that trash, and I fell right down -- right down in the hole. (Emphasis added)

Plaintiff's description of how the accident happened is borne out in the pictures on and around the time of the accident. Exhibit 2.



The top two (2) photographs were taken approximately an hour after the accident and the cardboard box on the corner of the ditch is where Bowerman fell. The bottom two (2) photographs were taken several days after the accident. The bottom right-hand photograph gives the reader a sense of the conditions of darkness at the time of accident. As a result of the accident, Ms. Bowerman suffered a displaced trimalleolar fracture of her right lower leg which had to be

surgically repaired with plates and screws. Ms. Bowerman was confined to a wheelchair for 16 weeks and she was in cast for approximately 5 months. After the cast was removed, Bowerman was given a boot for 8 weeks and she had to use a walker for 2 months.

The following facts are undisputed: 1) Defendant Westveld created the trench/ditch, and 2) Defendant Westveld knew and acknowledged that the trench/ditch was a trip hazard. As will be seen in this Brief, and contrary to Defendant Westveld's argument, this created a duty, pursuant to *Clark v. Dalman*, 379 Mich. 251, 261(1967) and *Loweke v. Ann Arbor Ceiling & Partition Co. LLC*, 489 Mich. 157, 169-170 (2011), that every person engaged in any undertaking must use due care as to not unreasonably endanger the other persons. Furthermore, as will demonstrated later in this Brief, the open and obvious doctrine is inapplicable legally and factually to the present case.

FACTS PERTINENT TO THE DISPOSITION OF DEFENDANT'S WESTVELD'S MOTION FOR SUMMARY DISPOSITION

(a) Introduction

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

In order to completely understand how this accident happened Plaintiff must first examine the testimony of Plaintiff, Randy Westveld – owner and operator of Westveld Services, LLC, Eric Koch – Defendant Red Oak's maintenance manager and the testimony of Albert Kerelis – Plaintiff's construction and safety expert.

(b) Jan Bowerman (Exhibit 1)

- Bowerman was born February 7, 1946. *Id* at 5.
- Bowerman has been a tenant at Stanton Park Apartments since 2013. *Id* at 6.
- Although she was aware of the trench/ditch in front of the garbage dumpster patio, she **never** – during this time – took her trash out at night. *Id* at 50-53, 62.
- Because of the darkness and the fact she could not see the trench in front of the garbage dumpster patio, Bowerman took a parabolic course to the dumpster on the grassy area. *Id* at 22-29.
- The cardboard box in the pictures is where she fell. *Id.*

Clearly, despite her knowledge of the existence of the trench/ditch, Bowerman's inability to see the trench/ditch contributed to why she came in contact with trench/ditch. As will be seen later in this Brief, Plaintiff's expert's – Albert Kerelis – opinion is that the parking lot was poorly illuminated under these circumstances and contributed to the fall.

(c) Randy Westveld (Exhibit 3)

- Owner and operator of Defendant Westveld Services, LLC. *Id* at 7.
- Westveld Services, LLC, was hired to perform the demolition, excavation, and replacement of the concrete flatwork. *Id* at 10-12.
- Trenches that were created for their wood formwork were partially filled in with sand and asphalt millings. *Id* at 13-14.
- He always puts out caution tape and cones to warn of wet cement and other things. *Id* at 14-16.
- He created the trench in front of the garbage dumpster patio that caused the accident and the trench was 10 feet long. *Id* at 18-21.

- Westveld relocated the dumpster to a grassy area at the south edge of the parking lot and to the west of and near the area where work was being performed. *Id* at 20.
- **Westveld filled in most of the trenches with sand and/or asphalt millings he created throughout the parking lot except for the trench in front of the garbage dumpster patio**. *Id* at 21-23.
- **He also testified that the trench in front of the garbage dumpster patio where Plaintiff fell was a trip hazard**. *Id* at 30-31.
- Westveld testified that they used caution tape at the end of each day except before leaving the jobsite when he did not guard the active construction site with caution tape. *Id* at 26-29.
- Westveld completed the job on or about October 21, 2021. *Id* at 27.

(d) Eric Koch (Exhibit 4)

- Eric Koch is a "construction specialist" for Defendant Red Oak Management. He inspects and maintains 44 properties for Defendant Red Oak. *Id* at 6 and 10.
- He has been in the construction industry since 2003 and was a licensed general contractor in the State of Michigan at the time of the incident. *Id* at 6-8.
- The demographic that Stanton Park Apartments serves is disabled people and people over the age of 62. *Id* at 11.
- Koch was responsible for hiring and managing the contractors for the concrete sidewalk and dumpster pad replacement project. He testified that there were no discussions about the use of yellow caution tape before the start of the job. *Id* at 17-21.
- Westveld filled in the trenches around the sidewalks but not the garbage dumpster patio where the accident happened. *Id* at 20.

- **Koch inspected the work performed by Westveld on October 21, 2021. He stated that there were no cones or yellow caution tape placed around the unfinished construction project around the garbage dumpster patio where the accident happened.** *Id* at 24-25.
- Koch testified the trench in front of the garbage dumpster was a trip hazard and that yellow caution taped needed to be placed in that area. *Id* at 22-23, 25.
- Koch testified that orange cones and caution tape would make the trench near the garbage dumpster patio more obvious to a person. *Id* at 32-33.

(e) Albert Kerelis – Construction And Building Expert

Albert Kerelis' CV is attached as Exhibit 5. According to Exhibit 5, Kerelis is a licensed architect in the State of Michigan and eight other states and is certified by the National Council of Architectural Registration Boards (NCARB). Mr. Kerelis is a residential property manager. He has earned the certification of Accredited Residential Manager (ARM) through the Institute of Real Estate Management (IREM). Mr. Kerelis is employed as a forensic architect and property management expert by Robson Forensic, Inc. and provides investigations, analysis, reports, and testimony toward the resolution of litigation involving personal injury (slip, trip and fall incidents), construction claims, property management standards, and other architectural and property management issues.

Exhibit 6 is a summation of Mr. Kerelis' opinion in this matter. Exhibit 6, paragraph 6 indicates that Kerelis performed a site investigation on December 16, 2022. At approximately 6:00pm, an hour after sunset, Kerelis took light meter readings at various locations on the site including in the hallway (5.9 fc) where Ms. Bowerman had exited from, the outside covered entryway (3.4fc), at various points along the sidewalk leading to the parking lot (0.4 fc, 0.1fc, 0.8 fc), the parking lot (0.1 fc), **at the incident location (0.0fc), and in front of where the dumpster**

had been relocated during the construction project (0.0fc)[1]. In paragraph 13 of Exhibit 6, Kerelis opines that: 1) the trench was inconspicuous in the underlit parking lot and was a dangerous trip hazard, 2) those responsible for the construction site should have known that not guarding against or providing warnings of the hazardous condition was dangerous to residents and; 3) the failure of those responsible for the construction site to prevent residents from encountering the trench did not meet the standard of care for construction site safety and exposed residents to the dangerous condition that caused Ms. Bowerman's fall and injury.

Exhibit 7 is the deposition of Albert Kerelis that was taken on January 17, 2023. In his deposition, Mr. Kerelis elaborated upon his opinions found in Exhibit 6:

- There are standards set by the Illuminating Engineering Society and ASTM International which govern how much illumination there should be to safely walk in an asphalt parking lot. Exhibit 7, pages 22-25.
- The City of Stanton in its ordinances recognizes the standards created by the Illuminating Engineering Society of North America and **based upon Bowerman's age – 75 at the time of the accident – an asphalt parking must have at least 0.5 foot candles everywhere in the parking lot in order to be considered safe to walk.** *Id* at pages 26-33.
- Kerelis' opinion about the lighting in the parking lot confirms Bowerman's testimony - the parking lot was dark and that she could not see and the fact that Kerelis got a 0.0 foot candle reading where the accident happened confirms that it was dark and the parking was under lit compared to the safety standards outlined by the Illuminating Engineering Society of North America. *Id* at pages 34-36.

[1] Fc stands for foot candles which is a unit of light measurement. Exhibit 7, page 18.

- Kerelis also opined that **Stanton City Ordinance 192 – Rental Housing incorporates the BOCA 1990 Code Section 3006.0 which states that whenever a building or structure is erected, altered, removed or demolished, the operation shall be conducted in a safe manner and suitable protection for the general public shall be provided.** *Id* at pages 38-40.
- Reasonable safety measures suitable to protect the public would include caution tape and traffic cones. *Id* at pages 41-43.
- Kerelis also opined that there was a violation of MCL 554.139(a) and (b). *Id* at pages 43-44.

LEGAL ANALYSIS

A. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO PLAINTIFF'S NEGLIGENCE CLAIM AGAINST DEFENDANT WESTVALD THAT PRECLUDE MCR 2.116(C)(8) SUMMARY DISPOSITION BECAUSE DEFENDANT WESTVELD OWED A DUTY OF DUE CARE WHEN IT CREATED THE TRENCH THAT CAUSED BOWERMAN TO TRIP AND FALL

(1) Standard Of Review

Defendant has brought this issue concerning duty pursuant to MCR 2.116(C)(8). The trial court reviewing the MCR 2.116(C)(8) motion must accept as true all factual allegations supporting the claim, and any reasonable inferences or conclusions that might be drawn from those facts. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670 (2008). A motion for summary disposition under MCR 2.116(C)(8) may be granted only when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 8 (2011).

(2) Introduction

First and foremost, this Court must remember that Plaintiff is asserting a **negligence** claim against Defendant Westveld and **not a premises liability claim against Defendant.** Furthermore, the duties listed in Plaintiff's Complaint paragraphs 20-24, (Exhibit 8) were not specific duties of care, but rather, were necessary actions Defendant Westveld should have undertaken to comply with the general common-law duty of care and to not unreasonably endanger others.

To establish a prima facie case of negligence, the plaintiff must first prove that the defendant owed the plaintiff a duty of care. *Henry v Dow Chem Co*, 473 Mich 63, 71 (2005). Every person has a duty to use due care or to not unreasonably endanger the person or property of others. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660 (2012). Whether a duty exists depends on whether the defendant has "*any* legal obligation to act for the benefit of the plaintiff," *Rakowski v. Sarb*, 269 Mich App. 619, 629 (2006). Michigan courts consider the following factors to determine whether a legal duty exists: "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Hill*, 492 Mich at 661. The duty of care that exists when an individual actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law. *Cummins v Robinson Twp*, 283 Mich App 677, 692 (2009).

(3) There Is A Genuine Issue Of Material Fact As To Whether Defendant Westveld Owed Plaintiff A Duty To Use Due Care When It Created The Trench/Ditch That Caused Plaintiff To Trip And Fall

In *Clark v Dalman*, 379 Mich 251, 261(1967), the Michigan Supreme Court recognized a common-law duty that imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. In *Loweke v Ann Arbor Ceiling & Partition Co*, LLC, 489 Mich 157, 169-170 (2011), our Supreme Court again recognized this duty, explaining:

> Determining whether a duty arises separately and distinctly from the contractual agreement . . . generally does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the plaintiff's injury was contemplated by the contract. . . . Instead, *Fultz*'s directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another. *Fultz v Union-Commerce Assoc*, 470 Mich at 461-462. As this Court has historically recognized, a separate and distinct duty to support a cause of action in tort can arise by statute . . . or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties . . . **and the generally recognized common-law duty to use due care in undertakings** . . . . (Emphasis added)

The common-law duty of due care in undertakings, recognized and referenced in *Loweke*, has also been recognized in several unpublished cases. In one case, a plaintiff was riding her bicycle along the sidewalk when it abruptly ended, causing her to flip headfirst over the handlebars and suffer injuries. *Salveta v Florence Cement Co, Inc*, 2012 Mich. App. LEXIS 1025, *1 (Exhibit 9). In a second case, the plaintiff was riding his bicycle on a sidewalk when he rode into an area where the sidewalk had been removed, and suffered injuries when he flipped over and landed on his face in the excavated area. *Price v Royal Oak*, 2011 Mich. App. LEXIS 1028, *2. (Exhibit 10). In a third case, plaintiff's decedent died from injuries he sustained when he collided with a guy wire stretching from a utility pole across a recently constructed city sidewalk in the city of Royal Oak. *Lameau v Royal Oak*, 2012 Mich. App. LEXIS 1635 at *1 (Exhibit 11). In each of these cases, the defendants were companies that had contracted with the city to repair sidewalks, and this Court found that defendants had a common-law duty to exercise reasonable care in the performance of their work. *Salveta*, 2012 Mich. App. LEXIS 1025; *Price v Royal Oak (After Remand)*, 2012 Mich. App. LEXIS 1134 (Exhibit 10); *Lameau*, 2012 Mich. App. LEXIS 1635 at *7. While these cases are not precedential, their reasoning may be instructive or persuasive, even more so since they are consistent with our Supreme Court's decisions in *Clark* and *Loweke*. *Cox v Hartman*, 322 Mich App 292, 308 (2017).

It is undisputed that Defendant Westveld created the trench/ditch that caused Bowerman's fall. It is also undisputed that Defendant Westveld left on October 21, 2021 without either **filling in the trench with sand and/or asphalt millings like the other trenches or putting up yellow caution tape and/or orange traffic cones.** Bowerman is basing her negligence claim on an alleged hazard that Defendant Westveld actively created, not the failure to protect her from harm created by someone or something else. Because Defendant Westveld created the trench and provided no protection, Defendant Westveld had a common-law duty to use due care in its undertaking associated with the construction project at issue, which encompassed a duty to avoid creating a new hazardous condition to third parties. *Loweke*, 489 Mich at 169-170.

The present case is very similar to the case of *Harper v. Ashgrove Apartments*, 2019 Mich. App. LEXIS 5744, (Exhibit 12). In *Harper*, defendant hired the services of BBK to remove and replace certain walkways in the apartment complex. As a result of the construction work that BBK had done, plaintiff tripped and fell on exposed tree roots and uneven roots. *Id* at *2-*3. Plaintiff filed a negligence claim against BBK and the Court of Appeals reversed summary disposition on this claim because BBK owed plaintiff a common-law duty of care in its undertaking. *Id* at *16-*20.

Accordingly, a genuine issue of material fact exists as to whether Defendant Westveld owed a duty of care when it created the trench that caused Bowerman to fall.

B. THERE ARE GENUINE ISSUE ISSUES OF MATERIAL FACT AS TO WHETHER THE OPEN AND OBVIOUS DEFENSE IS APPLICABLE TO THE PRESENT CASE WHICH PRECLUDES MCR 2.116(C)(10) SUMMARY DISPOSITION

(1) Standard Of Review

Defendant Westveld has brought this issue in its motion pursuant to MCR 2.116(C)(10). When a motion is brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings,

depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Furthermore, all inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 617-618 (1995). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183 (2003). In the context of MCR 2.116(C)(10), the Court of Appeals has stated that it is liberal in finding a genuine issue of material fact. *Benton v Dart Properties, Inc*, 270 Mich App 437 (2006).

(2) The Open And Obvious Defense Is Inapplicable To This Case For The Following Reasons: (1) Defendant Westveld Is Not A Possessor Or Owner Of Land Pursuant To *Vandall v. Post Electric Co.*, 1997 Mich. App. LEXIS 2044 And (2) The Open And Obvious Doctrine Is Inapplicable To Ordinary Negligence Claims Pursuant To *Laier v. Kitchen,* 266 Mich. App. 482, 494 (2005)

As can be seen from Exhibit 8 (Plaintiff's Complaint), Plaintiff has alleged ordinary negligence against Defendant Westveld. Plaintiff has not plead a premises liability claim against Defendant Westveld. Furthermore, Defendant Westveld – by their own admission - is not a landowner or possessor of land in this action and, thus, a premises liability case could not be plead against them. Nevertheless, as previously stated in this Brief, the Record evidence in this case demonstrates ordinary negligence for creating a trip hazard.

Whether a defendant may properly rely on the defense of open and obvious danger depends on the theory of liability at issue. *Walker v. Flint*, 213 Mich. App. 18, 20-22 (1995). According to *Betrand v. Alan Ford, Inc.*, 449 Mich. 606, 610 (1992), Michigan law concerning the open and obvious danger doctrine is derived from *§343A(1) of 2 Restatement of Torts 2d*, page 218, which provides as follows:

> "**A possessor of land** is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them,

> unless the possessor should anticipate the harm despite such knowledge or obviousness." (Emphasis added)

Attached as Exhibit 13 is *Vandall v. Post Electric Co.*, 1997 Mich. App. LEXIS 2044. At *4 of the *Vandall* Opinion, the Court of Appeals stated the following about contractors such as Defendant Westveld relying upon premises liability law in defense of cases such as the present case:

> "We find that the trial court's reliance on **open and obvious and premises liability in general, was erroneous. Defendants here were not possessors of the land on which plaintiff's injury took place. Defendants were independent contractors hired by the landowner, Beaumont Hospital, to perform work on Beaumont's land. The duties and policy reasons behind premises liability which would apply to Beaumont do not apply to defendants.**
>
> However, defendants still owed plaintiff a duty of ordinary care. Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care." (Emphasis added)

The Sixth Circuit has also concluded that Michigan premises liability law does not extend to independent contractors such as Defendant Westveld. *Kessler v. Visteon Corp.*, 448 F.3d 326 (6th Cir. 2006).

In *Laier v. Kitchen*, 266 Mich. App. 482, 490 (2005), the Court of Appeals stated the following:

> "To the extent that plaintiff pleaded a viable claim of ordinary negligence dismissal on the basis of the open and obvious danger doctrine was improper. **There is no doctrinal basis for extending the open and obvious danger defense to ordinary negligence**." (Emphasis added).

It is undisputed that Defendant Westveld is not an owner or possessor of land and, furthermore, Plaintiff has asserted an ordinary negligence claim against a contractor – Westveld – thus, pursuant to the holding in *Vandall*, the open and obvious defense is inapplicable to the instant case.

(3) Assuming Arguendo That The Open And Obvious Defense Is Applicable To The Instant Matter, There Is A Genuine Issue Of Material Fact As To Whether The Trench In Question Was Open And Obvious

In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693 (2012). A premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). That duty does not, however, extend to a hazardous condition that is open and obvious *Id.* at 516-517. The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238 (2002). This is an *objective standard*, calling for an examination of the objective nature of the condition of the premises at issue. *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012). To be considered open and obvious, the hazard must have been **wholly revealed** by that casual inspection. *Novotney v Burger King Corp* (On Remand), 198 Mich App 470, 474 (1993).

First and foremost, Defendant Westveld contends that Bowerman had knowledge of the trench and had no trouble going to the garbage disposal during the daylight hours. For the purposes of a summary disposition motion in a premises liability case, this information is irrelevant. *Estate of Trueblood v. P&G Apts., LLC.*, 327 Mich. App. 275, 292 (2019). Next, Bowerman testified that it was extremely dark at that time she encountered the trench which was borne out by the testimony of Albert Kerelis. Also, she tried to avoid the trench by taking a parabolic route to get to the garbage disposal, she was paying attention to where she was walking. Finally, Bowerman and others have testified that there is no streetlight near the area where she was injured. As to the issue of darkness, the Court of Appeals has held in *Abke v Vandenberg*, 239 Mich App 359, 362 (2000)

that whether an alleged hazard is open and obvious is affected by the lighting conditions in the area renders a motion for directed verdict or judgment notwithstanding the verdict inappropriate if there are questions of fact regarding whether the area where the plaintiff fell was dark or whether it was adequately lit. In *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 127-128 (1992), the Court of Appeals stated that the lack of adequate lighting created a fact question as to whether a danger was open and obvious and, thus, summary disposition was unwarranted.

More importantly, the Court of Appeals recently reversed summary disposition in *Thomas v. City of Warren*, 2023 Mich. App. LEXIS 947 (Exhibit 14), where the plaintiff tripped over a 2-inch vertical lip of a sidewalk that she could not see in the darkness. *Id* at *5-*6. At *8-*9 of Exhibit 14, the *Thomas* Court states the following:

> Kane Real Estate Investments 2, LLC also notes that Barnes testified that she had no trouble seeing the condition of the driveway, including the 2-inch lip where it intersected with the sidewalk. Yet, Barnes also testified that she took a nighttime photograph of her driveway from the porch. She indicated that she could not see the lip from the porch, but acknowledged that she could see a "line" in the area. The photograph does, in fact, depict a dark line in the area where the driveway appears to intersect with the sidewalk. The exact nature of the line, however, is unclear. Moreover, Thomas opined that, based upon her experience taking photographs at night, the flash had been used when the photograph was taken. Accordingly, although this evidence would support a finding that the lip would be visible upon causal inspection in the dark, it does not directly refute Thomas's testimony that it was too dark to see the 2-inch lip before or after she stubbed her toe on it. **Thus, as the evidence must be viewed in the light most favorable to Thomas, the non-moving party, there is a genuine question of material fact with regard to the visibility level of the allegedly hazardous condition. The trial court, therefore, erred by summarily dismissing Thomas's premises liability claim.** (Emphasis added.)

On pages 11-13 of Defendant Westveld's Brief, Defendant Westveld relies heavily upon the Court of Appeals decision in *Joyce v. Rubin*, 249 Mich. App. 231 (2002). However, *Joyce* is thoroughly distinguishable from the instant case both factually and legally. *Joyce* involved a situation where the plaintiff fell on snow and ice which is not the facts in the instant matter nor did

the accident in *Joyce* case take place when it was dark. *Joyce* also focuses on alternate routes that could have been taken by the plaintiff and discusses special aspects which is not applicable to the instant case.

Accordingly, there is a genuine issue of material fact as to whether the open and obvious defense is applicable to the instant case and MCR 2.116(C)(10) summary disposition is unwarranted under these circumstances.

(4) The Open and Obvious Doctrine Should Be Abrogated

It is understood that the current state of the law in Michigan requires trial courts to apply the "open and obvious" doctrine and Plaintiff does not expect this court to ignore the law dictated by the higher courts on this issue. Currently several cases are pending in the Court of Appeals which seek to test the viability of this doctrine. It is anticipated that one or more of these cases will reach the Supreme Court for a reevaluation of this doctrine and therefore plaintiff sets forth the following argument to preserve the issue for appeal in the event the law changes.

Premises liability jurisprudence in Michigan is broken. As a result of a series of decisions from our appellate courts, owners and possessors of land are regularly granted summary disposition even where they actively create hazardous conditions on their land that cause catastrophic injuries and deaths. Juries are frequently deprived the opportunity to assess the negligence of the parties in premises liability actions. Instead of allowing juries to apportion fault between the Plaintiff and the Defendant, as they are tasked with doing in every negligence action, courts classify factual disputes in these cases as questions of law by saying that they speak to the duty element of the Plaintiff's case.

As the Michigan Supreme Court has stated, Michigan's approach toward premises liability is based on the Restatement of Torts, 2d. *Bertrand* at 611; *Lugo* at 516-517. The Supreme Court

has interpreted the Restatement as providing that a landowner owes no duty to an invitee to warn of a hazardous condition where that condition is open and obvious.

The Restatement of Torts, 2d, addresses premises liability in two separate sections: §343 and §343a. Pursuant to §343,

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Then, §343(a) provides that;

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

As Justice Cavanagh explained in his concurring opinion in *Lugo*, the above-quoted provisions never mention the concept of duty. *Lugo*, 464 Mich at 531. Instead, the Restatement implies that a possessor of land owes a duty of care to an invitee and then further implies that the applicable duty of care does not require the possessor to warn of hazards that would be obvious *unless* the possessor should anticipate that harm will occur despite the obviousness of that hazard.

As the Court is aware, the question of whether an applicable duty was breached is a question of fact reserved for a jury. *Bailey v Schaaf*, 494 Mich 595, 603 (2013). A typical open

and obvious defense boils down to this- the landowner asserts that the claimed injuries were not his or her fault and, instead, the Plaintiff caused his own injuries by negligently encountering a hazard he should have seen. It is, in other words, no different than the comparative negligence defense that is available in virtually every personal injury case. Michigan law permits such defenses pursuant to MCL 600.2959, which provides that a Plaintiff's recovery shall be reduced by his percentage of comparative fault. That percentage of comparative fault is to be determined by the jury at the time of trial. See M Civ JI 11.01.

CONCLUSION

As to the issue of whether Defendant Westveld had a duty to use due care to Jan Bowerman when creating the trench in question, there is no question that there was a duty because Defendant Westveld created the trip hazard. As to the issue of open and obvious, this defense is inapplicable because Defendant Westveld is not a possessor and/or owner of land and Plaintiff is asserting a negligence claim against Defendant Westveld. In the alternative, at the very least, a question of fact exists for the jury to make this determination whether the trench was open and obvious. Therefore, Defendant's MCR 2.116(C)(10) Motion should be denied.

Respectfully submitted,

JOHNSON LAW, PLC

By: _____

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Dated: March 7, 2023

EXHIBIT LIST

1. Jan Bowerman deposition transcript
2. Photographs
3. Randy Westveld deposition transcript
4. Eric Koch deposition transcript
5. Albert Kerelis C.V.
6. Albert Kerelis report
7. Albert Kerelis deposition transcript
8. Complaint
9. *Salveta v Florence Cement Co, Inc.* 2012 Mich. App. LEXIS 1025, *1
10. *Price v Royal Oak (After Remand)*, 2012 Mich. App. LEXIS 1134
11. *Lameau v Royal Oak*, 2012 Mich. App. LEXIS 1635 at *1
12. *Harper v. Ashgrove Apartments*, 2019 Mich. App. LEXIS 5744
13. *Vandall v. Post Electric Co.*, 1997 Mich. App. LEXIS 2044
14. *Thomas v. City of Warren*, 2023 Mich. App. LEXIS 947

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

-vs- Case No. 2022-S-28824-NO

RED OAK MANAGEMENT CO., INC., WESTVELD SERVICES, LLC and BOB'S ASPHALT PAVING, INC., Hon. Ronald J. Schafer

Defendants.

Deposition of JAN E. BOWERMAN,

taken at the instance of Defendant Red Oak Management Co., Inc., under and pursuant to MCR 2.306, before JENNIFER L. SCHMALING, a Registered Merit Reporter, Certified Realtime Reporter, Certified Realtime Captioner, Notary Public in and for the State of Wisconsin, and an Illinois Certified Shorthand Reporter, with all participants appearing remotely via

virtual videoconference, on November 9, 2022,

commencing at 12:13 p.m. and concluding at 2:08 p.m.

APPEARANCES

JOHNSON LAW, PLC, by
MR. MICHAEL E. FREIFELD,
140 East Second Street, Suite 201,
Flint, Michigan 48502,
appeared on behalf of the Plaintiff.
WHEELER UPHAM, P.C., by
MR. DANIEL J. JAMES,
250 Monroe Avenue NW, Suite 100,
Grand Rapids, Michigan 49503,
appeared on behalf of Defendant Red Oak Management Co., Inc.

BOSCH KILLMAN VANDERWAL, PC, by
MR. JOSEPH P. VANDERVEEN,
2900 East Beltline Avenue NE, Suite A,
Grand Rapids, Michigan 49525,
appeared on behalf of Defendant Bob's Asphalt Paving, Inc.
SECREST WARDLE, by
MR. JUSTIN L. COLE,
2025 East Beltine SE, Suite 600,
Grand Rapids, Michigan 49546,
appeared on behalf of Defendant Westveld Services, LLC.

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Disposition Of Original Exhibits:
Attached To Original Transcript

TRANSCRIPT OF PROCEEDINGS

(Exhibits A and B were marked.)

JAN E. BOWERMAN, called as a witness herein, having been first duly sworn on oath, was examined and testified as follows:

EXAMINATION

BY MR. JAMES:

Q Good afternoon. Could you, please, state your name for the record?

A My name is Jan Elizabeth Bowerman.

Q Thank you, Ms. Bowerman. My name is Dan James. I represent the Defendant, Red Oak Management, in this case. This is the time and date for your discovery deposition, and I'm going to be asking you a number of questions about you generally and about the lawsuit that you filed and the incident that gave rise to that lawsuit. But before I get started with some of those questions, I just wanted to go over some rules that perhaps your attorney has already discussed with you, but I will do it for the record.

So the court reporter is recording everything I say, you say, everything everyone says, so it's very important that when we

communicate we use words because ultimately there will be a transcript. So if I ask you a yes-or-no question and you're saying "yes" or "no," please say that instead of a head nod or a head shake or an "uh-huh" or an "unh-unh."

A I understand.

Q Okay. Great. And sometimes people forget, and if someone reminds you, we're not trying to be rude. We're just trying to get a verbal answer for the record. It is also important for the court reporter that we do our best not to talk over each other. So if I'm asking you a question and you already know what I'm asking, you know, please put the brakes on answering until I'm done asking the question before you start your answer. Likewise, I will do my best to wait until you're done speaking before I move on to another question, okay?

A Okay.

Q It's also very important that if you don't understand my question you let us all know that because if you don't let us know and you give an answer when we get the transcript, we won't know that you didn't understand the question and will assume that you did. So --

A Okay.

Q -- you know, it's bound to happen that I ask you a question and you don't understand. Please speak up. You won't offend me.

A All right.

Q And we'll make sure we get on the same page, okay?

A Appreciate it.

Q All right. And if you ever need a break at any point, just let us know that as well. We may be here -- you know, I don't think an excessive amount of time, but we may be here for an hour or two. There are a number of other attorneys that may have questions for you. So if you do need a break, just let us know, okay?

A All right.

Q So I'm going to start with just some general background questions about yourself. What is your date of birth?

A February XXXXXXXX

Q And I'm going to ask you for your Social Security number. I would like you to give me the full number, and the court reporter will only put the last four numbers in the transcript. So if you can give me your social,

that would be great.
A Yes. *-**[redacted]**
Q Thank you. And what is your current address?
A 200 East First Street, Apartment No. 20, Stanton, Michigan 48888.
Q And do you reside at that location with anyone?
A No, just myself.
Q And how long have you lived in that apartment?
A Three years.
Q And you lived at that apartment at the time of the incident that gave rise to this lawsuit; is that correct?
A That's correct.
Q And what was the date that this incident occurred?
A October 30th, 2021.
Q And where did you live prior to this apartment on First Street in Stanton?
A Before I moved to Apartment 20, I lived at 200 East First Street, Apartment No. 23, Stanton, Michigan. I was my mother's caregiver.
Q Can you say that last part again?
A I lived with my mother as her caregiver.
Q So same apartment building, different

apartment; is that right?
A Correct.
Q And how long did you live in Apartment 23?
A One year.
Q And I understand your brother also lives in the same apartment building; is that right?
A That's right.
Q All right. What apartment number is he?
A 21.
Q And how long has he lived there?
A About two years.
Q And your brother's name is Larry Munson; is that correct?
A That's correct.
Q I wanted to ask you a little bit about your education. Where did you attend high school?
A Adrian High School, Adrian, Michigan.
Q And did you attend college?
A Yes.
Q Where did you go?
A West Shore Community College in Manistee.
Q And did you receive any degrees from there?
A An associate's.
Q Any other college after West Shore CC?
A No.

Q You are not married; is that correct?
A I'm a widow.
Q And when did your spouse die?
A In 1979.
Q Do you have any children?
A Two children.
Q And what are their names?
A Jan Michelle Bowerman. She was married, so -- but she went by Bowerman-Torres.
Q And -- Yeah.
A And my son's name is Eugene Scott Bowerman.
Q But where does Jan live?
A She lives in Greenville, Michigan.
Q And what about Eugene?
A He lives in Mount Pleasant, Michigan.
Q Do you have grandchildren?
A Yes.
Q How many grandchildren do you have?
A I'm losing track, but I think it's 11.
Q Wow. Congratulations.
A Could be more.
Q What are -- What's the age range of your grandchildren?
A Of grandchildren?
Q Yeah.

A Let's see. I think the youngest is probably sixteen now, and the oldest is, I believe, forty-two.
Q Have you been in the military before?
A No.
Q I'm going to ask you about your employment history. It's my understanding that you're retired; is that correct?
A That's correct.
Q And when did you retire?
A November 17, 1918, (sic) was my last day of work.
Q Could you tell me the year again?
A I'm sorry. November 17th, 2018.
Q Okay.
A Losing track of time.
Q And where were you -- Where did you work before retiring?
A I worked at Red Oak Management.
Q And how long had you worked at Red Oak for?
A Over 19 years.
Q And what -- Did you have the same position at Red Oak those 19 years or multiple positions?
A I was a site manager for six of their properties.

Q For 19 years?
A That's correct.
Q So at the time you retired, was -- the Stanton Apartments where this accident happened, was that one of the properties that you were a site manager for?
A Yes.
Q Okay. Did you ever live at a Red Oak property while you worked for them, or was that only after you retired?
A No. I worked. I lived at the Stanton property for about five years before I retired.
Q So just going back to when we were discussing apartments, maybe I need to go back one further. So you've lived in Apartment 20 for three years. You lived in Apartment 23 for one year. Did you live in another apartment --
A Yes, I did.
Q -- after that? What number?
A No. 1.
Q And how long did you live there? A year or two?
A Four years.
Q Four years.
A Or maybe -- Yeah.

Q So you have lived at the Stanton Park Apartments for roughly eight years?
A Yeah.
Q Is that correct?
A That's correct.
Q So as the site manager for Red Oak properties, what were your job duties?
A I was a jack-of-all-trades there. I made sure that -- First of all, when I'd go on the property, I made sure that the curb appeal looked nice, that the outside was of good -- of good safety factors, did the paperwork, processing of all the applicants, helped them fill out applications if they needed help, processed the verifications of them qualifying to live at the property, got the apartments ready, did the cleaning, did the painting, did the -- shampooing the carpet or made sure that was done by a shampoo company and welcomed the new tenants to their unit.
Q For the 19 years you were at Red Oak, were you the site manager for the Stanton Park Apartments that entire 19-year period?
A No.
Q How long were you the site manager for Stanton

Park Apartments?
A I would say about nine, ten years. That was the last property I took. I gradually retired myself from each property, and Stanton was the last one I retired at.
Q Prior to working for Red Oak, so we're going back a little while here, what is it you do for work?
A Let's see. I did a lot of retail work, worked in grocery stores, worked in retail stores. I was a caregiver. Basically, that's about -- about it.
Q What -- What types of positions did you have at the retail stores?
A I was department manager at the Yankee department store for three departments. And other than that, I was a cashier mostly. I was office manager for one of the grocery stores in Carson City.
Q Okay.
A Office manager. Basically, that's it.
Q And how many years were you a caregiver?
A I care-gived for about seven years until the gentleman passed away along with my other job.
Q I want to discuss your medical history before

the incident that happened October 30, 2021. Well, let's start with who is currently your primary care provider?
A My family doctor is Dr. Bryan out of the Sheridan Clinic in Sheridan, Michigan.
Q And how long has he been your primary care provider?
A About five years.
Q And who was your primarily care provider beforehand?
A Dr. Yard out of Sheridan, but he moved to Florida.
Q How long was he your doctor?
A From the time I moved to that area, probably two years he was my doctor.
Q And was he at the same clinic as Dr. Bryan?
A I believe he was in the same building.
Q Prior to the October 2021 incident, had you had any surgeries?
A Yes.
Q What surgeries have you had?
A I had colonoscopy procedures. I had diverticulitis, and they removed six inches of my bowel. Basically, that's it.
Q Have you broken any bones prior to the October

2021 incident?
A No.
Q Do you recall getting any MRIs before?
A No, never have.
Q At the time of the October 2021 incident, were you taking any medication for any reason?
A Just for my blood pressure, the lisinopril.
Q Prior to the October 2021 incident, and we'll say for the five years before that, can you recall taking any prescription pain medications for any reason?
A No.
Q So I want to know where in the building Apartment 21 is.
A 21? Where my mother lives.
Q I'm sorry. 20, where you lived at the time of the accident.
A I live in Apartment No. 20. It's on the south wing of -- It's an L-shaped building, and I live on the south -- south wing, and it's about -- I'm, I believe, the fifth door down from that side entrance door.
Q So do you live on the -- so you mentioned it's L-shaped, and so there's one wing that goes -- that's on the north part of the property that

runs east-west, is that right, and then there's --
A I'm bad at directions on north, south, east and west. I'm not good at that, but I do know I live on the -- I always emptied my trash and used that side door to get to my car and get to the dumpster --
Q Okay.
A -- because it was so close to my apartment.
Q All right. Does your apartment look out onto the parking lot?
A No, it does not.
Q All right. Your apartment is on the other side of the building?
A Uh-huh. Faces the back.
Q So then your brother's apartment, No. 21, it's on the other side of the hallway and faces the parking lot; is that correct?
A That's correct. Yes.
Q So the -- the entrance door you're referring to, this is on the south end of the building?
A Yes.
Q And that's the door you would use to get out into the parking lot, correct?
A Correct.

Q So why don't you tell me what happened on October 30, 2021, and how this incident occurred.
A Well, I'd have to backtrack to the day before, and I hate to make a long story out of this, but I had brussel sprouts for a meal. I didn't finish them all, so I threw the rest of them away. And when I went to bed that night, I didn't think about it, but when I woke up in the morning, I got up at 6:00 as I normally do, made my coffee. I had a terrible odor in my apartment, and I realized then that I had thrown them brussel sprouts in my trash.
So my brother came over as he normally does, and we had our morning coffee. And he left about an hour later to his apartment, and I wanted to get that trash out. So as soon as he left, I put my shoes on, got my trash ready. I went out my apartment, turned to the left, went about 80 feet to that side door. And that side door, there's a handicapped sidewalk. I walked down to the end of the sidewalk. And then about -- once you get past that sidewalk, it's about eight feet or ten feet, and I'm at the dumpster, and

that's the route I always use to take out my trash.
Well, that particular morning, I didn't wait. I looked out the side door, and I noticed that I could see the sidewalk. It was still dark, but there was still light on the sidewalk. I went down the sidewalk, and when I -- I knew I was going to have to go to the parking lot to miss some of the area, but -- so I went out to the parking lot. And once I got in the middle of the parking lot, it was all black. I couldn't see, so then I spotted the dumpster. They had moved it off the patio slab it was on. I -- I seen that because it had like a reflector on it, and there was a little light coming from the trees from the streetlight. So I kept my eye on that dumpster, and I started walking toward it. And before -- before I knew it, my foot went right to the edge. At that time, I didn't know what it was, but it went right to the edge of that trash, and I fell right down -- right down in the hole.
Q Okay.
A So do you want me to continue?

Q I'm going to ask you some -- some additional questions. We're going to kind of unpack that a little bit. But one thing I want to do is I want to share my screen with you to show you something, but I've got to pull it up first, so hang on. All right. So can you see my screen there, Ms. Bowerman?
A Yes. Uh-huh.
Q Okay. So this is what I'm going to mark as Exhibit A, and these are some photos that were produced by your attorney in response to some of the discovery requests that were sent to you, and I -- I have the pages numbered here. What I first want to do is just make sure I understand the path you took, so I'm going to go to -- I'm going to go to page 6, and I don't know what's the best way to do this, but do you recognize this picture?
A Yes, but could you tell me what date that picture was taken?
Q Well, that was a question I was going to ask you. I don't know. It was produced by your attorney, so I don't know where the picture came from or what day it was taken. Do you?
A It would have had to have been taken after my

accident. That's the only time that I had seen tape, and that was taken a day -- I mean, the tape was put on a day before the concrete man came to fill in the trench, and that was put on by the site manager's husband who was maintenance at that time.
Q So the tape, there was no tape up the day of your accident, correct?
A Correct.
Q All right. So what I wanted to hopefully accomplish right at this moment with this picture is to understand the path you took out of your apartment.
A Okay.
Q And so you can see my cursor on the screen; is that right?
A Yes, I can. Um-hum.
Q So my cursor here is on -- is this what you referred to as the handicap pathway?
A Yes, yes.
Q And if you take that path up, that goes towards the side door you've been referring to, correct?
A Correct.
Q Okay. So on the date of the accident, you came

out of the door and then turned right to come down this path?
A That's right.
Q Okay. And then before the parking lot, and it's a little bit obscured by the tape in this picture, but there is a -- there's a walkway; is that right?
A That -- There's a sidewalk. It'll come right onto the main sidewalk, and then that drops right down to the trench and then the parking lot. This sidewalk on the side is the one that goes to the dumpster.
Q Okay. So -- And this isn't taken facing where the dumpster was. We're looking towards the building, but as you walk down that pathway from the side door, you -- you then get to the sidewalk that runs parallel to the parking lot, correct?
A I don't -- I don't really understand what you're telling me.
Q Sure. There is -- There is a sidewalk that runs right in front of the parking?
A That -- Yes.
Q So when --
A Yes.

Q When you came down the path from the side door, it intersects the sidewalk that runs along the parking lot; is that right?
A Yes. That's right.
Q And if you continued to walk straight from that path, you would end up right in the parking lot, correct?
A Correct.
Q Okay. And there is this additional sidewalk shown on the -- sort of the right part of the page that extends down towards the cement patio you called it where the dumpster is located; is that right?
A Where -- Where it's supposed to be, yes.
Q Okay. So on the date of the accident, did you walk down this sidewalk on the right part of the page that connects to the patio?
A No. It was -- it was -- This is when it's done. It didn't look like that the day I fell.
Q Okay. So describe for me, what was the condition of the sidewalk on the date that you fell? Let's start with the path that goes from the side door to the sidewalk along the parking lot. Was that -- Had that been poured?
A No. I don't believe so. I don't think so, but

right where your arrow is, that was still a trench about this wide at the edge of that. Where the tape is, the yellow tape, that was still a deep trench. And if I remember right, this was nothing but dirt. Well, I -- No. It was -- it was -- I guess it was like that.

Q Okay.

A But this I had to walk. I couldn't walk. For some reason, they had equipment there or something. I can't remember what the reason was, but I couldn't just walk down that sidewalk.

Q And you're referring to the sidewalk that runs from, you know, that sidewalk up along the parking lot and then down to the cement patio where the garbage --

A Well, there would have been no sense of me walking down that sidewalk because the dumpster wasn't on that slab.

Q Okay.

A It was moved.

Q Where was it moved to?

A The day of the accident, it was moved over on the opposite side, more toward the road on the grassy area.

Q Okay. So when you reached the sidewalk that runs alongside this parking lot --

A Yes.

Q -- what direction did you go?

A Well, I knew there was no sense going there because the dumpster wasn't there, so I spotted the dumpster. As I got -- Somehow I got over a little bit on that sidewalk going toward the dumpster pad, but I got off from it and walked in through the parking lot. But the parking lot, once I got in the middle of the parking lot, it was dark, I mean, dark. I couldn't see where anything was, and I spotted the dumpster, reflection of the dumpster, over on this side of the -- opposite of the slab going toward the street. So I started walking through the middle of the parking lot, and then I spotted the dumpster and started going toward the dumpster. It was in the grassy area.

Q Okay. Let's -- let's look through some of these other -- Well, before we do, does -- does page 6 show the location where you fell?

A Page 6.

Q The page we're on.

A Oh. I think it does, but I can't really say.

It was right on the corner of the -- toward the street.

Q The corner -- The corner of what?

A The corner of the slab that the dumpster, the new slab was put in right about here.

Q And --

A Oh, I'm sorry.

Q Is this area where my cursor is --

A Yeah.

Q -- is this the trench --

A Yeah.

Q -- that caused the fall?

A Yes, right there.

Q All right.

A Um-hum.

Q Now, I went to page --

A See that box? I'm sorry. You see that box right there?

Q Yeah.

A That's -- That's where I fell. My box fell down, and my knees went into that box.

Q Okay. So this is -- We're looking at page 5, and I'm saying that for the transcript so when we look at this later, we'll know what we're referring to. So I'm looking at -- We're

looking at page 5, and this brown thing that's on the -- what we're calling the trench and by the corner of the slab, this is a box?

A A box that was in my hand that I was carrying, a small box.

Q And were you throwing that away?

A I was throwing that away along with that bag of trash.

Q Okay.

A And that fell out of my hand.

Q So do you know who took this picture?

A That picture there?

Q Yes.

A That was -- That was taken by my brother.

Q And this was taken the day the accident happened?

A Of the accident. The ambulance was still -- still in the parking lot in that picture with a light shining down. That's why it's so bright there. They were working on me in the ambulance, and he said all of a sudden he decided maybe he should take a picture of that. I didn't know he was taking it.

Q Okay. This picture, it has the area where the dumpster usually sits; is that right?

A That's correct.
Q Okay.
A Yes.
Q It's up against the fence in the upper right corner; is that correct?
A They had -- They had that fence tore down because that fence usually went on each side of the -- for closure for the dumpster.
Q When you say the fence tore down, I mean, there's a fence in this picture. Was the dumpster -- Would that set in front of the fence there?
A The dumpster would set right on that cement slab that's right there. And that board, them fences, are -- not a whole fence, just maybe four feet deep or -- four feet high, five feet high maybe, and they set at each side of the dumpster --
Q Okay.
A -- to kind of barricade it from the street.
Q So -- Sorry. So if I understand you correctly, you -- you came down this -- this sidewalk that connects the sidewalk along the driveway or -- the parking lot to the cement pad. You came down that partway; is that right?

A Yes.
Q Okay.
A And about right in there is where I realized the dumpster wasn't there. They had moved it.
Q And so at that point, you decided to -- you stepped off that sidewalk onto the parking lot; is that right?
A That's right.
Q Okay. Did you step on the newly poured cement pad at all?
A No, no. I didn't even -- I didn't get that close to the cement slab at that time. I was walking out on the parking lot to come around on the other side of where that slab is and put my trash in the dumpster that they had put on the grassy area on the opposite side where your arrow is.
Q Okay. So the dumpster is over in here?
A That's correct.
Q All right. And for the record, off the picture on page 5 to the right side, correct?
A Correct.
Q Okay. So you -- you got off the parking or -- the sidewalk, stepped into the parking lot, and then am I correct that you at that point walked

around the cement slab sort of in a C shape?
A No. I walked way out toward the middle of the parking lot to get it to stay away from that area. I didn't know exactly where I was once I got on the blacktop. I couldn't see. It was all dark, but I just kept going straight because I knew the slab was not that way. It was more where it is. So I got in the middle of that parking lot, spotted the dumpster reflection light over on the opposite side and started -- then started walking toward the dumpster 'cause I see the reflection, the reflector, on the dumpster.
Q Okay. So as you are approximately halfway down the sidewalk toward the cement slab, you realize the dumpster isn't on the slab; is that right?
A That's correct.
Q All right. So when did you see where the dumpster was?
A Well, as I -- as I -- where there was light on the sidewalk, I could see that it wasn't right there, but I was driving to eliminate the big trench that I'd have to walk over. So I went on that sidewalk right there where your arrow

is and then got off there, walked straight to the middle of the parking lot.
Q So as you're -- As you are at the point where you stepped off the sidewalk into the parking lot for the first time, did you know where the dumpster was located?
A Yes.
Q Okay. And you knew that it was --
A Over there.
Q -- on the other side of the cement slab; is that right?
A Yes. That's correct.
Q Okay. And why did you not walk straight to where the dumpster was?
A I couldn't without walking. I didn't -- I couldn't see where the trenches were once -- Well, I was on the sidewalk. I knew I had to get on the parking lot and walk away from that trench area and then get myself over on this side.
Q Okay. So you knew there was a trench in front of --
A Oh, yes.
Q -- that cement slab?
A Yes.

Q Okay. The only trench, though, is the one that you fell in; is that correct?
A No.
Q Where was the other --
A There were trenches -- trenches all over that place.
Q Okay. Well, where in your path from where you, you know, we'll say, deviated from your usual path, where else is there a trench?
A There is a trench as you're going to get off that handicapped sidewalk. That's all trench all the way down going toward the entrance door.
Q Let me -- I don't mean to interrupt, but I'm -- Yeah. So you're referring to the pathway up to the door. I'm talking about from where you -- where you deviated from your usual path to the dumpster and where the dumpster was. Where else is there a trench around this pad and in the parking lot other than the one that you fell in?
A I believe it was all around the dumpster except for the back. There's a trench right on that -- it was around.
Q So there was a trench, and in relation -- we're

speaking in relation to the picture on page 5, there was a trench on the -- on the top of the slab, the left side of the slab in the bottom of the slab. Is that what you're saying?
A There was a trench on the -- Is that right or left from this way? I can't tell. There's a trench that was on -- You can see the side of the trench from when you leave that handicapped sidewalk. You can see the side of the trench on that side. You can see the trench on the front, and I don't know if it was on the other side now or not. I don't know for sure.
Q So you see where my cursor is?
A Yes.
Q So I --
A There's a trench right there.
Q So there's a trench right here?
A That's right.
Q And I was referring to that as the top of the pad --
A Sorry.
Q -- yeah, for purposes of this picture on page 5. So there's a trench where my cursor is.
A Yes.

Q Is that what you're saying?
A Yes.
Q Okay. And is there a trench on the bottom where the cursor --
A I think so. I believe so, but -- Yes, I believe there was, and I know there was one on the ground.
Q And that's the one on the left side on page 5 where your box is; is that right?
A That's right.
Q Okay. Do you see a trench, any trench, on page 5 other than the one that you fell in?
A On that picture?
Q Yes.
A I believe I do.
Q All right. This is page 4, similar view, also taken by your brother?
A Yes. He took all them pictures.
Q That's his foot there?
A No. Oh, it might be in this picture, yeah.
Q Yeah. That's -- Right. Sorry. Okay. You had mentioned equipment that was in the area. Was equipment moved from the time that you fell and when your brother took these pictures?
A Yes.

Q And do you remember what kind of equipment it was?
A The day that I fell, the equipment was not there in the morning, but maybe the day before, there was some equipment there.
Q At the time you fell, there was no equipment in this area; is that correct?
A That's correct.
Q All right. And at the time you fell, was there a car in either of the parking spots shown on page 5?
A No. I don't -- I don't remember seeing a car.
Q So do you know who took the picture on page 1?
A I don't know if that's the same day or not, but I know Larry took some pictures the day before they come to lay the cement because the -- There are some pictures in there where the manager was putting that tape down the day before they come to do the repair.
Q Okay. So this picture on page 1 was taken after your accident, correct?
A Yes.
Q Same thing on page 2, taken after your accident, correct?
A It would -- Yes.

Q What about page 3? Do you know when this was taken?
A He took them all during the -- That was probably when I fell. I don't know, you know, for sure.
Q And page 3, does this show the corner of the trench where you fell?
A If I could see some other pictures besides, I probably could distinguish it better.
Q Well, compared to --
A That's where I fell.
Q Okay.
A And that's how it was left when they took me off in an ambulance.
Q And we're looking at page 4 right now, correct?
A I guess so. I don't know.
Q Okay. It's down in this lower corner. Now, page 8, do you know when this picture was taken?
A That would have been the day that I fell. That's how black it was out there.
Q The -- this picture shows the --
A Right there is where the dumpster is. That's how I could tell where the dumpster was. I spotted that.

Q All right. Going back to page -- what were we on -- page 5, so when you were halfway down the sidewalk to the cement slab, you could see that the dumpster was directly across the pad, correct?
A Yes.
Q Okay. But you walked. You did sort of a big -- You were doing a big semicircle path to walk around the pad because you were concerned about the trenches?
A That's right. I was probably thinking that the cement might be wet. I don't know. I just had a plan that since I realized the dumpster wasn't there, I had a plan of taking the -- taking it up the parking lot, making it across and getting over on the other side because I seen the dumpster over there.
Q So your goal was to walk completely around the pad and the trenches that were there or you thought were there; is that right?
A My goal was to not fall in any trenches.
Q Okay. And the trenches that you were concerned about, though, were right along the perimeter of the pad; is that correct?
A I guess because I was going to the dumpster, plus I was concerned about these trenches by the main sidewalk.

Q Okay. But you were past those at this point, so I'm just curious about from when you got off the sidewalk onto the parking lot to the dumpster, the plan was you were going to walk around the pad because --
A Walk away from the pad, stay away from the trenches even if it took me a little longer. I was just going to make a safe trip to empty my trash, and I chose to go out to the parking lot 'cause I didn't realize I couldn't see once I got out there. But once I got out there, I really couldn't -- I didn't know exactly where I was at until I seen the reflection of the dumpster and I started heading toward that dumpster where the light -- where I could see.
Q When you say when you were in the parking lot, you didn't know where you were at, can you explain that to me?
A I didn't know exactly. I -- I knew I was in the parking lot, but it was complete darkness, and I just started going toward that light where the dumpster was.
Q And what light was that?

A There was a light, a reflective light, from the street on the other -- on 200 East First Street. On First Street there was a streetlight, and it kind of showed -- showed -- shown through some bushes, and I could see a shadow of the dumpster, whatever you want to call it.
Q So aside from the trenches, did you have any concerns about walking through the parking lot even though it was completely dark?
A No, I mean, other than the trenches.
Q Well, right. You weren't concerned about walking through the parking lot as long as you avoided the trenches; is that right?
A That's correct.
Q You weren't concerned about tripping on anything in the parking lot other than just avoiding those trenches; is that correct?
A That's correct. There's that ambulance right there.
Q Okay. Yeah. We're looking at page 9, and this -- this shows where the ambulance parked when they came to assist you; is that right?
A That's right.
Q And page 9 shows the location, the edge of the

dumpster; is that correct?
A That's correct.
Q I think 10 might be the same. Okay. I'm going to stop sharing the screen for a moment. Ms. Bowerman, can you tell me what happened after you fell?
A Well, I was in shock. I couldn't believe I went down on the ground. And when I -- when I looked, I wondered what had happened. I looked, and I realized I was stuck in the trench, and I did my best. I couldn't get out. I tried to raise myself up. I couldn't get out. I did a little struggling, but I was able to get myself out. And when I looked to see where my foot was, my -- my toes, I could see my leg was, like, curled up like, and my toes were way in the back where my heel was supposed to be, and my heel was up on the top of my leg. I knew I couldn't stand, and it started drizzling rain.
And by that time, it was close to 7:30. I knew caregivers were going to be driving in to take care of some of the tenants that lived there, and I was afraid they wouldn't see me crawling on the cement to get

back to the building, and I had all these trenches that were all covered all around the sidewalk. There were just trenches that were probably 11 inches long and quite deep, and I had to get myself back somehow on -- and I don't know how I did it now, but I had to get myself back on the handicapped sidewalk which had a ramp, kind of a -- not a ramp, but it kind of had an incline to it. And I had to use my shoulders to kind of drag myself through the parking lot before I got hit by a car before a car drive -- drove in and couldn't see me. I was in kind of a dither. I was all winded out, and I left a stone or a rock by the entrance door 'cause I didn't take my keys with me to unlock the door. So I put a big stone there to keep the door propped open which good thing I did 'cause I was able to crawl up that ramp or lifted sidewalk, go into the building, and I couldn't call myself.
I didn't know where my phone was. I couldn't reach it, so I went and crawled into my brother's apartment, opened up his entrance door with the palm of my hand and yelled, "Larry," crawled into his apartment. And I

said, "Call 911, please." He came out of his building, and he said, "Where are you?" And I said, "I'm on the floor. Please call 911," so he did. And from there, they came and picked me up out of his apartment.
Q And where did they take you?
A Directly to Butterworth Hospital in Grand Rapids.
Q So tell me what your injuries were as a result of this accident.
A I'm not good at medical terms, but --
Q That's okay. Let me just interrupt you to say I know you're not a doctor, and I'm just looking for your understanding of what your injuries are.
A I broke the three main bones in my ankle.
Q And this is your right ankle, correct?
A That's correct.
Q Okay. Other than the broken bones in your right ankle, any other injuries?
A Well, they had to get my leg straight, and they had to put me to sleep to straighten my leg out. I was fearful. I was really afraid that -- I didn't know they could do such a thing. I was afraid they were going to have to

amputate my leg up to my knee. That's what I was afraid of, but they did do X-rays. They monkeyed with my leg trying to get it positioned. I was in excruciating pain at that time.
They ended up putting me to sleep. And while I was asleep, they straightened my leg up, put me in some type of a -- it wasn't a cast, but it was like splints going all the way from my ankle to my knee and wrapped it into like a material like a cast, but it wasn't. And I had to wait about three weeks with that before they could actually do the actual surgery and repair my leg.
Q So when you said they put you to sleep, this was at Butterworth Hospital the date the accident happened?
A It was trauma care, yes. They took me directly to trauma care.
Q How long were you at Butterworth Hospital?
A That day, just about all day.
Q Okay. But you were -- you were discharged --
A That same day.
Q Okay. And how did you get home that day?
A I was fortunate to have a granddaughter that is

a nurse, and she lives not too far from Butterworth. And I asked if I could call her, and she came and picked me up and brought me home.

Q Okay. And you did have surgery on your right ankle; is that correct?

A Yes.

Q And --

A Yeah. They straightened my leg the best -- Yeah. They straightened my leg, had me in splints, sent me home. And about three weeks later, I had the surgery, actual surgery.

Q When you say "straightened your leg," do you mean -- are you talking about the fractures in your foot, or are you referring to something else?

A My leg was all twisted. I couldn't -- My leg was just all twisted around. They had to straighten my leg up somehow, put me in the splint. And for some reason, I don't know why, but I had to wait three weeks to straighten the bones or fix the bone, bones.

Q To do the surgery for your foot, is that what you're referring to?

A For the ankle and foot, yes.

Q Okay. And your surgeon is Dr. Albert George; is that correct?

A That's correct.

Q What treatment did you have after he performed the surgery on you?

A Well, I had a lot of restrictions. I was confined. I was in a wheelchair for 16 weeks. I had to sleep with a pillow. They gave me a special pillow that elevates my leg from my knee to my foot up above my heart, had a terrible time trying to get up in the middle of the night to use a restroom, get myself into a wheelchair because medical procedures, you'd have to ask them. I kept having to go back for X-rays. Oh, gee. They did stitches. They had to stitch it and had to take stitches out. You would have to check with medical.

Q So let's talk about your mobility and weight bearing a minute. So after surgery, you were in a wheelchair for 16 weeks; is that right?

A Yes.

Q And what, did you have a cast, or what did you have on your foot?

A They said do not put any weight whatsoever on it. I was -- After surgery, I had a cast, yes,

wheelchair, eventually got into a walker, still had a hard time trying to put weight on it, but I kept pushing myself.

Q So how long did you have a cast on your -- on your foot?

A Well, I still had it in March. I think it was toward the latter part of March, first part of April that they took the cast off because I couldn't even drive until the cast got taken off. So I couldn't do any driving, couldn't -- couldn't do a lot of things.

Q So this was a cast that you had on, and it wasn't removable; is that right?

A That's right.

Q Okay. So you had the cast from when you had surgery until March or April?

A Yes.

Q And that's --

A Plus -- Plus I had physical therapy. I had to go to physical therapy.

Q After the cast, were you given something else to put on your foot?

A A boot.

Q And how long did you wear the boot for?

A The boot wasn't very comfortable. I didn't --

so I couldn't -- I didn't do a lot of walking. I didn't -- I wore the boot for probably eight weeks.

Q And after the boot, was there anything else that you were given for your foot?

A No, other than a walker that I had to use until I could feel steady enough to walk on my own. That was during the physical therapy processing.

Q Okay. So you had a wheelchair for 16 weeks, and then you had a walker; is that right?

A The walker came later. Yeah. I guess that's right. I really -- Sir, I don't remember exactly.

Q Well, what I'm just trying to understand is the progression of cast to boot to something else, if there was something, and then also the progression of wheelchair to walker to something else, if there was something. So I'm just trying to --

A Okay.

Q -- get a sense of what your progression was and approximately when it -- when things happened, but there was a period of time for about 16 weeks where you weren't walking at all; is that

correct?
A That's correct. That's correct.
Q All right. And during that time, you had a cast on your foot; is that right?
A That's correct. That's correct.
Q And then around March or April, you got your cast off, and you were switched to a boot. And when that happened, is that when you started to use the walker to --
A Walker, yes.
Q Okay.
A Um-hum. That's correct.
Q So how long did you use the walker for?
A Well, I started pushing myself. I kept saying, "You've got to start walking." I was afraid to put weight on it. It hurt, but I would -- we have handrails in our hallways, so I would take my walker out, and I would -- I would bring my wheelchair out, too, in case I had to sit down. And I would use that hand walker, that handrail, and use both of my hands on the handrail and go sideways and walk myself to the end of that side door I told you where I used to always use. And then I'd walk myself back, and then I'd sit in a wheelchair, rest a little

bit, and I'd get myself back up and do that, and I'd do that about three or four times a day. Then I got away from using both hands and started using one, and that's how I got myself back, going again.
Q So as of today, you don't use a walker; is that right?
A That's correct.
Q Okay. And when is the last time you think you used the walker for -- for assistance?
A I'd say the end of April.
Q And when you walk today, do you have anything on your foot? You don't -- You don't wear a boot, correct?
A That's correct.
Q Okay. You don't wear a brace, correct?
A No, I don't. I do have some problems walking, but it's not wearing a brace or a boot, but I do have -- I do have at times to where I feel unsteady. I feel kind of like I'm gonna tip. I have some pains. It could be nerve damage the doctor said. It'll go around my heel and just different things I'm experiencing, but I can walk. Sometimes I have a limp.
Sometimes if I do too much, I'm

limited. Let's put it that way. I'm limited on my walking, not like what I used to do. I used to be able to walk and jog and run, and always kept active, and now I can't do that stuff. And if I walk too much, I start limping. I think it's due to my limp that my back and my hip hurt. I get a pain, shooting pains, that go up to the top of my foot and pains that wrap around the back of my heel.
When I get up at night -- Just about every morning I get up, my right foot is in a terrible, terrible cramp, terrible. I can hardly get myself shifted forward. Eventually, I'm able to move it enough to get to the bathroom. And then that kind of wears down, and I'm kind of walking normal for a little while. And then I just never know, but I'm doing my best and pushing myself the best I can.
Q So when is -- Do you have any appointments scheduled with respect to your right ankle and foot?
A I'm still doctoring with Dr. Albert George. And, yes, I go back yet this month to see him again.

Q And when was the last time you saw him?
A I would have to go back on my calendar. I can't remember the actual date that I saw him, but I do know I go back this month.
Q I mean, did you see him earlier this fall, or was it more like the summertime?
A I believe it was in the summer or spring, March, April, probably around April.
Q And in what period approximately did you do physical therapy?
A That was in the spring, so it was after physical therapy that I went back and seen him.
Q So other than your -- your right foot and ankle and your right leg, you referred to this twisting, was there any other injury you sustained as a result of this incident? For example, like, did you hit your head? Did you cut some part of your body, anything like that?
A No.
Q Okay. So really, the injury from the accident was -- was the right leg and ankle, correct?
A Correct.
Q Do you have hardware in your ankle right now?
A Yes.
Q What's your -- Yeah. What's your understanding

of the hardware that's in there?
A My right foot is always heavy. I feel like I'm carrying around a ball and chain. I've never carried one around before, but that's what it felt like, like something heavy. I have steel rods. I have four rod or -- four plates and four screws in my ankle.
Q You said rods. Do you have rods, plates and screws?
A Well, plates. They're plates, four plates, four screws.
Q Got you. You have a scar on your right ankle from the surgery?
A It's healing. It's healing up.
Q Okay.
A I heal good as far as that.
Q Is there something you're doing to help that heal?
A Not now.
Q Okay.
A I used to -- I used to put cortisone on it before they cut it.
Q Okay. I want to make sure I've got a couple things clear about the accident itself. When it happened, it was dark outside; is that

right?
A That's right.
Q Okay. And was there -- Was there any light at all from sunrise or anything like that, or was it just full dark?
A Well, I usually don't take the trash out that early in the day, but I did that day because of the smell. I wanted to get it out of the building. I was thinking of putting my trash on my patio, but they have -- we have wild animals, wild cats. We have deer. We have raccoons, skunks. I didn't want them to get in my trash and strewn all over. So I thought, I need to get that out of the building.
So when I looked out the side door, I usually would go down this sidewalk, it looked bright. I could see the sidewalk. I could see, you know, going down the sidewalk. And I thought, okay. I'll just go out, empty the trash. So the only lighting that was actually coming is the parking lot lights, but they were quite dim. And once I got in the middle of the parking lot, you could see a little bit of the streetlight coming through the front part of the road hitting the dumpster.

Q So the -- Well, the question I had asked you was whether there was any daylight at all, or was it just completely dark?
A Well, it was -- it was 7:15 in the morning. It was -- it was dark, but I thought I could -- I would be all right because there was streetlights, and there was parking lot lights.
Q Okay. So the handicap sidewalk that goes up to the side door, you said you looked out there?
A It was lit.
Q It was illuminated, and it was illuminated by lights, either, like, the parking lot lights or -- or otherwise?
A Streetlight coming through the bushes --
Q Okay.
A -- because there was light. I didn't think I'd have any problem.
Q All right. And then the -- you said that the parking lot lights were -- they were on, but they were dim; is that right?
A Yeah. Yes.
Q Were they -- Were they dimmer than usual, or were they just their same?
A They were dimmer than usual because them parking lot lights -- them parking lot lights

were off. All of them were off for about a week, and then they finally got them turned on. But they never turned them off, so then the parking lot lights were on continuously, 24/7, for about two weeks straight. And you could just see they kept getting -- they kept getting a little dimmer and dimmer as you'd drive in the parking lot at night.
Q So for the two weeks that the lights were continuously on prior to your accident, they were getting less bright?
A That's right.
Q Okay. Quick question about a couple of witnesses that were identified on your witness list, there was someone named Tina Adams. Do you know Tina Adams?
A No.
Q Okay.
A I don't think that's -- Okay.
Q Well, maybe it's somebody from your medical records. What about Ray Landarby?
A No.
Q Don't recognize that name. Okay. Who's paid your medical bills?
A Whatever Medicare has not paid, they paid

85 percent, I've been paying the rest. I've been paying the balance owing.

Q So Medicare has paid, and you've paid; is that right?

A That's correct.

Q And how much do you estimate that you yourself have paid?

A I would be around between 7 and 800. I haven't paid yet on the physical therapy that I owe. I called them, told them that it's being pursued in a lawsuit, and they would like something. And so I've got to -- I'm strictly on just Social Security, and the money just goes so far, and I am doing what I can do.

Q You anticipated my next question which was, are there any unpaid bills? And so the physical therapy bills are --

A I still -- still owe on that. $795 I believe it is. I mean, that's the last bill I got. I think I picked up the rest and paid.

Q So Medicare has paid. You've paid 7 to 800, and you owe $795 on physical therapy; is that correct?

A To the best of my knowledge. Of course, I'm still doctoring with Dr. George, so it's --

Q Okay. There's something else I wanted to go over with you. I'm going to share my screen for a second. All right. So we're going to mark this. We'll call this Exhibit B, and this was a file that was produced as part of your discovery answers, and it was -- it was just called Jan Bowerman file. So my first question is, have you -- Do you know what this is? And I'll quick flip through it. It's 17 pages. But just generally, can you tell me what this document is?

A With the type of work I had done, I was trained to document, just document, everything. And we were having some problems on the property, and Carol Richards was my supervisor. She is president of Red Oak since the father passed away. And she had told me since I am no longer managing if you -- you know, if people come to you, just tell them, you know, you're not the manager anymore. You'll have to send them there.

So people would come to me, and they would give me some complaints, and that's where I'd say -- I'd say, "Sorry. Nothing I can do about it," but I got -- but I still documented

everything. And eventually, it was -- things were not getting any better. They just kept getting worse. And eventually, I was trying to turn it in to Rural Development if -- if the time come, the complaints.

Q Okay. So is this -- this document, is this your tenant file with Red Oak, or what --

A No.

Q This is your file?

A It's just something that I just always do, and I just -- I always document things. I don't know why, just what I do.

Q Okay.

A I had sent some in to Red Oak.

Q Okay. I understand. This is your own personal file. Okay. So some of these things I've seen before, and I don't really have any questions for you about it, but starting on page 8 through 17, these are handwritten notes. So are these notes?

A Sent them to Red Oak.

Q You did. Okay.

A Wait a minute. No. That I was sending in to -- I did contact Rural Development, discussed some of the issues. And they wanted

me to approach the site manager, which I did, to let them know what our problems were again. And it just never got taken care of, so I just put them in a file.

Q Okay. So did you -- You sent this to Rural Development?

A No. I discussed it with them over the telephone, not word for word, but I just told her we had some problems there, wondered when they were going to do another inspection, and it was during the pandemic. They weren't doing them inspections, and so I just put it in the file.

Q Your -- Your file?

A Yes, my file.

Q Right. So these -- These notes have never been sent to anyone until they were produced in this lawsuit. Is that fair to say?

A That's fair to say. It was discussed. Some of them were discussed.

Q Right. I understand that. But essentially, these are your own notes, and that's it, correct?

A That's right.

Q Okay.

A That's correct.
Q So my next question is, was all of this prepared on the same date, or was this --
A No.
Q -- sort of a running --
A Just a running. No, not the same day.
Q Okay. I want to -- Let's see. Draw your attention to -- So this exhibit, I numbered the pages. This is -- This is page 9, and this -- this paragraph towards the end on page 9 of Exhibit B references another accident like what happened on October 30. You're referring to your accident, correct?
A I didn't want anybody else to get hurt.
Q Okay. And when you -- There's a line down here where my cursor is third from the bottom. It says, "A tenant fell into the 11-inch trench." That was you, correct?
A That's correct.
Q All right. That's not another tenant, right?
A No. I wanted Rural Development to know someone did fall in, but I never -- it was all in writing, but --
Q What was -- What was 11 inches?
A The trench that I fell into was 11 inches deep.

Q All right. This is page 11. Towards the middle, there's a comment about sidewalks. And then in the margins, it says, "Replaced and some repaired on 10/14/21." Would you have made this note in the margin around that date, on October 14, 2021?
A The day they repaired it, I went and wrote that in.
Q Okay. Do you know when you first made the note about the sidewalks? There does not appear to be a date by it.
A Well, the sidewalks kept getting worse and worse and worse, and it was getting to be a real trip hazard. We had tenants in there. People lived in there that are in wheelchairs. Some are using walkers.
Q Ms. Bowerman, I don't mean to interrupt. I just want to know if you remember when you created the note about the sidewalks?
A It would have been on 10/14. It would have been on the date I wrote it.
Q Well, there's a note in the margin that says 10/14/21.
A Oh, then it was repaired.
Q I wondered if maybe the note about sidewalks

was prepared at an earlier date. And if so --
A Yes.
Q -- do you remember when?
A I'm sure it was. No, I don't have a date on it.
Q Okay. So it's on a block there. I guess it's page 16. Couple notes here with dates in the margin of 10/14/21, one about the dumpster being moved to the grass area. So that was a note you created on 10/14/21; is that right?
A So that apparently is when the dumpster was moved.
Q The note below that mentions that the sidewalks were being torn out, and it also mentions that there are no signs or caution tape or cones. Did you ever report that or, you know, make a complaint to Red Oak about that?
A Yes.
Q And how did you make that report or complaint?
A To the site manager. Her name was Chelsea.
Q And that was just -- I'm sorry.
A Yeah. Go ahead. I'm sorry, too.
Q Was it just an oral report?
A Yes.
Q Okay. Nothing in writing?

A No.
Q So then at the bottom of page 16, there's a note from October 30, 2021, that you fell into the trench while you were taking your trash out.
A Um-hum.
Q Did you prepare that note on October 30, 2021?
A No. I waited until I got home. After -- after -- I had a lot of free time to relax at home, so then I started documenting things.
Q All right. And then -- So now you have a note here from November 8 about the man putting up caution tape. Do you see that?
A That's right.
Q Okay. And I think you said earlier that was the day before somebody came in to take care of the trenches, right?
A The day before they were filling -- going to fill in the trenches.
Q Okay. And then the next note here is it's two days later, but the company comes in, and that's what they did. They filled in the trenches?
A That's correct.
Q And so -- So aside from the note on October 30

which you said might have been created not on that date but shortly afterwards, these other notes, though, the date next to them is the date that you created them; is that right?

A Yes.

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.

Q And --

A There's woods all around our property, and I feel uncomfortable at nighttime taking it out at night.

Q And on the date that you fell, you were aware or under the impression that there were trenches on three sides of the cement pad where the dumpster normally sat, correct?

A Correct.

Q And you were -- You took the path that you did to avoid it, correct?

A Correct, but I thought there would be -- Yes. Correct.

Q Or tried to avoid it?

A Um-hum.

Q And that reminds me. I did want to ask you something else going back to the path you took, so let me share my screen again with you on that. All right. So we're back on page 6 of Exhibit A. So we had already discussed you got about halfway down.

A I didn't even go halfway down.

Q Okay. But you were -- You were walking down the sidewalk from the -- toward the pad, and then you stepped off onto the cement --

A Cement.

Q -- parking lot which isn't cement but the parking lot.

A Um-hum.

Q And you started walking towards the middle of the parking lot. And I guess I wanted to ask you because you said you kind of did, like, this semicircle path to --

A I didn't do a semicircle. I knew I was too close to the trench yet. I went way out close to the -- close to the entrance door and started walking toward the dumpster. I didn't do it just to see. It was too close.

Q So did you -- did you actually -- I mean, you

did make some sort of curved walk, correct?

A It was like -- yeah, kind of like a -- kind of like a -- I went way out and then came back.

Q Like a -- Like a U?

A Yeah, or a checkmark.

Q Okay.

A Something like a V or a B or something.

Q Okay. So if we're saying like a V, the bottom of the V, was it off this picture, like you walked --

A Yes, yes.

Q -- off to the left of this picture?

A I went way out. Yes.

Q Okay. And then --

A Came back.

Q Came back. All right. I got you. All right. Let me -- I will stop sharing here. Let me look at my notes. I'm about set. Oh. What -- If you could tell me, you know, what is most problematic for you today as far as, you know, limitations on your -- on your right ankle?

A Well, I can't walk as much as I used to. I can't jog. I don't even try that. I used to walk a lot during the summertime. I get too sore. I get too tired, get too achy. The

weight of my foot bothers me. I can't wear shoes the way I used to. I used to wear high heels a lot. Can't even attempt it now. Can't do my grocery shopping like I want to because I just pick up what I need because it gets too sore, tiring, both to push each -- go down each aisle.

I can't do a lot of heavy lifting because it's too much weight on my foot, a lot of pain. Sometimes I don't have pain for a day, and then I think everything's done and then, boom, something happens. Something -- something hurts.

Q So the walking that you've described, that's just walks around the neighborhood?

A You mean when I used to walk?

Q Yeah.

A I used to fast walk, go up and down the streets, used to jog, used to try and stay in shape.

Q You have had conversations with people from Red Oak about your accident afterwards, right?

A No.

Q You haven't spoken to anyone at all?

A Not -- not -- no one -- Since the accident, I

got one phone call from one of the girls that worked there that knows me 'cause I knew her when I worked there. She asked me how I was doing. I didn't want to tell her all my aches and pains. I said, "I'm doing okay." But she called me not for that reason. She called me to get my annual recertification done, work papers. Work was still -- they were waiting for them.

Q And who was it that called you?

A You know, right offhand, I can't think of who it was, one of them that I used to work for or -- not work for but work with.

Q So you -- you haven't spoken with anyone from anyone at Red Oak?

A No one from Red Oak office has ever called me, contacted me, approached me, asked me how I was feeling, sorry. Nobody's ever said anything, not even the site manager.

Q Okay. You have had written communication; is that right?

A Not really.

Q One of the documents in your file was a letter from Red Oak to you about the accident.

A Oh, yeah. That's what I asked -- At that time,

the site manager was Chelsea. I've been retired from there for four years, and we've had five managers in that four years. Chelsea was the manager that time when I -- The accident happened, if I remember correctly, it was on a Saturday, and she wasn't going to be in the office until Monday.

I made a point to be at that office in my wheelchair. I had my leg all wrapped up and everything and was going to ask her -- I asked her for the accident report form that I could fill out. And she said, "Well, I'm busy right now. I've got to go to Edmore." And then she started walking toward the office like she was going to get it for me, and then she said -- she put her hand on the doorknob. And she said, "Oh, I've really got to get to Edmore. I've got something going there. Can I -- I'll be back shortly. Can I give you the report then?" I said, "Yes, that would be fine." But I said, "I'll probably be in bed. And if you come and if I don't answer the door, could you just slide it under my door?" And she said, "No problem." She said, "I'll be back shortly."

I never heard a thing from her, and that's when I faxed a note to Red Oak requesting a medical form, and then they sent me that letter back.

MR. JAMES: Well, thank you, Ms. Bowerman. I may have some follow-up questions for you, but I am all set for right now, and a couple of the other attorneys might have some additional questions for you, though, so thanks.

THE WITNESS: Thank you. Nice meeting you.

MR. JAMES: You, too.

MR. COLE: Before we continue, can I take a short break so I can go to the bathroom?

MR. JAMES: Sure.

MR. COLE: Thank you. I appreciate it.

(Recess, 1:56 p.m. to 2:01 p.m.)

MR. COLE: Back on the record.

EXAMINATION

BY MR. COLE:

Q Ma'am, my name is Justin Cole. I represent Westveld Services in this case. Mr. James was very thorough. I really have just a question

or two for you. Did you have any interactions or dealings with Westveld, Westveld Services, in connection with the work they were doing there either before or after your accident?

You cut out. I didn't hear you. I think we froze up again. Could you hear my question, Dan and Joe?

MR. JAMES: I heard it.

MR. VANDERVEEN: I heard it.

MR. FREIFELD: Sorry about that, gentlemen. Can you hear me now?

MR. COLE: Now we've got you.

MR. FREIFELD: Sorry about that.

MR. COLE: That's okay.

BY MR. COLE:

Q Ma'am, did you hear my question, or did you want me to repeat it?

A Would you, please, repeat it?

Q Certainly. Did you have any interaction or dealings with Westveld Services either before or after your accident?

A No.

Q We were going over -- You were going over those handwritten notes you made with Mr. James, and you indicated -- I don't know the specific date

but that Westveld came in to fill the trenches. Do you remember telling us that?
A Well, I don't remember telling you, but I see it wrote down.
Q Okay. Was that on November 20?
A No, 11/10.
Q 11/10. Okay. Did you physically see a Westveld truck out there or something?
A Yes.
Q Okay. Were there any other trucks that had any other different company logos on them at that time?
A At one time, but I would have to look through the records, there was two trucks out there, one was doing sidewalks, I believe, and one was doing the trenches.
Q Okay. So I guess, do you specifically know that it was Westveld that filled in the trench?
A (No audible response.)
MR. FREIFELD: Sorry about that. You're back.
BY MR. COLE:
Q Okay. Did you hear my question, ma'am?
A No. I'm sorry. I didn't hear it.
Q That's okay. If there were two trucks out

there, are you certain that it was someone from Westveld that was filling in the trench?
A I don't know. I myself don't know.
Q Okay.
A I think they were.
Q Okay. But you saw someone filling in the trench, correct?
A I didn't see anyone. No. They were supposed to come in to fill in the trench. They were there to fill in the trench. Sometimes the weather would not permit, and they'd leave.
Q Okay. Did you actually see anyone filling in the trench with your own eyes?
A No.
Q Okay. You just saw the trucks out there that day?
A Yes.
MR. COLE: I think that's all the questions I have. Thank you, ma'am.
THE WITNESS: Thank you. I like your shirt.
MR. VANDERVEEN: I have a few for you, ma'am.
MR. COLE: Thank you.
EXAMINATION

BY MR. VANDERVEEN:
Q I'm Joe VanderVeen. I represent Bob's Asphalt Paving.
A Hello.
Q Ma'am, do you know what work Bob's Asphalt did on the project at Stanton Apartments?
A I was assuming he was doing the parking lot.
Q You were assuming that Bob's Asphalt was?
A I -- I don't know for sure. I'd have to look back in my records. I don't know. I don't even know. I seen the two trucks.
Q Okay. But you don't know what work Bob's did out there, do you?
A Could you say that one more time?
Q You don't know what work Bob's Asphalt did at the apartment; is that fair?
A I didn't see him to see what he was doing. I seen the trucks.
Q And when did you see the trucks?
A I'd have to look back in my documentations. I don't know.
Q Right. When he -- When you previously said you saw some trucks out there, you were talking about on November 10th; is that correct?
A At that time, yes. Uh-huh.

Q Do you know if Bob's Asphalt was there prior to November 10th?
A I don't know.
Q Do you know what company put the concrete slab in there?
A No, not -- No.
Q Do you know which company dug the trench into which you fell?
A Well, I seen the trenches. I didn't see them actually dig it, but I seen the trenches. When I came home, the trenches were dug, and the truck was there.
Q But you don't know who dug the trench?
A No.
Q Is that fair?
A That's fair.
Q And I think the only other question I have for you, ma'am, are you on any current medications for your pain?
A I don't like to take pain pills. I just know they're not real good for you. No.
MR. VANDERVEEN: So you're not. Okay. Thank you. That's all I have for you.
THE WITNESS: Thank you.
MR. COLE: I don't have any

questions.

(Proceedings concluded at 2:08 p.m.)

STATE OF WISCONSIN)
) SS:
COUNTY OF MILWAUKEE)

I, JENNIFER L. SCHMALING, a Registered Merit Reporter, Certified Realtime Reporter, Certified Realtime Captioner, Illinois Certified Shorthand Reporter, and Notary Public in and for the State of Wisconsin, do hereby certify that the above deposition of JAN E. BOWERMAN was recorded by me via Zoom on November 9, 2022, and reduced to writing under my personal direction.

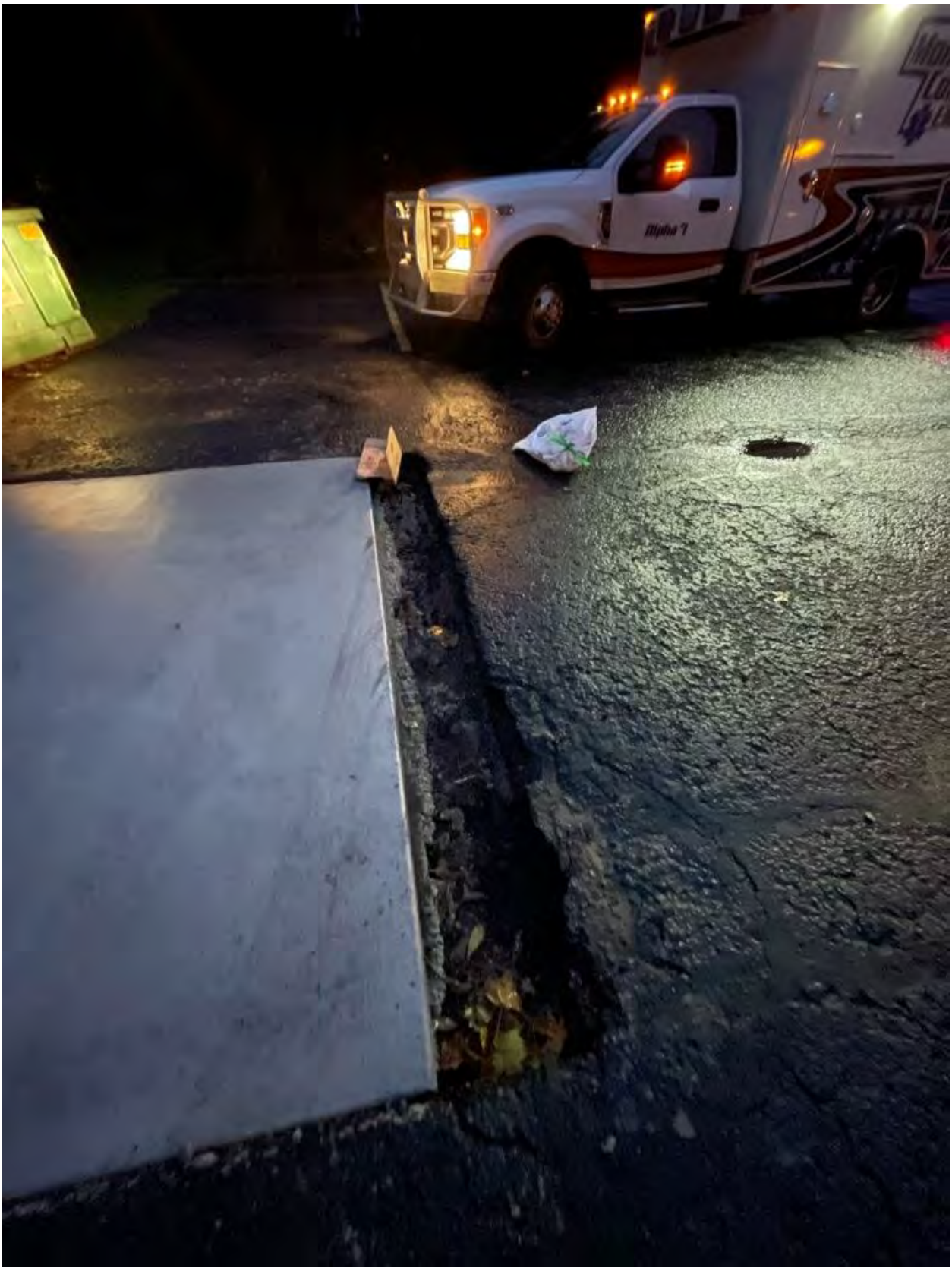
I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

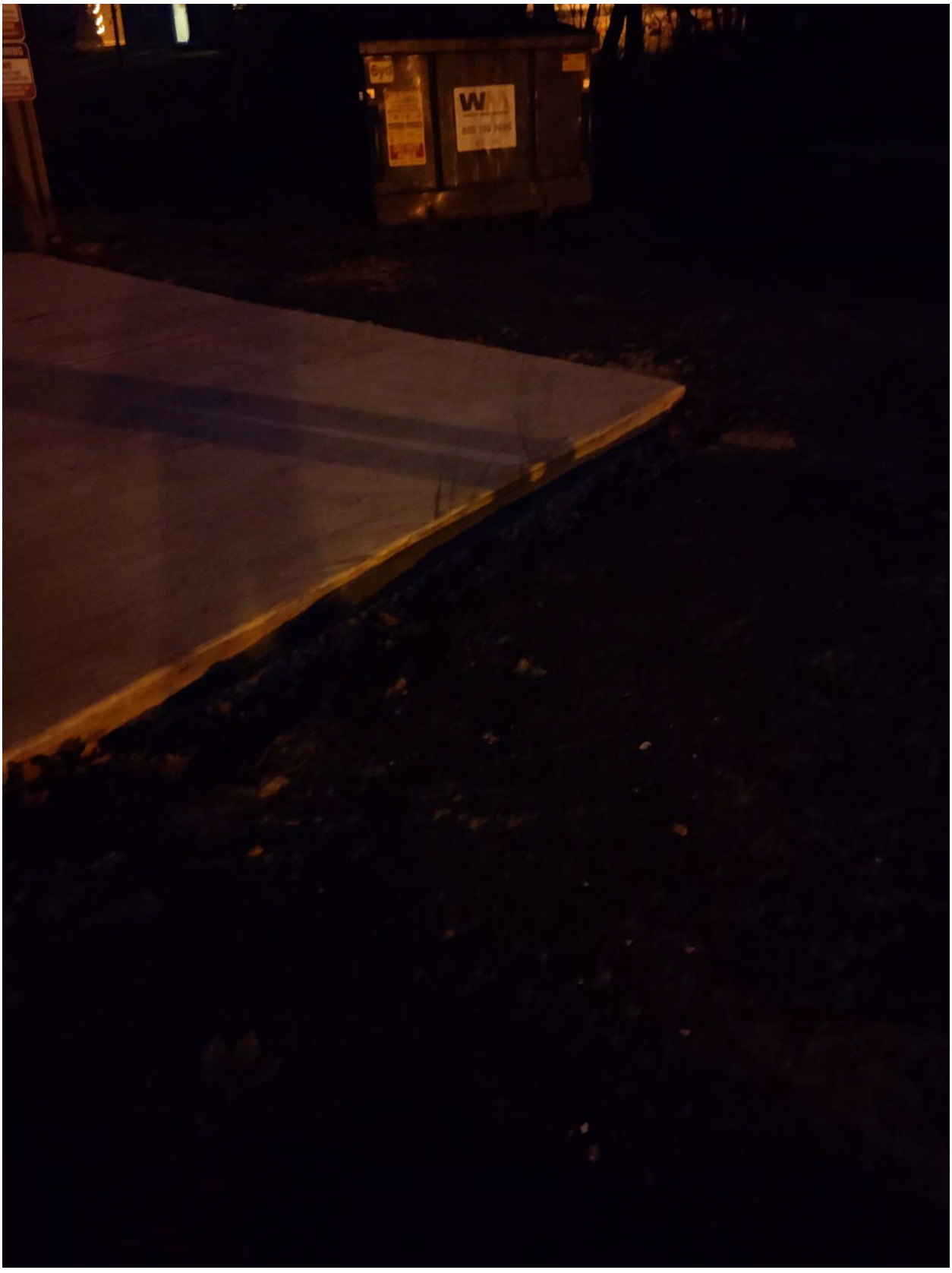
In witness whereof I have hereunder set my hand and affixed my seal of office at Milwaukee, Wisconsin, this 23rd day of November, 2022.

<%26892,Signature%>

Notary Public
In and for the State of Wisconsin

My Commission Expires: January 7, 2023
IL CSR License No. 084.004875





WITNESS, DATE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

vs. Case No. 22-S-28824-NO

Hon. Ronald J. Schafer

RED OAK MANAGEMENT, INC.,
WESTVELD SERVICES, LLC, and
BOB'S ASPHALT PAVING, INC.,

Defendants.

_____

The Deposition of RANDY WESTVELD,
Appearing Remotely from Muskegon County, Michigan,
Commencing at 1:59 p.m.,
Wednesday, November 16, 2022,
Before Corissa Bakko, CSR-8346,
Appearing Remotely from Oakland County, Michigan.

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EXHIBITS

Michigan
Wednesday, November 16, 2022
1:59 p.m.

COURT REPORTER: If each party agrees to taking this deposition remotely and also agrees to administering the oath remotely, please state your name and agreement on the record.

MR. FREIFELD: Mike Freifeld for the plaintiff agrees.

MR. JAMES: Dan James for Defendant Red Oak agrees.

MR. COLE: Justin Cole for Westveld Services, agreed.

MR. VANDERVEEN: And Joe Vanderveen for Bob's Asphalt & Paving agrees.

RANDY WESTVELD,
was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. FREIFELD:

Q. Mr. Westveld, we met before the deposition. My name is Mike Freifeld. I'm one of the attorneys

representing Ms. Bowerman in this case. Sir, have you ever given a deposition before?
A. No.
Q. All right. Mr. Westveld, I'm going to go over a couple rules with you to make this move much faster and more efficiently, okay?
A. Sounds good.
Q. The first rule is, if I ask you a question, Mr. Westveld, that you do not understand, you've got to tell me that you don't understand it, okay? If you don't tell me that you don't understand it, I'm going to assume three things; number one, you heard the question; number two, you understood the question; and number three, the answer you gave to the question was truthful and honest, fair enough?
A. Yep.
Q. All right. Very good. As you know, Mr. Westveld, we are on Zoom right now, and I have learned the hard way many times that Zoom is not a perfect technology. If it should happen, if it should happen that either I cut out, you cut out, or Justin cuts out, or any of the other people in this call get cut out and you're in the middle of an answer, if you could just stop what you're doing and wait until we reconnect so that we can get your full answer, okay?

A. Yep. Sounds good.
Q. All right. Could you state your full name for the record, sir?
A. Randy Allen Westveld.
Q. And, Mr. Westveld, what is your residential address?
A. 23225 36th Avenue, Ravenna, Michigan.
Q. And what is your date of birth, sir?
A. September [redacted]
Q. And what do you currently do for a living, Mr. Westveld?
A. We do concrete construction, flatwork mainly.
Q. All right. Before we go any farther, did you review any documents or photographs before today's deposition to prepare yourself for today, sir?
A. No.
Q. Do you own a business?
A. Yeah.
Q. What is the name of the business, Mr. Westveld?
A. Westveld Services.
Q. And how long has Westveld Services existed?
A. Five years now.
Q. And you are -- are you the sole owner of Westveld Services, sir, or do you share that with other people?
A. No. I am the sole owner.
Q. Does Westveld Services have employees that work for it?
A. Yes.
Q. How many employees does Westveld Services have, sir?
A. Four.
Q. Could you give me their names?
A. It would be my wife, Abby, A-B-B-Y.
Q. Okay.
A. And then my son Kyle Westveld.
Q. Okay.
A. And my other son Nate Westveld. And then myself.
Q. How old is Kyle, sir?
A. 25.
Q. And how old is Nate?
A. 23.
Q. And have they worked for you as an employee for Westveld Services the entire time the company's been in existence?
A. Pretty close. Maybe six months or so less.
Q. And I believe you indicated before that Westveld Services is in the concrete business?
A. Correct. Yep.
Q. Is that what Westveld Services does primarily is concrete work?
A. Correct.
Q. Do you primarily put in concrete driveways and things

like that or do you use the concrete for other reasons?
A. No. Pretty much patios, driveways, we do some commercial parking lots. Yeah, I mean various things. Footings, you know, for concrete walls and stuff also.
Q. Okay. It's my understanding in this case, Mr. Westveld, your company was hired by Red Oak Management to do some work at Stanton Apartments?
A. Correct.
Q. It's also my understanding from taking people's depositions that prior to this job that we're going to talk about in a minute, you've done other work for Red Oak in the past?
A. Correct. Yep.
Q. And have you always dealt with the same person when you were contracting with Red Oak, Mr. Koch?
A. Yes.
Q. And when it came to doing other work for Red Oak, were you just laying concrete?
A. When you say other work, what do you mean?
Q. Other than the Stanton Apartments work that we're going to talk about in a minute and these other jobs that you've done for Red Oak, was it always laying concrete?
A. Yes.

Q. And prior to the job that we're going to talk about in October of 2021 at Stanton Apartments, how many times have you been hired by Red Oak prior to that to lay concrete for them?
A. Off the top of my head, I would say half a dozen, probably five or six.
Q. Now, in this particular case, Mr. Westveld, in October of 2021 at Stanton Apartments, you were hired to lay concrete at -- in the parking lot -- or in the parking lot area of Stanton Apartments?
A. Yeah.
Q. And were you the one who negotiated with Mr. Koch about that?
A. Yeah.
Q. Did you actually -- prior to the job actually being done and prior to you giving them an estimate, did you physically go out to Stanton Apartments to see what needed to be done?
A. So there was a few that we -- I did not look at and there was a few that I did look at and I don't a hundred percent remember if that was one of them that I looked at because we did quite a few locations for them.
Q. Around the same time, sir?
A. Yes. I mean, in that season.

Q. And when you -- when you guys use the term season, it's a term of art for you folks.
A. Yes.
Q. What is your season?
A. So typically when the frost comes out of the ground in March/April-ish to about this time of year. I mean, when you start seeing this white stuff on the ground, we're trying to hibernate.
Q. Got ya. Have you guys -- do you guys typically lay concrete after the first hard freeze out by you which is usually about the second or third week of October give or take?
A. It depends on the situation. I mean, if there's no frost on the ground, we'll hammer it out and then put frost blankets over top of it or cover it of some sort, you know, some way. I mean, every application is a little different. You know, we have a lot of various inside jobs as well we can do in the winter.
Q. Okay. Getting back to my original question. Do you have a distinct recollection of going out to Stanton Apartments prior to issuing the estimate for that concrete job out there in October of 2021?
A. I do not.
Q. All right. Would one of your sons or both of your sons have gone and done that?

A. No.
Q. Are you the person primarily responsible for generating estimates?
A. Yeah. My wife and I, yes.
Q. Well, let me ask you this. In October of 2021, did you ever go out to Stanton Apartments either to look at the way the job had been done, assist in laying the concrete, anything like that? Did you ever go out to Stanton Apartments and take a look at what was going on?
A. Yeah. I mean, I performed the work, but as far as the estimate goes, I don't -- I think I did that over pictures or over the phone.
Q. Okay. Let me get back to what you said. You said that you actually performed the work. Now, that could mean a lot of different things. Did you actually lay the concrete?
A. You got it, yep.
Q. Start to finish?
A. From demo to -- yes, to finish.
Q. All right. And when you say demo, you're referring to demolishing or getting rid of the old concrete?
A. Correct. Hauling it out as well, yep.
Q. So that was part of the estimate was demo and laying the concrete?

A. Correct.
Q. Was there anything else that was part of your job other than demolishing the concrete and laying the new concrete?
A. Not that I'm aware of.
Q. Did anybody -- did either one of your sons assist you with the Stanton Apartments job in October of '21?
A. Both of them.
Q. What did they assist you with, sir, do you remember?
A. I mean, employee duties. I mean, they helped with the demo. They helped haul it. They helped me lay the concrete. We graded it all. They helped set forms. Saw cutting where it's needed. All of the duties that it entails.
Q. Did you supervise them, sir, during -- at that time?
A. Yes.
Q. I assume you lay the forms after you demolish the concrete and remove it, is that a fair statement?
A. Yeah.
Q. Okay. And when you lay the forms, could you -- for those of us who do not lay concrete on a regular basis, could you tell me what laying the forms is?
A. So once we do the demolition which is, you know, saw cutting the concrete sidewalks out, we'll haul those out and then we will set streamlines up to get our

heights with the forms and dig out where it's needed and put in a 2 x 4 or a 2 x 8 lumber and stakes behind it and pour the concrete behind that -- or on the other side of that.

Q. What's the purpose of laying the forms, sir? Can you give me a general sense of why a concrete company would want to do that?

A. If you didn't lay a form, you wouldn't have a nice flat edge.

Q. And you want a nice flat edge?

A. Yes.

Q. Why do you want a nice flat edge?

A. Appearance, efficiency, yeah. I mean...

Q. Mr. Westveld, typically when you engage in a job like the one you did at Stanton Apartments, what does your company do to warn the folks that live at the apartment complex that there are forms and ditches and new concrete?

A. I mean, essentially we come out and -- Red Oak has usually given them a heads up, a note or an e-mail I think, but as far as me sending out an e-mail to those people that live there or anything, I don't do any of that. I mean, when we show up, we start tearing -- ripping and tearing into it, and then, you know, cones and caution tape go up from there and, you know, so

on. I mean...

Q. Okay. Let me ask you about cones and caution tape, okay? When you use the term cones and caution tape, what are you using the cones and caution tape to do?

A. Well, in most cases, it's trying to keep people out so when it's wet, they don't walk on it. We have it all the time no matter where we go. They will step over it, walk around it, you name it, yeah.

Q. All right. So you use -- is it traffic cones, sir? There's a lot of different types of cones. Is it traffic cones you're talking about?

A. Yeah. I mean, they're, I don't know, 18 inches high, bright orange, very similar to a traffic cone.

Q. Okay. And the caution tape is the yellow caution tape that we normally see?

A. Yeah.

Q. Okay. And do you put that up immediately or when does that -- when do the cones and caution tape usually go up?

A. So it's a little different each time. I mean, if we're in that area working, you know, laying our forms, we won't always put that up. If we're, you know, moving to the next section, generally it's at the end of the night when we're kind of done working there. I mean, we're, you know, talking to everybody

as they're coming in and out warning them. Yeah, I mean, I don't want to go on a rabbit trail, but, I mean, we talk to a lot of them and warn them, you know.

Q. Okay. Let me ask you this. Do you put the cones and the caution tape after you set the forms or after you actually put the concrete down?

A. So if we demo one day and set the forms, we would put up the caution tape, come back, pour if we don't get the concrete poured in the same day, but at the end of the day, the caution tape will go up whether there is no concrete or there is concrete.

Q. Well, let me ask you this. Let's do it this way. The first thing you do is you demolish the concrete that's already there, correct?

A. Yep.

Q. All right. Do you put up caution tape and cones if you demolish the concrete but you don't set the forms and come back the next day to set the forms?

A. No. There would be caution tape up if we left.

Q. Okay. After you demolished?

A. Yes.

Q. So you come back the next day and you lay down forms. Is the caution tape going to still be there?

A. If the wind doesn't blow it down or somebody doesn't

tear it down or, you know, yeah, we have multiple issues with that stuff.

Q. Okay. And how long is the caution tape or the cones or both going to stay up after that point in time, a couple of hours, a couple of days?

A. There again, I mean, a lot of times we'll just leave it. And if the wind blows it, you know, I mean, I can't go back and babysit every single piece. You know, we've started to buy some reinforce stuff to where the wind doesn't rip it as easy or the children cannot tear it down as easy. So, yeah.

Q. Okay. Do you have a distinct recollection, sir, of cones and caution tape going up at the Stanton Park Apartments on the job that you worked on that we're going to talk about here?

A. Not distinct as far as where every single cone was or, you know, or every caution tape, but if I remember correctly, there was a main area and there was two other walkways that you would access the building that we repaired, and those I do know had caution tape up, but I don't remember -- sometimes we will do work in between entrances also or exits, if you will.

Q. Okay.

A. But I don't remember that situation, if there was some in between entrances or where it exactly was.

Q. Mr. Westveld, I should be sharing my screen with you right now.
A. Yep.
Q. Does this look familiar to you, sir?
A. Yes.
Q. Is this the patio area or the concrete area in front of the garbage disposal or the garbage can?
A. Yep.
Q. Were you as part of your job on this job, were you supposed to replace that concrete that was in front of the garbage can?
A. Correct.
Q. All right. So let me get -- or let me try to figure out -- you demoed all the concrete that was previously there?
A. Correct.
Q. And you removed the concrete, correct?
A. Yep.
Q. And then you set the forms for this particular area, this patio area?
A. Correct.
Q. All right. And this trench that's right here --
A. Correct.
Q. Did you create that trench?
A. Yes.

Q. All right. When you -- just so that I'm clear and I know it's going to be very obvious to you, Mr. Westveld, just bear with me. When you first started working on this job, that trench was not there?
A. Correct.
Q. That is a manmade trench, correct?
A. Yeah.
Q. And the person who made it was you?
A. Correct.
Q. And the purpose of this trench is what?
A. So where your cursor is --
Q. Yep.
A. -- that asphalt was really torn up, and we had come out with a saw and go out farther than what we need so that Bob's Asphalt can lay new asphalt up to our new concrete.
Q. Okay. Let me ask you this. Did you set forms in front of this --
A. Yep.
Q. Let me get the whole question out, sir, before you answer. I mean, that's perfectly okay. I understand why you're doing it, but my question is, did you set forms in the front of this patio before you put down the new concrete?
A. Yes.

Q. All right. And the purpose of that was to get this nice straight line here?
A. Yes.
Q. When I use straight lines, it's the front of the concrete patio?
A. Yes.
Q. All right. After you put up the forms but before you lay the concrete, did you put yellow tape in this area to warn people that there was a trench?
A. I don't believe so.
Q. All right. How about cones?
A. No. So the -- so the dumpster was sitting on the back of this pad and we removed the dumpster and put it over -- well, you can kind of see that yellow line with the parking --
Q. Yes, sir.
A. We put it over in that area so that nobody would need to access that area.
Q. Now, in this photograph, you see the yellow tape put up?
A. That would be done by us.
Q. That would have been done by you?
A. Yeah.
Q. How about that yellow tape there?
A. That was also us.

Q. This ditch here, could you tell me how deep it was, sir?
A. I would have to say around 3 inches.
Q. And could you tell me how long the ditch would have been?
A. 10 feet.
Q. And am I correct that the ditch does not go around the sides of the patio, just the front end of the patio?
A. You are correct.
Q. With respect -- now, there were other ditches in other areas of the sidewalk, is that correct, sir?
A. Yes.
Q. At any point in time, did you fill in any of those ditches with sand and/or asphalt millings?
A. So I remember one area. Mike from Bob's Asphalt had said that he was not going to be there, you know, that day or the next day. So I had seen a wheelchair, I don't know, there was -- I think it was a guy in a wheelchair. So I tried to put some sand in so he could get across because there honestly was no other way he was going to get into his residence. So I tried to put some sand down there about 4 foot wide just so he could scoot across or roll across, I should say.
Q. Okay. So the purpose of putting the sand in there,

Mr. Westveld, was to fill in the ditch to make it at least somewhat level with the rest of the ground?
A. Yeah. I mean, I felt bad for the guy, you know, so I tried to get some sand in there and push him across and, yeah.
Q. Did you put sand or asphalt millings in any other ditches anywhere else at Stanton Park Apartments?
A. If there would have been -- it wouldn't have been sand, I believe, but it would have been maybe over on the east -- I'm sorry, it would have been on the west side of the facility by the driveway.
Q. And did you fill in those trenches so that they would be level with the ground so people could traverse over them?
A. Yeah. Yep. I mean, I seen that guy in the wheelchair and I really felt bad because, I mean, what's the guy gonna do, you know.
Q. Did it ever cross your mind, Mr. Westveld, that a trench like the one that we're seeing here could be a trip hazard for pedestrians?
A. Not when we had put the dumpster quite a ways away from that.
Q. You never saw it as a trip hazard?
A. There would have been no reason for anybody to be there in my eyes.

Q. Okay. How about any of the other trenches that you created on the property in October 2021, did you feel that any of those could be trip hazards?
A. Those could have been. I mean, it's the same scenario everywhere we do concrete, you know, so you're going to find that trench pretty much everywhere we do concrete.
Q. Right. And part of the reason for putting up cones and yellow tape or caution tape is to warn people that not only is there new concrete here but there's also a potential for a trip hazard from the trench, correct?
A. Correct.
Q. Here's a better picture of it. Do you see this light back here?
A. Yep.
Q. Was there any lights on the opposite side, the one that's not photographed over here?
A. I am not sure.
Q. And back here where I'm circling, which is -- we'll see in a second, that's where the dumpster was, correct?
A. I guess. I don't recall exactly where that dumpster was. I thought it was a grassier area away from the actual dumpster pad.
Q. Does that look familiar to you?

A. Yep.
Q. Is that where you put the dumpster?
A. I think so, yes. That would have been where we did it, yep.
Q. All right. Do you recall any lights in the area of where you put the dumpster?
A. No. I mean, we're there during the day, so I don't think I was ever there in the dark, so, I mean, I don't know where the lighting situation is.
Q. So you never saw what the -- the concrete that you laid or this particular area near the dumpster or what the trench looked like at night, correct?
A. Correct.
Q. You only saw it during the day?
A. Correct.
Q. Based upon the photograph that we're looking at right now, Mr. Westveld, would you agree with me that it's difficult to see the trench in front of the concrete patio?
MR. COLE: Hang on, Randy. Let me just object real quick on the basis that a photograph might not be representative of what was out there.
But you can still answer, Randy, if you can.
A. Can you repeat the question?

BY MR. FREIFELD:
Q. Sure. Would you agree with me, based on the photograph that we're looking at right now, Mr. Westveld, that it's difficult to see the trench under these lighting circumstances?
A. I mean, you can see shadows of people in there, so there must be some sort of decent lighting in there. I can see two shadows of people standing there.
Q. Can you see the trench?
A. Yeah. You can see the shadow of the trench on the face of my concrete.
Q. Can you see how deep the trench is?
A. Nope.
Q. Can you see how long the trench is?
A. I cannot.
Q. According to your answers to interrogatories that were submitted to me, I asked if any warnings, verbal or otherwise, were ever put up before October 30th, 2021. Let me blow it up so you can see it better, that's fine. That's the day of the incident. The answer to that interrogatory, caution tape was present at one time. Also, crews were working on it for a few days which would have been observable to everyone.
I want to -- this caution tape was present at one time. Can you narrow down what time frame?

A. To completion of our job? I mean, are you looking for a date?
Q. Actually, the question talks about the time period from the time you started the job, and let me get on the record when you started this job. Am I correct, and I've heard it from several witnesses, you started this job on October 14th or 15th, somewhere in that neighborhood, of 2021?
A. Yeah. Could be, yeah.
Q. All right. So if you started the job on -- let's just use October 14th. If you started the job on October 14th, the first thing you're going to do is demolish the concrete, correct?
A. Yep.
Q. And how long is the demolition aspect of this job going to take?
A. Most of Red Oak's jobs we are in and out in about three to five days, but this one, I do recall we had a few days of rain or a couple days of rain, I don't remember exactly. So I would say we maybe started it on a Wednesday and finished it the next Wednesday, I mean, roughly speaking, I guess.
Q. So it took you about a week?
A. Yeah.
Q. And that's because of inclement weather. Under ideal

circumstances, Mr. Westveld, how long would it have taken?
A. Three days tops.
Q. All right. So you would have completed this job on or about October 21st, 2021?
A. Yes.
Q. Were the ditches filled in on October 21st, 2021?
A. No.
Q. Some of the ditches had sand in them?
A. Not even -- not even full width. I mean, it was just 4 or 5 feet of the ditch so people could get through with, you know, wheels.
Q. And sometime, and correct me if I'm wrong, Mr. Westveld, sometime between October 14th, 2021 and October 21st, 2021, somebody put up caution tape?
A. Correct.
Q. Can you give me a ballpark of when that would have happened during those two dates?
A. So at the end of most days, if we have some torn out, we'll caution tape that up. I don't remember exactly how this job went, but if we have that dumpster area or a sidewalk area demoed with forms set or not forms set, we're still going to caution tape it, come back the next day, take the stuff down, continue working.
Q. Caution tape and cones or just caution tape, sir? I

just want to be clear on that.
A. I think in that one we were doing just caution tape, but we have done others with cones and caution tape.
Q. And approximately how many days do you think the caution tape was up?
A. From the time that I was there or after I completed the job?
Q. Well --
A. I mean, it was there when I completed the job it looks like by your picture, and then from there, I do not know.
Q. Do you know when the asphalt -- when Bob's Asphalt came and laid the asphalt to fill in these -- I assume the -- let me back up because I don't want to assume anything here.
The purpose of the asphalt was to fill in these trenches?
A. Yes.
Q. And let's assume you completed the job on October 21st, 2021. When were the trenches filled in?
A. When were the trenches filled in?
Q. Yes, sir.
A. That would be a better question for Bob's Asphalt.
Q. Well, let me ask you this. When you completed the job on or about October 21st, 2021, did you know when

Bob's Asphalt was going to come and lay the asphalt or when they were supposed to?
A. I mean, we're in contact with each other a little bit, but I don't know his schedule, so he usually needs to know when I'm done and they take it from there. You know, the one that we just completed in Kent City, there's two facilities and they're on the one when we're finishing another one up front. You know, I mean, they're on one facility while we're doing another one in the front of the same grounds, I guess, if you will.
Q. You've worked with Bob's Asphalt before, sir?
A. A little bit here and there, yes.
Q. Did you ever work with Bob's Asphalt on any of these Red Oak projects other than this one?
A. Yes.
Q. Does Bob's Asphalt typically come in and fill in these trenches within a couple of days after you completed your work?
A. That's the plan, yes.
Q. Bob's Asphalt -- if you knew that Bob's Asphalt didn't show up until after November 1st to fill in these trenches, would that be a little bit too long for leaving these trenches the way they were during that period in the state that they were in?

A. So it would be a week.
Q. Actually, there's 31 days, so it would be more than ten days.
A. Yeah. That's probably a bit lengthy.
Q. If you had known that Bob's Asphalt was not going to be filling in these trenches for ten days or more, would you have put up caution tape and cones or left them there?
MR. COLE: Let me just object to the form of the question.
You can go ahead, Randy, and answer.
MR. FREIFELD: Thank you.
A. According to your pictures, there was caution tape, right?
BY MR. FREIFELD:
Q. My question was a little different, sir. My question was, if you completed the job on the 21st and you knew that Bob's Asphalt wasn't going to be filling in these trenches for another ten days or so, would you have left the caution tape and cones up?
A. Yeah.
MR. COLE: Same objection.
You can answer.
A. Yes.
BY MR. FREIFELD:

Q. And why would you have done that, sir?
A. For warning.
Q. Warning to who?
A. All that come into contact with it.
Q. Would that be residents and other pedestrians?
A. Yeah.
Q. And the reason is because a trench like this could potentially be a trip hazard?
A. Yep.
Q. When I say a trip like this, I mean the trench that's in front of the patio, that is where the garbage dumpster normally is?
A. Correct.
Q. Let me ask you this, Mr. Westveld. Did anybody at Red Oak, specifically Mr. Koch, who was probably -- well, let me back up.
Is Mr. Koch your main contact person at Red Oak, sir?
A. Correct.
Q. So that's the person when you're interfacing with Red Oak, the person you interface with is Mr. Koch?
A. Correct.
Q. All right. If Mr. Koch told you to fill in the trench with sand or asphalt millings, would you have done that?

A. Yeah.
Q. So my next question is, Mr. Westveld, at any point in time after October 14th, 2021, did Mr. Koch ever tell you, Randy, could you please fill in the trenches with sand and/or asphalt millings?
A. No.
Q. Mr. Westveld, let me ask you about the other jobs that you worked on for Red Oak where you laid concrete and put in forms. I assume you put in similar types of trenches in those other jobs, correct?
A. Correct.
Q. Did you ever fill in any of the trenches in those other jobs with sand or asphalt millings?
A. No.
Q. Did Red Oak ever ask you in any way, shape or form, Randy, could you please, on these other jobs, fill in the trenches with sand and/or asphalt millings?
A. No.
Q. And, Mr. Westveld, am I correct that -- and I hope you understand that by filling in these trenches with sand or asphalt millings, you're basically taking away the depth from the trench?
A. Correct.
Q. And by taking away the depth of the trench, you're ameliorating or preventing the trip hazard?

A. Yes.
Q. Mr. Westveld, do you see all these leaves that are in this trench?
A. Yes.
Q. The fact that there's all these leaves in that trench, would that lead you to believe that the trench had been there for a while?
A. I mean, I believe there was quite a few trees around there during that time of the year. That could have been done in a day, but...
Q. Okay. With respect to the dumpster in this picture where it's located, did you do that at -- did Red Oak know that you were moving the dumpster prior to you moving it?
A. I'm assuming they knew I had to move the dumpster to install the concrete underneath it.
Q. Okay. You're assuming, so I take it you didn't have any conversation with Mr. Koch about moving the dumpster?
A. I mean, not that I recall.
Q. Mr. Westveld, this concrete right here, because of the time of the year, how long did it take to cure?
A. I mean, a full cure would be 30 days.
Q. When you use the term -- Mr. Westveld, remember, I'm not a concrete guy, so I'm relying on you. What is a

full cure, sir?
A. So they will -- you can drive on it within ten days that time of year when it's cooler, but to get its full potential, it would be 30 days with a full cure. So within ten days, you know, everything else is pretty much cured enough to do what they need to do.
Q. All right. Was it your understanding, sir, that this dumpster would be -- let's see here -- would be back here, the dumpster was actually located right here?
A. When we got there, yes.
Q. All right. Did you understand that the dumpster that -- Waste Management who owned the dumpster and actually removed the garbage would bring in a truck and the truck would drive over this particular area to get to the dumpster and then dump the garbage in the back of the truck?
A. Repeat the question.
Q. Sure. When Waste Management would come and get the garbage out of the dumpster on the days that it picked up the garbage --
A. Previous to the job?
Q. Previous to the job.
A. Yes.
Q. Do you know that the truck would drive over this concrete area to get to the dumpster?

A. Yes.
Q. Now, was the concrete cured enough so that the garbage truck could go over it within that 30-day period to get to the dumpster if the dumpster was back here?
A. Not with that trench being open.
Q. Okay. So after you laid the concrete here, Mr. Westveld, when would you have felt comfortable to tell Red Oak, it's okay for the Waste Management garbage truck to drive over that concrete patio to get to the dumpster?
A. Around ten days or so that time of the year.
Q. Would you have felt comfortable if the trench was still there having the truck drive over the trench?
A. No.
Q. Why is that, sir?
A. The garbage trucks are really heavy, and when you drive them front tires down through that trench, it potentially cracks my nice crisp edge.
Q. So you would have preferred that the asphalt be put in by Bob's Asphalt before the garbage truck decided to back over the patio to get to the garbage dumpster?
A. Yes.
Q. When you were finished with the job on or about October 21st, 2021, did you take the dumpster and put it back to where it was supposed to be?

A. No. I --
Q. Go ahead. I'm sorry. I apologize.
A. I believe we left it right where that picture shows.
Q. Let me ask you this, Mr. Westveld. Why would you have left the dumpster in that position as seen in this picture?
A. So it was safe for people to dump in so they didn't have to go across the trench.
Q. If the tape had been -- if the caution tape and/or cones were up there, would that make it safer as well?
A. Yeah.
Q. And the reason why is because it would warn people that there was a trench there?
A. Correct.
Q. The caution tape that you used, was the tape reflective?
A. No.
Q. Were your cones reflective?
A. We have some of both. We have some that are reflective and some that aren't.
Q. Now, I represent Jan Bowerman, Mr. Westveld. Have you ever met Mrs. Bowerman?
A. No.
Q. Never talked to her?
A. I mean, I don't know. There was various people that

we brought their trash out and moved their cars and helped across the trench with the sand, but, I mean, I didn't ask all their names.
Q. Well, let me unpack that. You moved people's cars during this job?
A. Actually, yes, we did.
Q. Why did you move people's cars?
A. They're elderly people and they're in the way and, I mean, a lot of these people have a hard time getting around, so I would just move their car out of our way. And some of them we had to -- the ready mix truck has a long chute that comes off the front of it. There was some that wouldn't start, so we'd go over top of them and try to accommodate everybody in a time efficient matter.
Q. You also said that you helped people over the trenches?
A. The guy in the wheelchair. I mean, I don't know who it was, but...
Q. Mr. Westveld, the Stanton Apartments, did you know that they had a specific demographic that lived in those apartments?
A. No, I did not.
Q. You didn't know that the people that live in Stanton Apartments have to be one of two things, they either

have to be over the age of 62 or 65 and at least one person in the apartment has to be disabled, did you know that?
A. Nope.
Q. Would you agree with me, Mr. Westveld, that with respect to people over the age of 65 and disabled persons, that when it comes to trenches like the one that's in front of the patio here, that you have to be a little bit extra careful?
A. I mean, yes.
Q. Mr. Westveld, do you know if this trench ever got filled in with asphalt?
A. I do not. For all I know it's empty right now. I don't know.
Q. Since October of 2021, Mr. Westveld, have you been back to Stanton Apartments at all?
A. No.
Q. Have you done any work for Red Oak since October of 2021?
A. Yes.
Q. At one of their other properties?
A. I think more than one but I don't remember how many.
Q. And I forgot to ask this, Mr. Westveld. The putting up of cones and caution tape, that's standard operating procedure for your company with respect to

your construction -- your concrete jobs?
A. Yes.
Q. You've been doing that forever?
A. Yes.
Q. Where did you learn how to do that, Mr. Westveld, or is it just common sense?
A. Common sense, sir.
MR. FREIFELD: Mr. Westveld, I think that's all the questions I have for you right now. I really appreciate your time today. I'll pass you to the other lawyers if anybody else has any other questions.
MR. VANDERVEEN: I don't.
MR. JAMES: I do have just a few questions, Mr. Westveld.
EXAMINATION
BY MR. JAMES:
Q. So were all the trenches that were at the Stanton Park premises that were created as a result of the concrete work, was that strictly from cutting asphalt out or are there any other causes of those trenches?
A. A lot of times we don't even cut them because they're -- I mean, we do cut them sometimes, I should say, but they're so brittle that usually when we demo, it pulls that out -- it pulls extra out, I should say.
Q. So Mr. Koch gave a deposition last week and he talked

about trenches being created due to lippage. Is that what he meant, that when you pull the concrete out, it pulls out the adjacent asphalt?
A. Yeah. Yep. Over time, everything gets so old and brittle, that there's no way you can get just one piece out.
Q. Is that unique to the Stanton Park premises or is that sort of what you encounter at a lot of places?
A. On all of them, yeah. I mean, we do other apartment work and it's not just Red Oak's.
Q. So in regards to cones and tape, when you're finished with a project, would you -- and you put up tape, I mean, what is the plan for that tape coming down?
A. Mine, I just leave it up. And when we're done, as far as I'm concerned, I leave it up. He and I don't have, I guess, a certain plan of when that tape comes down. It just stays up and I'm assuming until the job is done with Bob's.
Q. Do you have any documentation about the day that you finished the job at Stanton Park Apartments?
A. No, not that I believe.
Q. Okay. Do you have any process of either taking a picture on the last day or texting, you know, in this case, it would be Eric Koch, that you're all finished, anything like that, that that would be routine that we

might be able to take a look at?
A. Probably not anything from that long ago that I have.
Q. How many days do you need for the concrete to cure before it's okay to walk on it?
A. In some instances, they don't wait that long. I want to say 32 hours, 36 hours.
Q. So some people go on much sooner than you'd like but you're comfortable with people walking on your concrete within a day and a half?
A. Yeah.
Q. Okay. And just to be clear, the slab where the dumpster normally was located, there was only a trench on the one end of it, is that right?
A. Correct.
Q. There weren't trenches on the sides, correct?
A. Correct. Correct.
Q. Now, you were shown a picture of -- the picture you talked about there being shadows on, you know, the picture taken either early in the morning or late at night when it was dark out, you remember that picture?
A. Yep.
Q. And you were asked some questions about whether you could see the trench or not in that picture. Do you recall that?
A. Yep.

Q. Any trouble seeing the cement slab that you poured in that picture?
A. No.
Q. So even in the dark, that cement slab was visible, correct?
A. Correct.
Q. When was the first time that you heard about the incident involving Jan Bowerman?
A. I received something in the mail, but I don't remember what the date was on that.
Q. Was it something from Jan's attorney?
A. I would assume so. I don't a hundred percent remember who it was from.
Q. Well, do you remember whether it was from Red Oak?
A. I don't.
Q. So just so I understand this. From the time you left that project, you didn't have any conversations with Eric Koch about putting sand and millings in trenches, is that right?
A. I don't recall what the conversation -- I mean, we had probably -- I'm assuming we talked and said, hey, I'm done or -- you know, because we had some rain events, so I'm assuming I had told him, hey, we're finished up or whatever. Go ahead.
Q. Yeah. I didn't mean to cut you off there. Let me ask

you a more general question. After you were finished with the project, do you recall Mr. Koch to do anything further at the Stanton Park Apartments?
A. I do not.
Q. Do you recall whether you had any communications with Bob's Asphalt about the timing of the work?
A. I believe he knew I was done with it or I was completed.
Q. Did you have any knowledge about when he was expected to start his work at Stanton Park Apartments?
A. No. I mean, I usually tell him I'm done, you're all set. I don't run his schedule.
Q. Sure. Do you have any recollection of whether you knew whether he was delayed at all in doing the work -- his work at Stanton Park Apartments?
A. It could have been delayed with the weather. It was not very pleasant when we were trying to fit that thing in.
MR. JAMES: I'm all set, Mr. Westveld. Thanks.
THE WITNESS: All right.
MR. FREIFELD: Justin, do you have any questions? Because I have one follow-up.
MR. COLE: I don't have any questions. Go ahead.

MR. FREIFELD: Thank you very much.
RE-EXAMINATION
BY MR. FREIFELD:
Q. I just have one question, Mr. Westveld. When Dan was asking you questions, he asked you about how long you would leave the cones and tape up, and you said the answer to the -- something to the effect, he and I would agree to do this or that. Who is the "he", because I know who the "I" is, but who is the "he"?
A. It could have been either Mike or Eric, but I'm assuming Eric.
Q. Eric Koch?
A. Yes.
Q. And I just want to clarify. Once you put up the caution tape and/or cones or both, you would leave at least the caution tape even after you were done with the job?
A. Yes.
MR. FREIFELD: All right. Thank you very much. I appreciate your time today.
MR. JAMES: Just one more for clarity sake.
RE-EXAMINATION
BY MR. JAMES:
Q. You said Mike or Eric Koch. Mike is Mike from Bob's Asphalt, correct?

A. Correct.
MR. JAMES: Okay. Thanks. That's it.
COURT REPORTER: Everyone ordering as before?
MR. FREIFELD: Yeah.
MR. JAMES: Yes.
MR. COLE: Yes.
MR. VANDERVEEN: Yes.
(The deposition was concluded at 3:02 p.m. Signature of the witness was not requested by counsel for the respective parties hereto.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, CORISSA BAKKO, certify that this deposition was taken before me on the date hereinbefore set forth; that the foregoing questions and answers were recorded remotely by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.

CORISSA BAKKO, CSR-8346
Notary Public,
Oakland County, Michigan.
My Commission expires: October 4, 2028

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WITNESS, DATE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

vs. Case No. 22-S-28824-NO

Hon. Ronald J. Schafer

RED OAK MANAGEMENT, INC.,
WESTVELD SERVICES, LLC, and
BOB'S ASPHALT PAVING, INC.,

Defendants.

_____

The Deposition of ERIC KOCH,
Appearing Remotely,
Commencing at 1:21 p.m.,
Thursday, November 10, 2022,
Before Corissa Bakko, CSR-8346,
Appearing Remotely from Oakland County, Michigan.

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ALSO PRESENT:
Heidi Reed

TABLE OF CONTENTS

EXHIBITS

Michigan
Thursday, November 10, 2022
1:21 p.m.

ERIC KOCH,
was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. FREIFELD:

Q. Mr. Koch, my name is Mike Freifeld.
A. Hi, Mike. How are you doing today?
Q. Good. I'm doing good, Mr. Koch. Mr. Koch, did you sit through Ms., I forgot her last name's, deposition?
A. Shuck a row of corn.
Q. Shuck a row of corn. Did you sit through that deposition?
A. Yes, sir.
Q. So you heard all of my instructions?
A. Yes.
Q. All right. Have you ever given a deposition before, Mr. Koch?
A. No, sir.
Q. All right. So I won't go over the instructions again.

Mr. Koch, could you state your full name for the record?
A. Eric Jason Koch.
Q. Mr. Koch, what is your residential address?
A. 2825 East Braden, B-R-A-D-E-N, Road, that's in Perry, Michigan 48872.
Q. Mr. Koch, what do you currently do for a living?
A. I work for Red Oak Management as a construction specialist.
Q. Chelsea indicated that you're a vice president, is that true?
A. No, sir, that's incorrect.
Q. How long have you worked for Red Oak?
A. Two years in March.
Q. So you started in March of 2020?
A. That is correct.
Q. And you've always been in that construction specialist position?
A. Yes, sir.
Q. And who do you report to?
A. I report to Rae Lynn Darby and Heidi Reed.
Q. Those names sound familiar.
A. Yes, sir.
Q. Prior to working for Red Oak, where did you work?
A. I worked for Streamline Enterprises out of Lansing,

Michigan from July of 2019 to March of 2020.
Q. What did you do for Streamline?
A. I was a project manager, oversaw roofing, siding, gutters, insulation, doors, windows.
Q. Where did you work before Streamline?
A. During the period from 2014 to 2019, July of 2019, I was self-employed, had my own construction business, remodeling, kitchens, bathrooms.
Q. How long did you have your own construction business for?
A. I started the construction business in 2003 and ran through 2011 and work was really tight, so during that period of time I worked on an oil rig in North Dakota and I also worked for a machine shop, welding shop in Fowlerville, Michigan.
Q. Tell me about your education. Did you go to college?
A. I did.
Q. Where did you go?
A. I have a -- Phoenix Institute of Technology in Arizona.
Q. What kind of degree did you get from there?
A. I've got a degree in welding technology.
Q. Have you ever been a general contractor here in the State of Michigan?
A. Yes, sir.

Q. A licensed general contractor?
A. Yes, sir, and I am still currently licensed.
Q. What classes did you take to become a general contractor here in Michigan?
A. I just took the general contractor's licensing test. I take my continuing education I think it's every three years, I got to do three hours or whatever, pass the test and became a state licensed general contractor, residential contractor.
Q. With respect to your general contractor courses, have you ever received any training on safety?
A. Yes.
Q. That's an important part of becoming a general contractor, is that correct?
A. They emphasize a lot on business practice and ethics and quality, following code.
Q. There is some emphasis on safety, agreed?
A. Some.
Q. So in October of 2021, you were a licensed general contractor in the State of Michigan?
A. Yes.
Q. Just out of curiosity and for the record, what is a Michigan licensed general contractor? What does that license allow you to do, sir, specifically?
A. It allows you to -- you can build a home, pull permits

for general construction-type things. It does not allow you to do things like electrical work or plumbing or HVAC or mechanical, those are all specialty licenses. So like if I was to build a deck, I would be able to pull a permit to do the deck, or if I was to do a roof, I would be allowed to pull a permit to do the roof, so it allows you to do general construction-type stuff.
Q. Does it allow you to pour concrete?
A. That is part of the construction process, yes.
Q. In your current job with Red Oak, what are your duties and responsibilities?
A. My duties are to go out to our properties and make sure that the properties are being maintained on the exteriors in the proper way, roofing, siding, windows, parking lots, sidewalks, just making sure that everything is in good repair.
Q. So when you use the term good repair, what do you mean?
A. We don't want a rainstorm leaking through a roof and flooding a resident's unit. We don't want windows, you know, that are not operational or not functioning properly, keeping warm in, cold out, so to speak. We want our parking lots and our sidewalks to be maintained so that they're functional and safe for our

residents.
Q. With respect to the sidewalks and parking lot, you want to make sure that they're in good repair so they don't have tripping hazards so that tenants and residents fall and injure themselves?
A. Correct.
Q. And that's part of your duties and responsibilities in your current position?
A. Yes, sir.
Q. How many properties managed by Red Oak are you currently responsible for making sure that that doesn't happen?
A. 44.
Q. Holy smokes. All in Michigan?
A. Yes, sir.
Q. All on the west side of Michigan or all over Michigan?
A. Mostly west of M-66 all the way from Dowagiac, all the way to Houghton/Hancock in the UP.
Q. And with respect to your duties and responsibilities in your current job, are you responsible for conducting inspections of these properties on a scheduled basis?
A. Yes. I visit the properties often. I just cycle through all of them. And then also in regard to that, if there's something that comes up or whatever at a

property that's urgent or is reported by a resident to the manager, then I'm notified of that and then that goes -- I go there immediately, resolve any issues as fast and as efficiently as possible in this post-COVID era with no contractors available to do work hardly it seems.
Q. Mr. Koch, I forgot to ask. Are you related to anybody who works for Red Oak?
A. No, sir, I am not.
Q. So I want to specifically talk about Stanton, the Stanton property.
A. Sure.
Q. You're familiar with that property, sir?
A. Yes, sir.
Q. All right. You're familiar with the demographic that Stanton -- the demographic of the typical tenant at Stanton?
A. Yes. Yes, I am.
Q. And you know that the typical tenant at Stanton is, at least for the most part, is either 62 or older and or disabled or has somebody in the apartment with them who is disabled, correct?
A. That is correct.
Q. Would you agree with me that knowing that that demographic is the resident, the typical resident at

that particular property, that safety should be more of a concern from a construction standpoint?
A. Yes.
Q. And the reason why is because -- and I'm starting to approach that age, people over the age of 62 and people who are disabled, depending on what their disability is, they have mobility issues, they have eyesight issues, they have hearing issues, et cetera, agreed?
A. It depends on the person, but we all -- as we age, we slow down and things get a little more difficult, I agree.
Q. And I agree too. Now, before I go any farther, what, if anything, pictures, documents did you review for purposes of your deposition today?
A. We went over --
MR. JAMES: Hold on. Just make sure your answer is about the documents that you looked at, not -- when you say we, like our conversations.
THE WITNESS: Yes.
MR. JAMES: Okay. You can answer about the documents.
A. We just -- Dan and I went over the documents this morning that we were going to be talking about today.
BY MR. FREIFELD:

Q. Did you go over photographs?
A. No, sir.
Q. Before the deposition, Mr. Koch, I received at least two text messages that you are involved in on October 13th, 2021?
MR. JAMES: And let me just -- I don't know that he knows specifically what I sent you.
MR. FREIFELD: Well, let me ask him this then, Dan.
MR. JAMES: Sure.
BY MR. FREIFELD:
Q. Did you turn over some text messages to your counsel prior to today concerning this issues that I'm talking about today?
A. Yes.
Q. Unfortunately I will not be able to share those because I received those shortly before the deposition, but you are familiar with those text messages, Mr. Koch, are you not?
A. Well, depending on which ones they are, I shared those --
MR. JAMES: If I may, Mike. The one that I shared with him today had to do with a text message about lights.
MR. FREIFELD: Correct.

MR. JAMES: And also a picture of the light bulb.
BY MR. FREIFELD:
Q. From a gentleman -- that text message was between you and a gentleman by the name of Gary?
A. Yes. Gary DeGram of DeGram Electric.
Q. Could you spell that last name for the court reporter, please?
A. D-E-G-R-A-M.
Q. And at least a text message that has your name on it, it says that the parking lot lights, there were issues with break-ins, is that correct?
MR. JAMES: And I'm showing it to him, Mike.
MR. FREIFELD: Okay.
A. Yes. Chelsea had said that there was issues with parking lot break-ins.
BY MR. FREIFELD:
Q. And was it you who made sure that the parking lot lights stayed on 24/7?
A. Chelsea took care of that.
Q. And this e-mail apparently at the very top says Wednesday, October 13th at approximately 3:27 p.m.?
A. Text message, that is correct.
Q. And it's not clear from what I have in front of me.

Who are you texting here, Mr. Koch?
A. That was Chelsea, I believe.
Q. Did the -- as a result of the lights being left on 24/7 in the parking lot, did the light bulbs -- any of the light bulbs need to be replaced because of the extended usage?
A. No.
Q. You're familiar then in October of 2021, the sidewalks and the area in front of the dumpster had to be recemented or there was new cement put down?
A. Yes.
Q. Why is that, Mr. Koch? Why was that needed to be done?
A. The -- there was a few places in some of the concrete where tree roots had grown underneath the sidewalk and caused some cracking and it was out of our spec, you know, for trip and walking, we wanted it to be a smooth surface for our residents to eliminate trips and hazards for tripping, so that's why we replaced them.
Q. So some of the concrete slabs --
MR. FREIFELD: Uh-oh. I think Dan froze.
BY MR. FREIFELD:
Q. Unfortunately, Mr. Koch, you froze there for a minute and we didn't get the entire -- so I'm going to back

up and try to get the complete answer.
The reason why the concrete was being done on the sidewalks is because of heaving?
MR. FREIFELD: I think I lost them again. No, he's back.
BY MR. FREIFELD:
Q. Did you hear that question?
A. You were fragmented.
Q. All right. The reason why the concrete on the sidewalks was being replaced was because of heaving, that made the concrete uneven?
A. It had some cracking in it. And before it got to a point where it created a trip hazard, we had them removed and replaced, and then the trees that were causing damage were also removed.
Q. Okay. Did you also -- what about the slab in front of the dumpster?
MR. JAMES: I'm sorry, Mike. We're having a little bit of trouble at the moment, and so we missed that.
MR. FREIFELD: Okay. I'll do it again.
BY MR. FREIFELD:
Q. Can you tell me why the concrete slab in front of the dumpster was replaced?
A. It had some cracking in it due to the weight of the

garbage trucks. Over time they end up cracking those dumpster pads and they just need to be periodically replaced.
Q. Mr. Koch, I should be sharing my screen with you right now. Can you see what we're talking about here?
A. Yes.
Q. All right.
MR. FREIFELD: I don't know what photograph number this is, gentlemen, so bear with me.
MR. JAMES: It's 6, A6 from yesterday.
MR. FREIFELD: Thank you.
BY MR. FREIFELD:
Q. Does this look familiar to you, Mr. Koch?
A. Yes.
Q. Were you familiar with these -- the concrete being redone in October of 2021?
A. Yes.
Q. Were you familiar with this area prior to this accident that happened on October 30th, 2021?
A. Yes.
Q. Were you responsible for hiring the vendors -- well, let me back up.
Did you lay this concrete?
A. No.
Q. So were you responsible for hiring the vendors that

did lay this concrete?
A. Yes.
Q. All right. Can you tell me who laid the concrete?
A. Randy Westveld of Westveld Services.
Q. And you were the person responsible for hiring him?
A. That is correct.
Q. Had you used him before?
A. Yes.
Q. For Red Oak or for your own business or for somewhere else?
A. Only for Red Oak.
Q. Only for Red Oak. Where else had Westveld laid concrete before this?
A. Colony Junction, Colony Apartments.
Q. Now, the concrete was laid by Westveld. Can you see these ditches here, sir?
A. Yes, I can.
Q. All right. Who created the ditches?
A. When you tear out the concrete, sometimes there will be some lippage underneath the form. When that lippage goes underneath the asphalt and you tear that concrete out, it has a tendency sometimes to break the edges of that asphalt away. So when that was tore out by Randy, that's when those ditches would have occurred.

Q. So Westveld created these ditches?
A. Yes.
Q. And am I correct -- and please correct me because I'm not an expert on laying concrete by any stretch of the imagination. When they laid the concrete down, the new concrete down, did they put up wood boards to maintain the shape?
A. Yes. In regards to the concrete apron in front of the dumpster, both the -- in this picture looking at it, the far side of the apron and the near side of the apron, the edge of the asphalt would have been the form, meaning that they cut a straight line and used that as like an earth form. The front edge where the trench is would have been a wood form and that would have been there to hold the shape of the front edge.
Q. And who put the wood in the front edge to maintain the form?
A. That would be Randy Westveld. That's what they do.
Q. Had you ever seen Mr. Westveld do this before at any other projects you asked him to work on?
A. Yes. Standard procedure of installing concrete.
Q. I had a feeling, but I just wanted to check.
A. Yeah.
Q. Now, the yellow tape here, do you see this yellow tape?

A. Yep.
Q. All right. Who put the yellow tape in?
A. I'm not sure of that.
Q. In your opinion, who would have been responsible for putting the yellow tape in?
A. None of that was discussed before starting the job.
Q. Okay. Were these trenches eventually filled in?
A. Yes.
Q. And who filled those in?
A. Randy filled in the trenches by the sidewalks where it meets the parking areas.
Q. Okay.
A. And then anything near like any ADAs or whatever, he filled those in with sand and millings, like asphalt millings. It's like gravel.
Q. Okay.
A. But it's a compact surface to walk on.
Q. Okay. And who filled in the trench at the front of the apron where the dumpster concrete is, right here?
A. That was filled in with -- when the asphalt was done, that was filled in with new asphalt.
Q. And which company did that, was that Westveld or somebody else?
A. That would have been Mike from Bob's Asphalt.
Q. And were you responsible for hiring Bob's Asphalt to

come in and do that?
A. Yes, I was.
Q. Earlier you testified that you did not have any discussions with Westveld about putting up yellow tape, am I correct about that?
A. That's correct.
Q. Let me ask you this. In other projects that you would use Westveld to lay concrete, you said that -- were these ditches created in those situations as well?
A. Yes.
Q. Did you have discussions with Westveld about putting up yellow tape in those circumstances?
A. No, I did not.
Q. Do you know if Westveld did put up yellow tape in those circumstances?
A. In those circumstances, the only edge was on the grass side. It was just dirt. So when the forms were pulled, the dirt was pulled right back in.
Q. So let me ask you this, Mr. Koch. Tell me about the lighting in this area. I see that there's one light or one lamp, I guess I would call it a lamp, here, right here. Are there any other lights in the dumpster area?
A. I cannot remember off the top of my head.
Q. Okay. And I notice on -- go ahead. I'm sorry for

interrupting.
A. I did not hear that. I'm sorry.
Q. I'm sorry for interrupting. I interrupted while you were answering.
A. I -- facing that light there, I don't know if there's one behind, in the parking spots behind, I cannot remember.
Q. Okay. And in this picture, Mr. Koch, I noticed there are big yellow Xs on three trees. And I'm going to go out on a limb here, no pun intended, these trees were probably removed because their roots were causing the concrete to break?
A. That is correct.
Q. That just shows you how smart I am.
A. I gave you a good clue.
Q. Thank you.
A. No problem.
Q. I want you to take a look at this photograph here, Mr. Koch. This is a closer picture of the actual trench itself. You've seen this trench before?
A. Yes.
Q. How deep -- if you had to estimate, how deep was that trench?
A. Probably about four to maybe five inches, five and a half inches deep, just depending on where you were to

measure.
Q. Okay. Let me ask you a question. In your opinion, do you think that that trench could constitute a trip hazard for a resident?
A. Yes, it could.
Q. And you see all this -- all these leaves in the trench?
A. I do.
Q. All right. Do you know how long this trench actually existed?
A. We poured concrete on October 14th, I believe, and then the -- I was there on October 21st to inspect the concrete and take pictures. And then Mike was supposed to be there on November 5th, but Mike was having some health issues at that time, which -- and I don't know what, but that's irrelevant, I guess, but the asphalt didn't get completed until November 10th, if I recollect correctly.
Q. So let me ask you a question. The trench would have been created -- would have been created on October 14th, sir?
A. Yes.
Q. And you came out to take a look and take pictures on October 21?
A. Yes.

Q. And you turned those pictures over to Mr. James, is that correct?
A. Yes.
Q. On October 21, was there yellow tape surrounding the concrete slab like I showed you in the previous picture?
A. No.
Q. Let me ask you this then. From October 14th, 2021 until October 30th, 2021, was there ever yellow tape surrounding the concrete slab like you see in this picture?
A. I can't answer that with any certainty because between the 14th and the 21st, I was not at the property.
Q. Okay. But on October 21st when you were there to inspect and take pictures, there was no yellow tape like we see in the picture I'm sharing with you right now, correct?
A. Correct.
Q. Were there any orange traffic cones delineating where the trench was in front of the concrete slab on October 21st, 2021?
A. No.
Q. At any point after October 14th, 2021 and before October 30th, 2021, Mr. Koch, did you tell Mr. Westveld that you wanted yellow tape like you see

in the picture I have in front of you?
A. No.
Q. And am I correct, Mr. Koch, that from October 14th, 2021 to October 30th, 2021, you yourself never put yellow tape around the concrete slab where the dumpster is as seen in this picture?
A. No, I did not.
Q. And the purpose of putting yellow tape around in these areas is to warn people that there's a possible trip hazard, would you agree?
A. Yes.
Q. Do you think it's a good idea to put up yellow tape like that in a situation such as this to warn people that there's the potential for a trip hazard?
A. Yes.
Q. But from October 14th, 2021 to October 30th, 2021, Mr. Koch, that concept didn't enter your mind?
A. No.
Q. And why is that, sir?
A. The areas along the sidewalks had been filled in with sand and millings and I felt that the areas that were left open were filled in and taken care of.
Q. Was the trench here -- do you see where my cursor is going back and forth, Mr. Koch?
A. Yes.

Q. Okay. On October 21st, 2021 when you went out to inspect, was this filled in?
A. No.
Q. And am I correct, sir, that as far as you know, during the period of time from October 14th, 2021 up until October 30th, 2021, this trench that I'm going back and forth on in front of the concrete slab where the dumpster is, that wasn't filled in at all?
A. Correct.
Q. And would you agree with me that because it wasn't filled in, putting yellow tape or some other warning of some kind to let tenants know that there was a trench there would have been a good idea?
A. That trench there was so wide and so big that it was pretty obvious for sure, so I figured that they would see it and avoid it.
Q. Do you know how dark this area gets at night even with the lights on?
A. I've been there in the dark areas, yes.
Q. Okay. Is it -- what did you think? Was it pretty dark?
A. No, not really. Not where I couldn't navigate the parking lot or walk on the sidewalk.
Q. Let me ask you a question. Do you see this dumpster right here?

MR. FREIFELD: And, gentlemen, I don't know what page number this is, I apologize, but I'm sure somebody will tell me.
MR. JAMES: It's 8.
MR. FREIFELD: Thank you very much. I appreciate that.
BY MR. FREIFELD:
Q. Do you see this dumpster right here, sir?
A. Yes.
Q. You've seen that dumpster before?
A. Yes.
Q. Let's see if I can find out. Where is that dumpster normally, if you know?
A. There is a wooden fence. There you go. All the way in the back, do you see the signs?
Q. Yes, sir.
A. To the left of those signs sitting in there where the fence is is where that dumpster normally sits, but due to needing time to cure, the concrete cannot be driven on by, you know, dump trucks and et cetera, so it was set off to the side; A, they have to have it off to the side so the trucks could get in there to dump their garbage; and then B, you can't put it right back on there and let the trucks drive on it. It will wreck the new concrete.

Q. How long did it take this concrete to cure?
A. This time of year, normal is, you know, 30 plus days.
Q. And just for those of us who are sitting here who don't know what cement curing is, could you explain that on the record, please?
A. Yeah. As the water evaporates out of it, the lime and the actual cement hardens. So in the summer months, it evaporates quicker and sets off quicker. Was it hard? Yes. Was it cured? It takes longer in the winter or, you know, in the fall when it's not as hot.
Q. And while it's curing, you can't allow a garbage truck to ride over it, correct?
A. Correct.
Q. Because if it does ride over it while it's curing, it could actually cause the cement to deform or crack?
A. Correct. It wouldn't deform. It would crack. It's not fully hard. But I'd like to point out too that that sidewalk there --
Q. Which one? There's a few.
A. Yeah. So where your arrow is, do you see that? That's the access or the walkway for going to the dumpster. So in that area going across that concrete pad over to the dumpster, there is no trip hazards whatsoever. That is the access route to that dumpster.

Q. That's when the dumpster is where it's supposed to be which is this area that I'm circling with my cursor?
A. And where it was while the concrete was curing and the work was being -- after the work was completed after the concrete was poured, you could walk across that area safely. There were no hazards in that area.
Q. Okay. Can you explain to me why in this picture there is no yellow tape around the concrete slab?
A. I cannot. What was the date on the picture where the yellow tape is?
Q. It's after the accident. I just can't tell you when. It's probably in the first part of November.
A. Okay.
Q. Did you ask anybody to put up yellow tape?
A. I believe after the accident we did.
Q. And who did you ask to put up yellow tape?
A. I want to say it was our maintenance staff.
Q. Do you know who specifically?
A. Chelsea and David were both out with COVID. It might have been David because he would have been back. It could have been David.
Q. And why is that? Why was yellow tape put up at that time?
A. Because we had an accident and we didn't want anyone else to get hurt.

Q. Okay. In this picture, once again, I'm referring to the area near the concrete slab, do you see the dumpster here, sir?
A. Yes.
Q. And the dumpster is there. Correct me if I'm wrong, Mr. Koch. The dumpster is there because you didn't want to put it back in the area where the fencing was because the garbage trucks can't ride over the concrete yet?
A. That is correct.
Q. Who moved the dumpster to that area?
A. The actual garbage company, either they'll move it or Randy Westveld will move it with his skid-steer. In this case, I'm not sure whether it was Waste Management or Randy Westveld.
Q. But it definitely wasn't you?
A. It wasn't me. I'm not that strong.
Q. Was it anybody who worked for you?
A. No.
Q. How many maintenance guys either with you or for you at this time? It may be different today, but in October of 201.
A. There were probably 8 to 10 approximately.
Q. And none of those folks were responsible for moving this dumpster, correct?

A. No.
Q. Now, the owner of the dumpster is Waste Management, yes?
A. Yes.
Q. And who is responsible for maintaining the garbage bin, in other words, that it works properly? It is you guys or is it Waste Management?
A. Waste Management. They maintain all their own equipment.
Q. Now, this is the opposite -- Mr. Koch, we were looking at the left -- if you were facing the dumpster where it's supposed to be, we were looking at the left side of the dumpster, now this is the right side of the dumpster, okay, or right side of the area. Is there a light post anywhere in this area? Is there a light anywhere over here?
A. I don't know the answer to that.
Q. How big is the parking lot?
A. Like width?
Q. Yeah, if you could, approximate it for me.
A. Maybe 40-feet wide approximately. I've never measured the width of the parking lot, so I really can't answer you on that.
Q. All right. After October 21st, 2021, when's the next time you went to Stanton?

A. I was there on November 15th.
Q. What were you there for on October 15th for?
A. The asphalt repairs had been done and I took pictures of that to document that the work was done and that it was satisfactory so that we could authorize payment to the contractor.
Q. I'm looking at a picture right now. I know there's headlights from something in the back shining forward. Would you agree with me that because of the lighting at this time, that it's difficult to see the ditch?
A. I've been on the property in the dark and it's -- I don't know that that's what my eye would see. Pictures are deceiving with light.
Q. You don't know what your eye would see in terms of actually seeing a ditch or not seeing a ditch, is that what you're telling me?
A. I'm not sure that that's a good representation of what I would see.
Q. So are you telling me that the darkness would not obscure somebody's ability to see this ditch?
A. No. That ditch is pretty obvious. I mean, it was a pretty wide ditch.
Q. Even in the dark?
A. Yeah, I would say so, yes. Especially with the concrete being new, it's very, very light colored and

the asphalt is obviously black, so there's a very strong definition of concrete to asphalt.
Q. Would you agree with me that yellow tape would make it even more obvious to a person?
A. I would agree, yes.
Q. Would you agree that orange traffic cones, if they were put near the trench, would make it obvious to a person?
A. Yes, I would agree.
Q. Would you agree with me that Red Oak Management is responsible for making sure that this area near this concrete slab is safe for its residents to travel by foot?
A. Yes.
Q. How did you find out about this accident, Mr. Koch?
A. I believe Chelsea either called or -- yeah, I'm pretty sure she called me and let me know.
Q. Do you remember when?
A. I want to say it was the first day she was back from COVID. I believe that was November 1st.
Q. Okay.
A. She called when she found out about it. It was the same day.
Q. Is that the same day that you went back out to Stanton?

A. No.
Q. You said you went out to Stanton several days after that?
A. November 15th, that is correct.
Q. Did you document your trip on November 15th?
A. Yes.
Q. Did you document your trip out to Stanton on October 21st, 2020 (sic)?
A. Yes. I get paid mileage, so I have mileage documentation for everywhere I go.
Q. So do I. I get paid for my mileage too.
Let me ask you this. When you went out there on the 21st, other than documenting your mileage, did you document anything else other than take pictures?
A. I did not.
Q. But you did take pictures?
A. Yes.
Q. And you turned those over to Daniel?
A. Yes.
MR. FREIFELD: And, Daniel, you turned those over to me?
MR. JAMES: I did.
MR. FREIFELD: Thank you.
MR. JAMES: And the pictures on November

15th.
BY MR. FREIFELD:
Q. Did you ever talk to Randy about this particular incident?
A. Briefly. I just let him know that we had a -- we had a fall and a broken ankle.
Q. Did you ask Randy Westveld, Randy, why didn't you put up yellow tape or cones or anything like that?
A. I did not.
Q. Did Randy suggest to you that he should put up yellow tape or cones near these trenches?
A. No, he did not.
Q. Would that be something that you would have expected him to do?
A. Not really because we did fill in -- after we were done, we filled in with millings and sand.
Q. Was that done after the concrete cured?
A. It was done right after the forms were pulled.
Q. So that would have been done on October 14th, 2021?
A. That was the day that the concrete was poured, so it would have been a couple days after that. We usually leave the forms on for a day or two after the concrete is poured. I'm not sure the date that Randy pulled forms.
Q. And I believe I asked this before but I'll ask it

again. The trench right here in front of the concrete apron where the dumpster is, that was not filled in with milling?
A. For whatever reason, that did not get filled in, that is correct.
Q. Do you know why it wasn't filled in?
A. I do not.
Q. It should have been filled in, do you agree?
A. Yes.
Q. And who would have been responsible for filling it in?
A. At the time, we were -- like I said, we were expecting Mike to get there pretty quickly. There was a lot of -- you know, that was -- it was unfortunate because he got sick and his scheduling changed so we were anticipating Mike to be there and get that taken care of. That's why I believe that one didn't get filled in.
Q. But with respect to filling it in with the millings, the asphalt millings, who would have been responsible for putting the asphalt millings in the trench that we're looking at in this photograph?
A. We would have probably had Randy do that, that or sand.
Q. That or --
A. Sand.

Q. And the reason why you would have relied on Randy to do that is because Randy put millings and sand in the other trenches that were near the sidewalks?
A. Yes.
Q. When you did your inspection on October 21st, 2021, was there sand and millings in the trenches that were near the sidewalks, like the one right here?
A. Yes.
Q. So you're telling me that in this trench which is right here, there's sand and millings in there?
A. There were on that day, yes.
Q. But there was still clearly a trench?
A. You could see that there's a cut in asphalt, but it was not a big gap like the trench in front of the dumpster apron.
Q. Got it. Mr. Koch, are you familiar with the multi-family information system physical inspection that was conducted by Rural Development?
A. Yes.
Q. Okay. Could you tell me what Rural Development is, sir?
A. They're an agency that works under the U.S. Department of Agriculture and they come out and inspect the properties, like yearly, and look for any, if you will, like a deficiency or an issue that maybe needs

to be fixed that they have not been seen or the management company not notified of, and then they let us know that that deficiency is now on what they call a findings list, and then I have a copy of those, and then I go to the properties, look at the issues, hire the appropriate contractors to fix the issues. Then once they're done, I go back, take the photographs -- the pictures, we send those in to Rural Development, and then they take them off the list and we move on.

Q. You said Rural Development is affiliated with the United States Department of Agriculture?

A. Yep.

Q. Are all of the properties that are managed by Red Oak in some way or another have oversight from Rural Development?

A. All of them but one that I work with.

Q. And because I'm not an expert in this and it sounds like you know it a hell of a lot better than I do, why would -- why would an apartment complex like Stanton Park Apartments be overseen or inspected by the United States Department of Agriculture?

A. It's part of the Affordable Housing and it's just the vision that they work under. That's a great question because I don't think any of us really understand the government.

Q. No, I have no -- I don't either. But they do inspections. Is this a yearly inspection, sir?

A. Yes. Minus the -- well, and we're not back to yearly inspections yet because they don't have their policy quite worked out yet.

Q. Well, let me ask you this, Mr. Koch. Are there certain rules and regulations that Rural Development has in place that Stanton Park Apartments has to conform to in order to maintain its operation?

A. I don't know the answer to that.

Q. Do you know what the consequences are after a physical inspection and something is brought to the attention of the management, if it's not corrected, do you know what the penalty is for that, if any?

A. I don't because we don't let it get to that point.

Q. Is it your understanding that there is some kind of penalty associated with an apartment complex not conforming to whatever rules and regulations the United States Department of Agriculture has in place?

A. I really don't know. We take our finding lists seriously, and when findings are reported to us, if they are reported to us, we take care of them in a timely manner. And I work ahead to try and stay ahead of those inspections so when they go out there, the findings are minimal to zero. That's what my position

is.

Q. So I take it you must know what these folks from Rural Development are looking for in order to make sure that they don't exist on these properties?

A. Yes, that is correct. In Section 2 there --

Q. Yes, sir.

A. -- exterior site inspection, it's pretty well spelled out right there. That's what they're looking for.

Q. I was going to ask you, were you familiar with this particular physical inspection that was conducted in July of 2020 at Stanton?

A. I was not with the company, with Red Oak at that time. And during the COVID shutdown, no work was allowed or performed. So like those 2020 inspections sat until we could get back in and actually do work on the sites.

Q. Okay.

A. I am familiar with that list and have worked on the things that are listed on that list.

Q. Okay. So you can interpret this for me because -- you can interpret this for me because you understand what they're talking about?

A. Yes.

Q. All right. Exterior site inspection, we have drives, parking surfaces and walks, and there's an X marked

under F. What does that mean?

A. That means there was a finding and that was done on September 30th of 2020. And then if you see that comment number 3, you can go down to comment number 3, and it says right there, if you go up to 3, drives, parking and surfaces have potholes and/or are deteriorating. Sidewalks have changes in height between slabs of half an inch or more. Sidewalks have some holes and/or are deteriorating. Parking lot has been sealed and striped but is in need of new asphalt. Access aisles all are very uneven with tripping hazards.

Q. What does that mean to you, Mr. Koch?

A. That means that the areas of the concrete that we tore out all have deficiencies that were not allowable by us and Rural Development, meaning that there was heights of a half an inch or more in uneven areas in the sidewalk and/or deteriorating concrete where like snowplows or et cetera hit the front edge and chip it. They're pretty specific on that. So anything that would create a trip, we take and cut that out and replace it.

COURT REPORTER: I need to interrupt. Was that striped or stripped?

THE WITNESS: Striped.

COURT REPORTER: Okay. I'm just confirming.
THE WITNESS: You're good.
MR. FREIFELD: It's not your fault, Mr. Koch.
BY MR. FREIFELD:
Q. Mr. Koch, is this the reason why in October of 2021 the concrete was replaced on the sidewalks in the apron in front of the garbage dumpster?
A. Yes, that is correct.
Q. It was because of this inspection that was conducted by Rural Development in July of 2020?
A. That is correct.
Q. And the reason why it wasn't done right away, correct me if I'm wrong, Mr. Koch, is because of the COVID pandemic?
A. That is correct. It raised hell in all of our lives, for sure.
Q. Absolutely. Are the regulations that Rural Development has in place which governs these inspections, are they health and safety regulations, if you know?
A. I do not know that.
Q. Do you know who took -- there's some site inspection photos that were attached to this report, Mr. Koch.

Do you know who took these photos? You probably don't, but I'll ask it anyway.
A. I do not. Snowplow.
Q. How do you know that's a snowplow?
A. It's just where they're plowing, they ram into the edges and it chips the corners of the concrete off.
Q. So you're familiar with this type of fracture in this slab?
A. You bet.
Q. And as you can see, I'm pulling up in front of you a letter from Red Oak Management dated November 20th, 2020 to the United States Department of Agriculture Rural Development concerning the Stanton Park Apartments 2020 physical inspection. Have you ever met Tenna Adams?
A. Tenna? I've met her one time about three weeks ago for the first time ever.
Q. And could you tell me who she is, sir?
A. She -- she works for Rural Development and each -- Tenna Adams, there's many, many -- they have properties that they oversee, and so Stanton Park is hers, and she comes out. I don't know if that was her or who did the inspection, but she oversees that, that's under her jurisdiction. And so that's -- she had -- like I said, she has many different properties

in that area. They each have, what do you call it, a region, the properties in that region that they oversee for us and other management companies as well.
Q. She works for the United States Department of Agriculture as far as you know?
A. As far as I know, yep.
Q. And, Mr. Koch, correct me if I'm wrong, but part of your job from Red Oak is to make sure that the properties that Red Oak manages, the ones that at least are inspected by Rural Development, pass their inspections?
A. Yes, that is correct.
MR. FREIFELD: Mr. Koch, I think that's all I have for you at this time. I may have more questions after -- if the other attorneys take a shot -- not take a shot, ask questions of you.
THE WITNESS: It's almost deer season.
MR. FREIFELD: It is, so at least not -- I'm not too far off then, so I'm going to pass you to whoever wants to go next.
THE WITNESS: Okay.
MR. COLE: I don't have any questions for the witness.
MR. VANDERVEEN: Me neither.
MR. JAMES: I do have just a couple quick

follow-ups.
EXAMINATION
BY MR. JAMES:
Q. Eric, would the lights have been at all dimmer on the lamps in the parking lot due to have been running 24/7 for that period of time in the fall?
A. No, no, not at all.
Q. Okay. You said the concrete slab at the time of this accident wasn't cured enough for the dump trucks to operate on them, is that right?
A. That's correct, they're just too heavy.
Q. Was it cured enough for people to walk across?
A. Absolutely, yes.
Q. And there was nothing up telling people once the concrete had dried that -- I mean, it was free, they weren't barricaded in any way from accessing the concrete slab, were they?
A. No.
Q. Did Rural Development require complete replacement of the asphalt parking lot or just portions?
A. Only portions.
Q. And did they require complete replacement of all the sidewalks on the property?
A. No, just the affected areas.
Q. And if I understood you correctly, the original plan

was that Bob's Asphalt would come in pretty quickly after Westveld got done with their work, is that right?

A. Yes, that is correct.

Q. But due to illness and other, you know, unforeseen circumstances, it just got delayed, is that correct?

A. That is correct.

MR. JAMES: I don't have anything further.

MR. FREIFELD: I don't have any more questions for you, Mr. Koch. Thank you very much.

THE WITNESS: All right. Thank you.

(The deposition was concluded at 2:30 p.m. Signature of the witness was not requested by counsel for the respective parties hereto.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, CORISSA BAKKO, certify that this deposition was taken before me on the date hereinbefore set forth; that the foregoing questions and answers were recorded remotely by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.

CORISSA BAKKO, CSR-8346
Notary Public,
Oakland County, Michigan.
My Commission expires: October 4, 2028

THE EXPERTS
Robson Forensic

ALBERT J. KERELIS, JR., AIA, NCARB, ARM
Architect

PROFESSIONAL EXPERIENCE

2019 to present **Robson Forensic, Inc.**
Associate
Provide technical investigations, analysis, reports, and testimony for failure analysis, and toward the resolution of commercial and personal injury litigation involving slip, trip and fall injuries, code compliance, accessibility, construction claims and disputes, construction materials and systems, property management practices, and professional liability. Areas of expertise include:

Facility Failure/ Property Damage:
- Building foundation settlement / failure
- Water intrusion
- Building envelope failures
- Roof system failures
- Wall system failures
- Fire protections, sprinkler systems
- Structural systems
- Pre-engineered structural systems
- Building hardware devices, manual and powered
- Electrical, HVAC, plumbing systems
- Building maintenance, repair failure
- Walking surface ice and snow removal
- Site unsuitable soils investigation and related remedial costs
- Parking lots, loading docks

Premises Safety:
- Stairway design and safety
- Handicapped accessible ramps, ramp safety
- Guard rail, railing and baluster failure, safety
- Ingress and egress safety
- Special users safety, elderly, handicapped, disabled
- Swimming pool design, safety
- Walking surface safety, slip, trip, stumble and fall incidents
- Conspicuousness of hazards, contrast, warning

Accessibility:
- Accessible components, ramps
- Accessibility standards, Americans with Disabilities Act (ADA)
- Areas of rescue assistance, two way communication
- Site accessibility
- Building accessibility, accessible routes

THE EXPERTS
Robson Forensic

ALBERT J. KERELIS, JR., AIA, NCARB, ARM
Architect

Contracts:
- Architect default of contract
- Contractor default of contract
- Subcontractor default of contract
- Owner default of contract
- Construction defect claims
- Delay claims

Codes and Standards (building/site design and planning):
- Building codes and safety standards violations
- Zoning codes, ordinance, and standards violations
- Planned unit development violations
- Accessibility codes and standards
- Special use and conditional use violations
- Covenants and restrictions claims

2004 to present **Facilities Design Group, P.C.**
Architect *2016-present*
Design firm providing architectural services for private sector residential, commercial, and industrial projects.
Responsibilities for new construction include: site analysis, code review, code compliance, ADA review, schematic design, structural design, mechanical, electrical and fire suppression designs, cost estimates, construction documents and construction administration/observation. Responsibilities for additions and renovations included: documentation of existing conditions including: structural, mechanical, electrical and plumbing systems; code review and compliance; design of new structural, mechanical, electrical and plumbing systems; construction documents and construction observation.

Consultant *2004-2016*
Duties included review of construction documents, structural system design, wall section and detailing for constructability, construction observation/administration for industrial, commercial, institutional, and residential projects. Provided expert witness services including: investigations, analysis, reports, depositions and testimony for residential projects.

2005 to 2015 **Kerelis, Inc.**
President *2005-2015*
Ran the day to day operation of a property management company and expanded the business into real-estate development. Procured real estate, created Planned Unit Development working with Village Staff, presented to planning commission and village board to obtain zoning approval, annexation, and final plat of subdivision for an 11 unit townhouse development. Was the Construction Manager for site improvement including: site grading, storm sewers, site utilities and roadway as well as for the construction of three buildings containing a total of 11 units.

THE EXPERTS
Robson Forensic

ALBERT J. KERELIS, JR., AIA, NCARB, ARM
Architect

Responsibilities included: bidding and negotiating, construction phasing and timelines, contract performance, change order analysis, enforcement of contract provisions, site safety, closeout procedures, warranties, and repairs.

Facilities Manager *2000-2015*
Managed residential and commercial properties. inspected site and building conditions and investigated site and building defects. Repaired or contracted and directed maintenance personnel and contractors including roofers, HVAC, landscaping and snow management. Contracted, managed, and directed the remodeling of bathrooms, kitchens, and door/ window replacement projects. Created budget and long-term maintenance plan for buildings and their sites.

Additional Facilities/Property Management Experience:

- Parking lot maintenance, repair and replacement including wheel stops
- Sidewalk maintenance, repair, and replacement
- Roof maintenance, repair, and replacement (flat and pitched)
- Foundation repairs
- Flood control of units (storm and sewer)
- Flooring maintenance and replacement including common areas and stairwells.
- Snow and Ice management
- Stairwell and railings
- Landscaping and grounds maintenance
- Exterior Lighting
- Decks and balconies
- Curbs and ramps
- Pest control
    - Insect infestation (ants, cockroaches)
    - Rodent infestations
        - Squirrels and raccoons
        - Rats, mice, and bats

1993 to 2004 **Facilities Design, LTD**
Principal Architect *1995-2004*
Design firm providing architectural services for public sector institutional projects and private sector commercial, industrial, and residential projects including prison security doors, space planning, retail, medical offices, high hazard warehouse and chemical processing facility.

Intern Architect *1993-1995*
Responsible for construction documents including wall sections and details. Coordinated consultants work. On-site representative for public and private sector projects including institutional, commercial, residential, and industrial projects.

THE EXPERTS
Robson Forensic

ALBERT J. KERELIS, JR., AIA, NCARB, ARM
Architect

Additional Architectural / Design Services:

- Public Hearings, special and conditional uses
- Legal proceedings or arbitration
- Construction / project owner representation
- Programming / needs analysis
- Site evaluations / surveys
- Construction cost estimating
- Quantity and existing condition surveys
- Bidding and negotiating
- Construction time-line creation and maintenance
- Interior design services
- Owner consulting services

1992 to 1993 **Peter Kamnitzer and Associates**
Staff Architect
Responsibilities included the schematic design of assisted living facilities, creation of presentation drawings for client and zoning appeal meetings.

1986 to 1992 **Facilities Design, Ltd**
Intern Architect
Design firm providing architectural services for public sector institutional projects including schools and a prison's multi-purpose building, as well as private sector commercial, industrial and residential projects; assisted with building surveys, field measurements and construction documents including wall sections and details; provided on-site representation on public sector projects.

PROFESSIONAL CREDENTIALS

Registered Architect: Georgia, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, South Carolina, Wisconsin
Certified by the National Council of Architectural Registration Boards (NCARB)
ASCA-C Professional Certified
Certified XL Tribometrist (CXLT)
Accredited Residential Manager (ARM)

EDUCATION

M.Arch., University of Illinois, Champaign, Illinois, 1993
B.S., Architecture, University of Illinois, Champaign, Illinois, 1990

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Architect

Continuing education:
"POSH 3rd Edition-ASC Virtual 4 Day Course", NSC Learning, 2022
"Barrier-Free Design and the 2010 ADA Standards", NCARB, 2022
"Fire Safety in Buildings Part III: Managing the Fire", NCARB, 2022
"Fire Safety in Buildings Part II: Preventing Ignition", NCARB, 2022
"Security and Crash-rated Bollards, AEC Daily", 2022
"Breaking In: Designing and Strategizing for Successful Multifamily Housing Projects", Hanley Wood University, 2022
"Getting in Touch: The Importance of Architect-Manufacturer Collaborations" (Print Course), Hanley Wood University, 2022
"Aging Infrastructure: A Universal Approach to Managing Condos", IREM, 2022
"Managing Industrial Properties Effectively 2022", IREM, 2022
"Fair Housing Skill Badge", IREM, 2022
"How to Avoid and Mitigate Personal Injury Claims in the Property Management Industry", IREM, 2021
"Window Code Fundamentals 20", Anderson Windows, Inc., 2021
"2019 Chicago Construction Codes", ICC, 2020
"Deck Safety and Codes", ICC, 2020
"Real Estate Management Ethics Online", IREM, 2020
"Managing Residential Properties", IREM, 2020
"Best Practices for Residential Property Managers - Before, During, and After a Tenancy", IREM, 2020
"Residential Maintenance Operations: Working with Contractors", IREM, 2019
"Professional Conduct Part V: Conflicts of Interest", NCARB, 2019
"Professional Conduct Part IV: Honesty", NCARB, 2019
"Professional Conduct Part II: Accountability", NCARB, 2019
"Professional Conduct Part II: Competence", NCARB, 2019
"Professional Conduct Part I: Registration", NCARB, 2019
"Why Buildings Fail Part V: Errors During the Construction Phase", NCARB, 2019
"Why Buildings Fail Part IV: Errors During the Design Phase: Material Selection and Detailing", NCARB, 2019
"Why Buildings Fail Part III: Errors During the Design Phase: Structural Engineering", NCARB, 2019
"Why Buildings Fail Part II: Fundamental Errors at the Outset of a Project", NCARB, 2019
"Understanding the Architect's Standard of Care", NCARB, 2019
"Understanding and Specifying with WDMA's Architectural Door Standards", Hanley Wood University, 2019
"ADA, Building Codes, and Standards Relating to Handrails and Guards", BNP Media, 2019
"Understanding Health Care Door Systems", BNP Media, 2019
"Designing with Tile", International Masonry Institute, 2019
"Codes and Standards Update – IBC 2012", American Wood Council, 2019

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Architect

"Maximum Daylight and Ventilation", BNP Media, 2019
"Permeable Interlocking Concrete Pavement System Design and Construction", BNP Media, 2019
"Specifying Natural Stone", BNP Media, 2019
"Universal Design and Meeting the Needs of an Aging Population", BNP Media, 2019
"Composite Wood Products in Cladding and Architectural Trim", BNP Media, 2019
"Building Enclosures: Moisture-Control Fundamentals – Parts 1, 2 and 3", BNP Media, 2019
"New Options for Insulating and Ventilating Wood-Framed Sloped Roofs", BNP Media, 2019
"2018 International Energy Conservation Code (IECC) Updates", SEDAC/UIUC, 2018
"Structural Design for Wood Construction", HalfMoon Education, Inc., 2018
"Healthy Walls= Rainscreen and Ventilation", ALA, 2015
"Top Framing Concerns", APA – The Engineered Wood Assoc., 2015
"Mid Rise Design: Understanding Building Size and Fire Protection", Wood Products Council, 2015
"Foundation Restoration", ALA, 2015
"Lightweight Honeycomb Reinforced Stone Cladding System", Ron Blank & Assoc., 2012
"Polished Concrete Floors", Ron Blank & Assoc., 2012
"From ANSI to ISO: Differences Between Porcelain and Ceramic Tiles and Differences in Dry and Liquid Latex Thinsets", ALA, 2010
"Introduction to Aluminum and Natural Metal Composite Material", ALA, 2010
"Risk Management and Business Planning Seminar for Design and Const. Professionals: The Administrative Side of the Practice", Schuyler, Roche and Crisham, PC, 2010
"Corrosion Prevention in Construction Fastening Systems", SFS Intec, 2009
"Green Roof Technology", ALA, 2008
"Building Envelope Systems: The Devil is in the Details", ALA, 2008
"Illinois Accessibility Code: History, Implementation and Future of Accessibility", State of Illinois Capital Development Board, 2006
"Bayport Production Tour-1, Safety and Impact Glazing, Combined Mulling Systems, Glass Performance Systems", Anderson Windows, Inc., 2006
"Concrete: Your Aggregate Knowledge", ALA, 2006
"Land Use Issues and Strategies Concerning Developments: Subdivision, Annexation, Zoning and Environmental Laws in Illinois", National Business Institute, 2005
"Factory Pre-blended Mortar for Masonry Construction", SPECMIX, 2005
"Moisture Prevention in Masonry Construction", Mortar Net, 2004
"Metal Lath, Beads and Trims: Stucco and Plaster Products and Applications", AIA, 2004
"Pedestrian Cable Railings (Guardrails with Cable in-fill)", AIA, 2004
"Helping Your Clients Maintain Good Indoor Air Quality", AIA, 2004
"Assuring Water Resistance of Masonry Construction", AIA 2004
"Design-Build Model: Utilizing Cold-formed Steel Framing System", AIA 2004

THE EXPERTS
Robson Forensic

ALBERT J. KERELIS, JR., AIA, NCARB, ARM
Architect

PROFESSIONAL MEMBERSHIPS

American Institute of Architects
ASTM
- Technical Committees:
- D08 - Roofing and Waterproofing
- D08.20 - Roofing Membrane Systems
- E06 - Performance of Buildings
- E06.25 - Whole Buildings and Facilities
- F13 - Pedestrian/Walkway Safety and Footwear
- F13.50 - Walkway Surfaces

International Code Council (ICC)
National Fire Protection Association (NFPA)
Capital Development Board Project Manager
Alpha Rho Chi Professional Architects' Fraternity
Institute of Real Estate Management

COMMUNITY INVOLVEMENT

Lithuanian Cultural School of Chicago
- Board of Directors since 2004-2019

Lithuanian Scouts Association, Inc.
- Chairman of the Board of Directors since 2021
- Chief Scoutmaster-Boys Division 2013-2020
- Local Troop Leader since 2009

Jesuit Fathers' Lithuanian Center, Inc.
- Board of Directors 2010-15

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

v.

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

Defendants.

Case No.: 2022-S-28824-NO

Hon. Ronald J. Schafer

PLAINTIFF'S DISCLOSURE OF EXPERT WITNESS TESTIMONY

The expert retained in anticipation of litigation and expected to testify at trial is as follows:

EXPERT	FIRM	ADDRESS/PHONE
Albertas J. Kerelis, Jr., AIA, NCARB, ARM	Robson Forensic, Inc.	557 W. Randolph St. Suite 202 Chicago, Illinois 60661 312-714-1740 www.robsonforensic.com

1. Albertas J. Kerelis, Jr., AIA, NCARB, ARM is a licensed architect in the State of Michigan and eight other states and is certified by the National Council of Architectural Registration Boards (NCARB). Mr. Kerelis is a residential property manager. He has earned the certification of Accredited Residential Manager (ARM) through the Institute of Real Estate Management (IREM).

2. Mr. Kerelis is employed as a forensic architect and property management expert by Robson Forensic, Inc. and provides investigations, analysis, reports, and testimony toward the

resolution of litigation involving personal injury (slip, trip and fall incidents), construction claims, property management standards, and other architectural and property management issues.

3. Mr. Kerelis is familiar with the design and construction technology of buildings, construction site safety practices, lighting requirements for parking lots, the practice of residential property management, and premises safety. He will testify concerning the standard of care for inspections, maintenance, and management of multi-family residential properties, including maintaining a construction site in a safe manner.

4. A copy of Mr. Kerelis' curriculum vitae listing some of his education, training, experience, and qualifications is attached hereto and incorporated herein as reference.

5. Mr. Kerelis has reviewed the Complaint, Defendant Red Oak Answers to Plaintiff's Interrogatories and Request for Production with produced documents including photographs, Defendant Westveld Services, LLC Answers to Plaintiff's Interrogatories and Request for Production with produced documents, Deposition Transcripts of Jan E. Bowerman, Chelsea Shuckerow, Eric Koch, Heidi Reed, Michael Radford and Randy Westveld, photographs taken of the incident location by Ms. Bowerman's brother immediately after the incident and on subsequent days.

6. Mr. Kerelis performed a site investigation on December 16, 2022. At approximately 6:00pm, an hour after sunset, Mr. Kerelis took light meter readings at various locations on the site including in the hallway (5.9 fc) where Ms. Bowerman had exited from, the outside covered entryway (3.4fc), at various points along the sidewalk leading to the parking lot (0.4 fc, 0.1fc, 0.8 fc), the parking lot (0.1 fc), at the incident location (0.0fc), and in front of where the dumpster had been relocated during the construction project (0.0fc).

7. Mr. Kerelis is informed that on October 30, 2021, Ms. Jan E. Bowerman, a 75 year old, was a tenant of Stanton Park Apartments located at 200 E. First St., Stanton, Michigan. While taking out her trash at approximately 7:15am, an hour before sunrise, she stepped into a trench created by the excavation for a recently poured concrete slab, tripped, fell, and was injured.

8. Mr. Kerelis has learned that Stanton Park Apartments is a 24-unit multi-family residential property for seniors over the age of 62 and those with physical disabilities. The single-story L-shaped building is located on a 2.33-acre parcel. The two legs of the building run along the north and east sides of the site. An asphalt surface parking lot is situated inside the two legs along the south and west faces of the building. Entrances are located on either end of the legs (west and south) and in the corner of the L. There is a concrete sidewalk along the edge of the parking lot and in front of the building. Sidewalks extend to the three entrances. There is a concrete pad at the southern end of the parking lot. A trash container is located there. There is a concrete sidewalk that connects the pad to the sidewalk in front of the building. Light posts are located along the sidewalk: two along the north leg, one in the corner, two along the east leg, one in the inside corner of the parking lot, and one next to where the sidewalk to the south entrance and the sidewalk along the edge of the parking lot meet.

9. Starting on or around October 14, 2021, Red Oak Management undertook a construction project, which involved removing and replacing sections of concrete sidewalk and the concrete dumpster pad. Westveld Services, LLC was hired to perform the demolition, excavation, and replacement of the concrete flatwork. Westveld relocated the dumpster to a grassy area at the south edge of the parking lot and to the west of and near the area where work was being performed. On or around October 21, 2021, Westveld completed their work and left the jobsite. Trenches that were created for their wood formwork were partially filled in with sand and

asphalt millings. Randy Westveld, who performed the work, stated that only the front edge of the concrete pad had been formed with formwork. The other sides were poured directly against the soil. He described the trench in front of the concrete pad as three (3) inches deep and ten (10) feet wide. He agreed that it was a trip hazard. Westveld testified that they used caution tape at the end of each day except before leaving the jobsite when he did not guard the active construction site with caution tape. He anticipated the asphalt contractor to be at the job site within a couple of days

10. Eric Koch is a "construction specialist" for Red Oak Management. He inspects and maintains 44 properties for Red Oak. He has been in the construction industry since 2014 and was a licensed general contractor in the State of Michigan at the time of the incident. Koch was responsible for hiring and managing the contractors for the concrete sidewalk and dumpster pad replacement project. He testified that there were no discussions about the use of yellow caution tape before the start of the job. Koch inspected the work performed by Westveld on October 21, 2021. He stated that there were no cones or yellow caution tape placed around the unfinished construction project. He did not instruct Westveld to guard the area with cones or yellow caution tape. He did not instruct any of his maintenance personnel to put out cones or yellow caution tape. Koch stated that the trench was a trip hazard. He believed the trench to be an obvious hazard and agreed that placing cones and yellow caution tape would make it more obvious.

11. In addition to relying upon the available discovery in this matter, Mr. Kerelis will rely on his education, training and experience in the design and construction of multi-family residential buildings and parking lots and the management of multi-family residential rental properties. Mr. Kerelis will cite codes, relevant industry standards, and standard practices applicable to the

inspection, maintenance, guarding and warnings on construction hazards, and parking lot lighting.

12. The standard of care for a property owner, manager, and their subcontractors includes maintaining safe premises for tenants and their guests. It includes ensuring that areas under construction and their associated hazards are guarded and warned against.

13. I anticipate that Mr. Kerelis will offer expert opinions relating to the construction, operation, and maintenance of the residential rental property where Ms. Bowerman fell and was injured. Mr. Kerelis is expected to testify within the bounds of reasonable architectural, property management, and technical certainty, and subject to change if additional information becomes available, that:

a. The trench was inconspicuous in the underlit parking lot and was a dangerous trip hazard.

b. Those responsible for the construction site should have known that not guarding against or providing warnings of the hazardous condition was dangerous to residents.

c. The failure of those responsible for the construction site to prevent residents from encountering the trench did not meet the standard of care for construction site safety and exposed residents to the dangerous condition that caused Ms. Bowerman's fall and injury.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

vs. Case No. 22-S-28824 NO

RED OAK MANAGEMENT CO., INC.,
WESTVELD SERVICES, LLC and
BOB'S ASPHALT PAVING, INC

Defendants.

_____/

The deposition of ALBERT KERELIS

Taken Remotely Via Network Reporting

Commencing at 3:00 P.M.

January 17, 2023

REPORTER: Julie K. Sleboda, CSR 0140
Independent Contractor for
Network Reporting Corporation
Firm Registration Number 8151
1.800.632.2720

APPEARANCES:

MICHAEL E. FREIFELD
JOHNSON LAW, P.C.
140 East 2nd Street
Suite 201
Flint, Michigan 48502
Appearing on behalf of the Plaintiff.

DANIEL J. JAMES
WHEELER UPHAM, P.C.
250 Monroe Avenue NW
Suite 100
Grand Rapids, Michigan 48503
Appearing on behalf of the Defendant Red Oak Management.

JUSTIN L. COLE
SECREST WARDLE
2025 East Beltline SE
Suite 600
Grand Rapids, Michigan 49546

Appearing on behalf of Defendant Westveld Services.

I N D E X

January 17, 2023
3:00 p.m.
Via Zoom
* * * * *

ALBERT KERELIS
after having been first duly sworn by the Notary Public, was examined and testified on his oath as follows:

EXAMINATION

BY MR. JAMES:

Q Thank you. Good afternoon, my name is Dan James. I represent the defendant, Red Oak Management and we are here today for the deposition of Albert Kerelis.

Mr. Kerelis, that is your name, correct?

A My full name is Albertas J. Kerelis, Jr. A-l-b-e-r-t-a-s. I go by Albert.

Q Thank you. Have you given a deposition before?

A Yes, I have.

Q Approximately how many times?

A I'd say about 17 times in the last three years.

Q All in your capacity as an expert in lawsuits?

A In my employment for Robson Forensic, yes.

Q Okay. So you know the drill as far as this

goes. Obviously, if you don't understand one of my questions, let me know. Do your best just to wait for me to finish the question before you give me your answer. If you don't understand my question, let me know. If you need a break, let me know. All pretty standard protocol, correct?

A Correct, yes.

Q All right. Well, Mr. Kerelis, I wanted to briefly go over your C.V. that was provided to us. You presently work for Robson Forensic; is that right?

A That's correct.

Q And you've been in that capacity since 2019?

A Yes.

Q Did you ever work as an expert in lawsuits, legal matters, prior to working for Robson?

A I did on a handful of occasions, mostly in construction claims, construction defect type cases.

Q Your C.V. mentioned that, it looks like you still work for Facilities Design Group; is that correct?

A That's correct.

Q Tell me about that.

A That's really just on a consulting basis. I

don't draw a salary from them. I'm a partner there so anything that I do for the firm benefits the firm. So I'll do what's call red lines where we go over construction documents to make sure that there's no errors and omissions. I'll do structural calculations, I'll do some code consulting, some design consulting at times, whatever I'm asked. But it's not on a very regular basis.

Q So approximately what percentage of your time is spent with Robson versus Facilities Design Group?

A Facilities Design Group would probably only be about five percent of my time, maybe ten at the max. But that's outside of the full-time that I work at Robson.

Q Understand. And so you have a Bachelor of Science and Master of Architecture; is that right? And your Bachelor of Science was in architecture?

A Yes, that's correct.

Q Okay. And then you've got various letters after your name, AIA, that's -- tell me what that is.

A That's the American Institute of Architects.

Q Okay. And what does --

A That's an organization that is -- educates architects with continuing education, advocates for architects at the state and local and federal levels. It honors architects for their achievements. It's just a place for architects to come together and share their ideas and their experiences.

Q Sure. But the fact that you have the letters after your name means they certified you or licensed you?

A Well, it means that I am a licensed architect. In order to be in the AIA, I am to be a licensed architect and, again, it's a national organization that's recognized throughout and it's a -- the reason to put that there is to show that I'm a member of the architectural community.

Q What about the next set of letters, NCARB?

A So that's the National Council of Architectural Registration Boards. For that organization, I did have to submit paperwork and they had to accept me into that organization to show that I've had experience and training outside of my education and training in terms of meeting certain training requirements while I was an

intern as an architect. And that organization allows me -- assists me and allows me to become licensed in other states.

Q And then the last set of letters, ARM.

A Sure. That's the Accredited Residential Manager. That I received from the Institute of Real Estate Management. They are an organization that promotes education and ethics in the property management industry. They're a national organization. They've been around since the 1930's. And that was a -- eight to ten different courses over a long period of time, exams after each course and a final exam in order to gain that accreditation.

Q And that's in regards to real estate management; is that correct?

A Residential real estate management, correct.

Q Okay. One of the things I noticed on your C.V. that you've identified as an area of expertise includes conspicuousness of hazards. And I wanted to ask you about that. What, in your opinion, qualifies you as an expert in conspicuousness of hazards?

A So, as architects, we are charged with designing buildings for the life, health and safety of

those that are in the built environment, so that would be the general public. In that, we have to design buildings so that they are safe for people and then, in turn, we recognize what a hazard is and so, therefore, we don't design those. And then when we are -- in my capacity as well, I've done investigations of existing buildings, identifying areas that are not code compliant or are hazardous and need to be repaired.

Q Okay. You're not an engineer; is that correct?

A I'm not a professional engineer. I don't have an engineering degree or a license.

Q Okay. Have you ever been qualified by a court as an expert in conspicuity in the past?

A I've only been in trial a couple times and I don't think that either of those really related to conspicuity. One of them had some of that but it was a staircase, an exterior stair, where the defect was not conspicuous, not visible.

Q Okay. So you just touched on something I did want to ask you about. So you've been to trial two times; is that right?

A That sounds about right, two or three times. Yeah, one was an arbitration.

Q Okay. Do you maintain a list of the cases you've testified in?
A Yes.
Q I'm going to ask that that be provided to me so that I can take a look at that. And that list will identify the names and the locations and case numbers; is that right?
A That's correct.
Q Have you ever been stricken as an expert in the area of conspicuity in the past?
A No.
Q So the basis for being an expert in conspicuity is in your education and training and experience as an architect. Does that somewhat summarize what you described to me?
A Yeah, that's true. And I also have taken a course with the National Safety Council called Principles of Occupational Safety, Health and Safety. And that was also a week-long course where we had certain exercises where we talked about hazard recognition and how to then mitigate those hazards.
Q Is there a difference between the way you use the word recognition of a hazard versus seeing a hazard?

A Well, there -- sure. So this is more -- that course was more related to workplace environments specifically but it also was just in general. And so when you are performing, let's say, an inspection of a place, you are there to recognize a hazard. When you are simply a pedestrian or a person who is walking -- you know, obviously, a pedestrian is someone who is just walking through an area. If you were just a general person in the general built environment, you are not there particularly inspecting for hazards and so the point of when you recognize a hazard as an inspection, you want to either design it out, you will either want to eliminate that hazard or if you can't, you're going to guard against that hazard or you're going to warn against that hazard so that others then will not encounter it.
Q The course that you mentioned as having taken that sort of informs your expertise in the area of conspicuity, is that listed on your continuing education list on your C.V.?
A That should be listed. I don't know when Mr. -- I don't recall when I was retained for this case.
Q This one is dated June 22, 2022.
A I believe I took that course later than that, after that.
Q Okay.
A I can get you a more current C.V. as well if you need it.
Q All right.
A But also in the course of my property management career, there was many times where I conducted inspections to find, for hazardous conditions that would need to be eliminated.
Q As an expert with Robson, what percentage of your time is spent on files for plaintiffs versus defendants?
A So it's currently my -- it's 70 percent plaintiff and 30 percent defense. And that's been true for pretty much the entire time I've been here.
Q Have you ever provided your expert services to the Ven Johnson Law Firm in the past?
A No, this is the first time.
Q How many cases have you handled in Michigan prior to this one?
A Maybe only one or two. There haven't really been very many in Michigan.
Q And where are you located presently as you're giving this deposition?
A I'm in the Chicago offices of Robson Forensic.
Q So do you have a file with respect to this case?
A I do.
Q Can you tell me what's in your file?
A I have the materials that Mr. Freifeld sent to me for my review. I have my disclosure. I have my notes on those files, on the information, discovery information that was sent to me, and I have research documents that bolster my opinions.
Q All right. I want to just go through that. So we'll start with your disclosure. And I guess we've talked about your C.V. and we'll mark your C.V. as Exhibit A and just -- it will be the one that was previously provided to me. But I will just share it all with you briefly and we'll mark this as Exhibit A.
(Exhibit A marked for identification.)
Q So you mentioned a disclosure and I want to share what was provided to me in that regard. And I'm just looking for it.

All right. Mr. Kerelis, when you mentioned your disclosure, were you referring to this document here?
A That looks like the document, yes.
Q Did you author this document?
A Yes.
Q And then you had mentioned that you reviewed documents from Mr. Freifeld and I'm looking at paragraph five of your disclosure. You've identified the complaint, Red Oaks answers to interrogatories and request to produce including photos, Defendant Westveld's answers to interrogatories and request to produce, deposition transcripts of Jan Bowerman, Chelsea Shuckerow, Eric Coke, Heidi Reid, Michael Radford and Randy Westveld. And then photographs taken of the incident location by Ms. Bowerman's brother. Is that all the documents that Mr. Freifeld provided to you?
A Yes.
Q And so those are the documents you're referring to when you said the documents he provided you, correct?
A That's correct.
Q And then you said you have your notes from

reviewing those documents; is that right?
A That's correct.
Q And then your research, tell me about your research materials.
A Would you like me to list them all out for you?
Q Yes.
A So I have ASTM International F1637-13, standard practice for safe walking surfaces. I have the City of Stanton zoning ordinance. I have the international -- I'm sorry, the Illuminating Engineering Society's lighting for parking facilities publication, issued in 2014. I have the Property Management 9th Edition by Robert C. Kyle.
Q Can you repeat that one please?
A Sure. Property Management 9th Edition by Robert C. Kyle, published by Dearborn Publishers.
I have the American National Safety Institute's standard for construction and demolition operations. That's ANSI/ASSE A10.34-2001, revised 2012. Actually, it's called protection of the public on or adjacent to construction sites.
And then I have the Manual of Accident Prevention for Construction, 9th

Edition, published by the Associated General Contractors of America.
I have some notes, some research for the local ordinances, City of Stanton ordinances and State of Michigan statute regarding residential premises, leased or licensed residential premises. And I have the BOCA National Building Code of 1990.
Q Let me make sure -- I'm not going to ask you to repeat all of them but it looks like you identified nine sources; is that right?
A I didn't count them. One second. Yes, if you separate the Stanton ordinances and the State of Michigan, yes, then nine.
Q Okay. Did the documents that Mr. Freifeld provided to you include a blueprint of the Stanton Park Apartments?
A No.
Q Were you provided the -- there was a self evaluation needs assessment and transition plan prepared by E&A. Did you review that?
A No.
Q You did your inspection at Stanton Park Apartments on December 16, 2022, correct?
A That is correct.

Q And you took light meter readings at various spots on the premises, correct?
A Yes.
Q Tell me about your light meter. What kind is it?
A Oh, I don't recall offhand which brand we have. Robson Forensic maintains a laboratory at our headquarters in Lancaster, Pennsylvania and we have a number of light meters that the lab technicians there will calibrate and inspect and then send to us. I don't recall offhand which of those light meters I had in my possession. We do have a record of that, though, if you --
Q Okay. So there's a record of their calibrating the light meter before it's sent to you?
A I don't know what records they have on those light meters. I can -- we can request that but that is -- I don't know how often they calibrate those. Whatever the instruction manuals require, they do follow those procedures.
Q So the numbers, for example, the light meter reading you took inside the hallway -- and Justin wasn't there but I was there and Mr. Freifeld was there -- it's identified as 5.9 FC. What does FC mean?

A So FC stands for foot candle, which is a unit of light measurement. Basically, it's an old explanation where what a candle, a single candle, the amount of light it would give off one foot away from the flame.

Q And the light meter you were using, does it only provide you with a measurement to tenth of a foot candle or does it provide hundredths or even thousandths or more than that?

A It only provides a tenth of a foot candle. That's what the most standards, when they provide you with foot candle measurements, it will be to the tenth.

Q And you took photos of each reading; is that right?

A That's correct. So the meter has a function where it captures the light and provides you with a reading. You can pause that or you can put a stop to that so that you can then document the light meter reading without affecting the reading itself. So when I took a photograph of it with my flash, you know, my flash would go off, the flash would not affect the light meter reading because I paused that reading.

Q Got you. So when you took a picture of the

light meter reading in the inside hallway, the light meter displayed 5.9 and that's what would show up in your photograph, correct?

A Correct.

Q Not 5.91, correct?

A That's correct.

Q You explained this function it had so that you could take a picture and then -- or you could take a reading, it would sort of hold the reading so you could take a picture of it. What would happen if you didn't set that function on and you -- how would it work then?

A Right. So if I took picture with a flash, then the reading -- the flash would affect the reading so obviously it would jump up.

Q Yeah, I think my question wasn't clear. I was just curious, explain to me how this works, though. Forget about taking a picture. If you take a reading, how long -- does the number stay on the screen for a certain period of time anyway?

A Oh, right. So it would stay on the screen. And so when you initially set the reader down, you set it away from the meter itself and the -- and, therefore, you stand back so that you're

not obstructing light, for the eye to take the light in and get its reading and when you start that, the numbers will move around a little bit and you wait until that stabilizes and stops and then I engage the hold function.

Q So you get your reading, you approach the meter, you engage the hold function and then you take your picture?

A Yes.

Q Got you. So there's a number of different -- we've got, you know, 5.9 inside the hallway. Obviously, that was the brightest spot because we were inside the building with the lights on, correct?

A That's correct.

Q All right. And then you had two readings that were 0.0 FC, foot candle, and that was at the incident of the location, and then also in front of where the dumpster was located at the time of the incident. So 0.0 doesn't mean pitch black, does it?

A 0.0 means there was no light entering the meter.

Q Okay.

A So there's a function of the way the eye works. So we can be in an environment --

Q Mr. Kerelis, let me just clarify. When you say the eye, do you mean the eye of the machine or our own eye?

A Yes, the eye of the machine is no longer taking in any light. It is not registering any light coming in. Is that pitch black? Depends on the viewer, depends on how long the viewer has been in that dark environment of what they can discern in that dark environment.

Q Well, I mean, the ability of somebody to see, I mean, that's sort of independent of a light meter reading; isn't that correct?

A Well, in a way that is correct. I'm sorry, can we just pause? I think there's some feedback happening here. I think something might not be muted.

(Off the record.)

Q Well, what I asked was, you had given me an explanation that what is pitch black, you know, depends on what a person can see and that answer was given in response to my question about 0.0 didn't mean pitch black. And then I had asked you, well, isn't it true that what somebody can see is, you know, independent of a light meter reading even if it's 0.0?

A So there are standards that are set by the Illuminating Engineering Society that state what -- and research that has been done -- of what people can, you know, what light levels are needed for people to be able to see certain things, either it be a safety item or a security item. And so they, through years of research, have come up with standards of what would be acceptable lighting levels so that hazards can be recognized in certain environments, so especially at night when there are artificial lights on.

Q Well, my question is more, the fact that your light meter reading says 0.0 does not mean that a person cannot see anything in that environment; is that correct?

A Well, that's a very complicated answer because the ability for someone to see at night has a lot of factors, from age to then also how long they've been outside at night or in that dark environment. So coming from a lit environment into a dark environment, it takes time for eyes to adjust to that darkness, for our cones and rods, for light receptors in our eyes to be able to adjust to that new light or low light level

or no light level. And that varies then from person to person and it varies much so with age as well.

Q When you were out there in the area of the incident and in the area in front of the dumpster, were you using a flashlight so that you could see where you were walking?

A No, but I also had been out in that environment since 4:30 that evening so I had been outside that whole time and my eyes adjusted to that light level because I had been out there for that long period of time waiting for the sun to set and waiting for it to become -- for the sky to be dark.

Q So are you qualified as an expert to provide an opinion as to how long it takes any particular person's eyes to adjust to light?

A Not any particular person's but I am an expert in what is required for lighting levels and have the understanding that not all -- what those standards are based on. I did take a entire semester on lighting at University of Illinois. I have done some parking lot lighting design, maybe once or twice. I've done interior office design for lighting levels and when, you know,

laying out light fixtures, of what patterns, so that you have proper lighting on a work surface, in a bathroom, in a rest area or in a hallway, what's required. So I do have that understanding of what the standards are and how they're derived and what affects those -- how those standards are arrived at.

Q You're not offering an opinion in this case that Ms. Bowerman's eyes hadn't adjusted to the light levels in the parking lot at the time this incident happened, are you?

A Well, I can say that, understanding that she did say that it was very dark out there, based on her testimony, she could not see where she -- it was very difficult for her to see where it was, and that the -- even the lighting levels that are recommended by the Illuminating Engineering Society, they state that they are not applicable to anyone over the age of 60, because all these standards were based on people under the age of 60 that -- and they do say that it can take up to tens of minutes for someone's eyes to become adjusted. And, again, that is based on someone 60 and under.

Q But as it applies -- I mean, you read Mrs.

Bowerman's deposition transcript. You don't know what her level of vision is, do you?

A I don't know what her level of vision is but I do know that she stated that it was dark in that parking lot and she was only able to see the dumpster because of some light reflecting off of -- was it a sticker or something on it that had a reflective -- that had reflectiveness to it and so she was able to identify where it was solely based on that.

Q So you've sort of touched on this, but your disclosure states that the parking lot was under lit. So what is the standard for parking lots and where does it come from?

A Right. So ASTM International is an organization -- we'll start with them -- they're an organization, they are a national organization that creates consensus standards and one of their standards, as I mentioned, F1637-13, standard practice for safe walking surfaces -- could I share my screen so I can show this? Would that be helpful?

Q Sure.

A Can you see that? Does that work?

Q Yes.

A Okay. I just want to make sure that that was -- so this is just a practice that covers design construction guidelines and minimum maintenance criteria for new and existing buildings and structures, and it's intended to provide reasonably safe walking surfaces for pedestrians. And so they just talk about walkways and they talk about walkway hazards so what constitutes a trip hazard is anything over a quarter inch.

They have a section on illumination and here it reads, minimum walkway illumination shall be governed by the requirements of local codes and ordinance or, in their absence, by the recommendations set forth by Illuminating Engineering Society of North America.

Now, this Illuminating Engineering Society of North America, their publications are something that I'm familiar with that we used in our classrooms and that we -- that I used in determining the correct lighting levels for office spaces and for parking lots.

The City of Stanton and its zoning ordinance that was effective December 1st, 2018 -- let me get to that section. One second

please. This is just definitions. Apologize, it takes a moment to get to these. So they have a section on lighting requirements, section 3.26, and they say parking lot lighting shall be -- is required in chapter 17, and then they do talk about in commercial industrial zone. So their lighting standards are really more about not letting light spill off of a property. But at the same time, they do say that your measurement standards, they should follow the measurement standards of Illuminating Engineering Society of North American, shall be used. Can you read that? Do I need to enlarge that?

Q No, I can read that. And the Illuminating Engineering Society of North America is what was referred to in the previous document; is that right?

A That's correct. So there are several now, you know, authorities that are saying that this organization, follow their, you know, measurement standards, follow their standards for lighting, that this is, you know, these are the authority on illuminating parking lots and so forth. They have the authority on that.

Q Let me interrupt you a second.

A Sure.

Q At the beginning of that section F, doesn't it say commercial and industrial and non residential?

A Yeah, so this is -- what I'm simply stating here is that the city ordinance and the City of Stanton recognizes that the Illuminating Engineering Society of North America has some authority here, because they want you to use their measurement standards even if it's in commercial industrial zones. I'm not referencing that section. All I'm pointing out is that they are aware of the organization and that they provide the standards for lighting.

Now, chapter 17 doesn't really inform me too much about what the lighting should be. It's really more about that they don't want light spilling out from an area into another. They're concerned about light pollution. So here, they just want lighting fixtures to be arranged so as to deflect the light away from any adjoining residential properties or streets and highways, they limit the height, and they want total luminary cutoff, basically they want

at the property line that -- at the property line, so that there would not be light spilling out onto other properties.

So they're not giving us a specific illuminance for the parking lot. So in absence of that, I am relying on the Illuminating Engineering Society's lighting for parking facilities, their latest one that is 2014. And their standard discusses that -- it just talks about parking facilities that, or extension of the roadway surface may include open surface parking lots, the kind that we have here in this situation. And the purpose of the document is to provide recommendations for the design of fixed lighting for parking facilities. And it does represent current good practice. That's their last sentence.

Q So what does this document say is the standard for illumination in a parking lot?

A Sure. So, again, it's for reasonably safe movement of pedestrians and parking facilities. So they have -- and here's a section about eye adaptation. It talks about going from light to dark areas. Age factors, again, that this is -- it is assumed that most are below 65 years of

age and yet Ms. Bowerman was 75 at the time of the incident. They say that design methods should, you know, result -- they should double the recommendations for older populations, so let me just get to that table.

So this is table two. This is illuminance recommendations for parking lots, illuminance recommendations for active parking facilities open to the general public. So they give here -- this is asphalt surfaces, post, pre-curfew five lux, they use lux instead of foot cancels. I'll show you where that translates. And then two is post-curfew and so that's just a time when no one is going to be using that facility or you're not anticipating anyone using that facility. And for concrete surfaces, they want to see a ten lux on that surface. So this is for, so that's safe use of that parking facility. And that, those numbers, ten lux is equivalent to one foot candle and five lux then is 0.5 foot candles and they provide that in another section of this document.

Q Just so I'm clear, what is the standard for an asphalt parking lot?

A So that would be 0.5 foot candles.

Q And does that mean it needs to be 0.5 at every location on the parking lot or is that an average?

A So that is -- so the average to minimum is four to one, max is fifteen to one. So they want to see -- but zero is not an acceptable number.

Q I just want to make sure I have an answer to the question --

A Right, so there is a range that you can have but 0.5 is what you're looking for.

Q Okay. So if the standard is 0.5, does that mean, is that an average in the parking lot or is that 0.5 everywhere?

A That would be 0.5 everywhere.

Q And does that take into consideration -- and that's the parking lot is otherwise empty; is that correct?

A So if your light stanchion is raised above a certain level and it does take into consideration that there could be automobiles or other obstructions in there -- and, I'm sorry, 05. is a minimum. My apologies. 0.5 is the minimum requirement for the parking lot. It can --

Q Yeah, I figured that.

A Yeah, I'm sorry. Yeah, I said average. It's the minimum for the parking lot. And, yeah, it's recognizing that that's why it's the minimum because it does recognize that there are going to be areas where a car might obstruct a light post, might cast a little bit of a shadow somewhere, but 0.5 is the minimum that they want to --

Q So circling back to my question --

A -- for a safe parking lot.

Q And that's if the parking lot is empty, correct?

A No, this is going to be mixed with pedestrian and vehicular activity.

Q All right. So if an automobile casts a shadow and you set your light meter down in the shadow, it's still supposed to read 0.5, according to these standards.

A Right. So that would be a spot reading and, yes, they want to see a 0.5 in that. In post-curfew, there's less use, that can go down to 0.2.

Q What is curfew? How do they define when --

A I read through the entire document several times and they don't really define curfew very well.

It's at a time when you would think that, anticipate that no one would be using the facility or there would be very little use of the facility.

Q You can stop sharing that now.

A Okay.

Q Unless there is more to it. But, yeah, my question was, and I think we covered it, but it's under lit because this IES document says that 0.5 is the minimum for an asphalt parking lot; is that right?

A That's correct, and it was 0.0.

Q Now, was there anything in the City of Stanton zoning ordinance that you showed me that says it is the law under the City of Stanton that you must have lighting in a residential property that complies with that IES document?

A It does not. It does not state that. They only gave that as a reference for measuring lighting. And, again, they were just giving for zoning ordinance, they just didn't want light to spill out onto adjacent properties.

Q Did you review -- you did not review any Montcalm County rules or laws or ordinances or anything like that, did you?

A I attempted to. Their website does not function.
Q Okay.
A I went there and couldn't --
Q What about -- sorry to step on you there.
A That's okay.
Q What State of Michigan law did you look at?
A I was not able to find any particular -- a law in the State of Michigan for the lighting standard.
Q Okay.
A And, therefore, with the absence of one, the standard would be to follow the IES. And that is my experience here where I have done parking lot lighting and office lighting, there are no codes necessarily set for those and so we just use what the good standard and practice would be set by the IES.
Q So there is no local or state law stating that compliance with the IES document in regards to parking lot lighting is the law; is that correct?
A Not that I'm aware of.
Q And there's no local or state law that says, because we haven't said anything on it, what's

stated in the IES document is the law, nothing like that either --
A No, but my experience would be that you would use an architect or anybody, a planner, electrical engineer who is designing that or maintaining that would reference the IES for what kind of lighting they want or how to design their lighting.
Q All right. At the -- at your inspection, did you do anything else other than take the light readings?
A That was my main purpose of my site inspection, was to take light meter readings.
Q And have you taken or do you have otherwise measurements of the property at all?
A No, the only measurements I would have been interested in would have been the depth, the actual depth of trench or the face of the concrete surface but that already had been -- that work had already been completed and there was nothing there for me to measure.
Q Let's talk about the trench. You do not have measurements of the trench; is that right?
A Yes, I only have some comments made by Randy Westveld, his estimation as to the size and

depth of the trench, and I think he was the only one that might have given that. I don't know if Mr. Oak, is that how you pronounce his name?
Q Coke, yes.
A Coke. I don't recall if he gave measurements or not but --
Q But you're just talking about what people testified to in their depositions.
A Right, and looking at the photographs that was -- you know, tripping hazard, we can refer back to that ASTM standard and anything over a quarter inch is a -- it's considered a tripping hazard. That's also considered that way by the ADA, that same measurement, and it was apparent to me that that was over a quarter of an inch.
Q Are there any local or state laws that define what a trip hazard is as you've characterized the trench?
A The only one I'm aware of is -- well, the ADA talks about walkway safety and that anything over a quarter inch should be mitigated.
Q I want to go back to the lighting issue a minute. So if the lighting had been 0.5 at the -- where the trench was, would that, in your opinion, have prevented this accident from

happening?
A Not necessarily. It depends. It was still an active construction site in a construction zone where there were hazards present and it's my opinion that it should have been guarded against as any active construction site should be and that is based on codes and standards as well.
Q Fair enough. I'm focusing on the lighting issue here. And so is it fair to say that you don't have an opinion whether or not Ms. Bowerman would have seen the trench if the light meter at that location had been 0.5 foot candles.
A Yeah, I can only say that it confirms that what she said, the parking lot was dark and she could not see, that the fact that I got a 0.0 foot candle reading at that location confirms that it was dark and it was under lit compared to what the standards say that a parking lot should be.
Q Okay. I want to show you, this was Exhibit 8 or, I'm sorry, Exhibit A-8 in Ms. Bowerman's deposition, and you may have seen this before. This photo was used in her deposition as well as the depositions of some or all of the personnel from Red Oak. Let me pull it up here. Hang on a second.

All right. Mr. Kerelis, can you see this photo?
A Yes.
Q You've seen this photo before?
A Yes.
Q And you can see the cement pad on this photo, correct?
A I can, yes.
Q Can you see the trench on this photo?
A I cannot see the trench. I can see the edge of the concrete pad but I cannot see the trench.
Q Does the fact that you can see the edge of the concrete pad indicate that there's space in front of it?
A It could just be raised.
Q Generally speaking, other than the opinions that the parking lot was under lit and the trench was a trip hazard, are you providing any other opinions in this case?
A Yes. So that the -- that construction area, that trench, any areas that were trenched should have been warned and guarded against by the people, by the contractors or the management for the safety of the residents and the public in general.

Q And what do you think should have been done?
A So Mr. Westveld had stated that he had, during the course of the construction, used caution tape and perhaps cones to warn and guard that area. I believe that those caution tapes and cones should have remained until the work was complete, until the asphalt in those trenches were filled and the tripping hazards were eliminated. So I believe there's a photograph that was used in the exhibits that showed some caution tape and that was -- that would be an acceptable solution.
Q So what do -- and you've said there is no local or state laws on this issue, correct?
A No. No, I did not. So the City of Stanton has a rental house ordinance, number 192, that states --
(Off the record. Mr. Cole temporarily loses connection.)
BY MR. JAMES:
Q So you were explaining to me about a Stanton rental housing ordinance, 192 something.
A Yes. Can I share my screen with you again just so it will be easier for everyone to view that?

Q Yes.
A So this is just an excerpt from their ordinance, ordinance number 192, rental housing. It's to, you know, the purpose of this ordinance, to regulate rental dwellings for the purpose of maintaining adequate sanction and public health to protect the safety and welfare of the people. They talk about application of building codes which would be enforced, that they should follow all applicable building codes, and they define that the building code is the BOCA 1990 edition, officially adopted by the City of Stanton and the County of Montcalm for the regulation of construction, alteration, repair, removal demolition, maintenance of buildings and structures.
And so the BOCA 1990 code has protection of public and workers, and section 3006.0, wherever a building or structure is erected, altered, repaired, removed or demolished, the operation shall be conducted in safe manner and suitable protection for the general public and workers employed thereon shall be provided.
So that is a section from the code

that's adopted. And then also it said during maintenance that the safeguards -- construction equipment and safeguards, the safeguards themselves should be constructed and installed and maintained in a substantial manner to ensure the protection to the workers engaged thereon and to the general public. So that's talking about the safeguards themselves should be well built and maintained.
Q And safeguards refers to caution tape and cones?
A Yes, it does. In my opinion, it absolutely it does. There are other standards that refer to that, even property management -- no, I'm sorry, not the property management, the American National Safety Institute says that during a construction project, there should be a public hazard control plan. You know, it doesn't necessarily mean something in writing, but that something that, when hazards are identified, they should be -- there should be a control plan so that they're not -- people aren't encountering them.
They say that at all times during construction, those areas designated for public pedestrian traffic shall be clearly delineated

and the areas shall be maintained so hazards that may cause slipping, tripping or falling are minimized so that the public should be protected.

So this is a guide that's intended for the protection of the public during construction activities and it's the responsibility of the project constructor to implement them as well as the American -- Association of General Contractors of America, they state that, first of all, that planning and controlling are basic functions of management, that they recognize the general public is often impacted by construction operations. The nature of the work may create concern about potential damage to property and the public.

Things they recommend is to contact area residents, advise them of the work to be done and that, protect people in the area, provide adequate fencing around work and barricade all excavations.

So those are standards that would speak to protecting the public during construction activities.

Q Other than the BOCA document that you shared

with us, these other standards that you've been referring to, they're not referred to in the Stanton rental housing ordinance, are they?

A No, they are not. But the BOCA code only gives so much information and then contractors will rely then upon the standards that are issued by ANSI, ASTM and other such organizations on good practice on what those -- how to implement the code.

Q Other than the Stanton rental housing ordinance, are there any other local or state laws that you referred to in connection with your opinion about cones or caution tape around this trench?

A I mean, the state also has a provision 554.139 that simply reads that -- that's section B -- to keep premises in reasonable repair during the term of the lease and to comply with adequate health and safety laws of the state and of the local unit of government where the premises are located. So, basically, it's just saying comply with the City of Stanton laws which is the BOCA code, which they refer to as the BOCA which talks about maintaining a safe -- sorry, to suitable protection for the general public. So suitable protection then is defined by standards

and not necessarily by the codes.

Q So are there standards then -- because we covered some more, I'd call it general provisions -- is there anything that says you need cones versus caution tape and, if cones, how many cones, how close together they have to be, anything like that?

A No, there is not.

Q Have you, in any of your previous cases you've handled as an expert, provided opinions regarding the sufficiency or insufficiency of lighting?

A I have a number of cases that refer to sufficiency and insufficiency of lighting. I don't know if I've been deposed on any of those right now. I don't recall. But I do have a number of cases that -- where I have taken light meter readings for that purpose.

Q All right. So I think we've covered three, generally speaking, opinions you'd be providing in this case: One, under lit parking lot; two, the trench is a trip hazard; three, there should have been cones or tape around this trip hazards. Are there any other opinions you're going to be providing in this case?

A So at this time, no, those three opinions that are listed in my disclosure are the three that I would be testifying to which include the responsibility of the construction site, those responsible for the construction site should have done that guarding and warning.

MR. JAMES: Mr. Kerelis, that's all I have at the moment. Mr. Cole may have some questions for you and I may have a couple follow-ups after that. Thank you.

EXAMINATION

BY MR. COLE:

Q Hi, Mr. Kerelis. My name is Justin Cole. I represent Westveld Services. Just a couple brief follow-ups. This won't take long.

You would agree with me, sir, that your criticisms of Westveld do not involve the lighting situation, right? We can agree they had no control over the lighting situation of the parking lot?

A They had no control. Mr. Westveld said he had never even been there at night.

Q And then your criticism of Westveld is that they should have kept up cones or tape after they were done with their work, right?

A That's correct.
Q Even after they were done and weren't planning on coming back?
A You know, they said that they do a lot of work for Red Oak and, yeah, I mean, it's just caution tape and some lumber that's part of the cost of the job of, you know, when you're doing a job that you're going to eat that cost of your caution tape and some lumber.
Q As far as the caution tape or cones, in your opinion, where should those have been set up? By that I mean on the actual concrete pad or in front of it before someone would encounter that trench?
A Well, I wasn't asked for, to give those kind of opinions. You know, there's a photograph, again, that shows caution tape placed in the trench that could have been at the edge of the trench to prevent, you know, to alert people to that. The cones could have been on the trench covering it. The trench was -- you know, cones as described by Mr. Westveld would have been large enough to completely cover that and placed at regular intervals to provide warning and guarding against it. They could have been in

front, on top, not behind.
Q What do you mean, on top? I guess I'm not entirely clear on that.
A Well, if you look at the picture, there's a couple pictures of the trench. The trench was about, I don't recall, about six inches wide or so and the base of the cone would have covered that trench completely. That would have been, you know, a good way of then warning or barricading people from encountering it.
Q Are you inferring that they should have -- we can agree the trench was only on the front part of that concrete pad, right?
A Well, it was -- at the easement location, yes, there were other trenches then along portions of the sidewalk as well.
Q Understood. So to cover it, and forgive my ignorance here, maybe this is a stupid question, maybe it's not, are you saying they should have put cones across the entire stretch of the trench to completely cover it from one side to the other or just several cones or a few cones?
A I stated they could place them at regular intervals and I said either on the trench itself or in front of the trench in a way to guard

people from encountering the trench itself.
Q Okay.
A And with the combination of caution tape, that would have been a very clear warning and barricade for pedestrians.
MR. COLE: That's all the questions that I have, sir. I appreciate your time.
MR. FREIFELD: Nothing for me.
MR. JAMES: I'm good.
MR. FREIFELD: Thank you, gentlemen.
(Off the record.)
MR. JAMES: Just to clarify, the exhibits in this matter are Exhibit A, which was previously marked, and that's Mr. Kerelis' C.V. Exhibit B, which I think I referenced, is his disclosure and Exhibit C, which I may have failed to specifically mark is the photo that I shared with him that he looked at of the concrete pad and the trench in the dark. Good, everyone?
MR. FREIFELD: While we're still on the record, Albert, do you have a fee schedule?
THE WITNESS: It's a flat fee. It's listed in the -- in our contract.
MR. FREIFELD: Okay. Send me your

invoice and I will pass that along to Mr. James.
THE WITNESS: And then if we're -- off the record. There were some items you requested, Mr. James.
(Exhibits B and C marked for identification.)
(Deposition concluded at 4:15 p.m.)

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

I, Julie K. Sleboda, (CSR-0140), a Notary Public in and for the above county and state, do hereby certify that the witness, whose attached deposition was taken before me in the entitled cause on the date and the time and place hereinbefore set forth, was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony contained in said deposition was by me reduced to writing in the presence of said witness by means of stenography; that said testimony was thereafter reduced to written form by mechanical means; and that the deposition is, to the best of my knowledge and belief, a true and correct transcript of my stenographic notes so taken.

I further certify that I am not of counsel to either party nor interested in the event of this cause.

Julie K. Sleboda, Notary Public
Oakland County, Michigan
My Commission Expires: 11-18-2024

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As of: March 6, 2023 6:49 PM Z

VANDALL v. POST ELEC. CO.

Court of Appeals of Michigan

December 19, 1997, Decided

No. 198130

Reporter
1997 Mich. App. LEXIS 2044 *; 1997 WL 33330692

MONICA VANDALL, Plaintiff-Appellant/Cross-Appellee, v POST ELECTRIC CO., Defendant-Appellee/Cross-Appellant, and BROADCAST DESIGN & CONSTRUCTION, INC., Defendant-Appellee.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Oakland Circuit Court. LC No. 95-505792-NO.

Disposition: Reversed.

Core Terms

summary disposition, excavation work, obvious danger, inspected, barriers, premises liability, trial court, contractor, excavation, removal

Case Summary

Procedural Posture
Plaintiff pedestrian appealed from the judgment of the Oakland Circuit Court (Michigan), which granted summary judgment to defendant contractors, in the pedestrian's negligence action. A contractor cross-appealed the trial court's denial of summary judgment in its favor on additional grounds.

Overview
The pedestrian was injured when she stepped on ground which allegedly collapsed beneath her as a result of a recent project involving underground wiring which required excavation work. The trial court granted summary judgment to the contractors based upon its finding that the ground was an open and obvious danger. On appeal, however, the court reversed because the "open and obvious danger" doctrine applied to possessors of the land, not to independent contractors such as defendants. Even assuming that the defense was applicable to the contractors, it could not exonerate the contractors from liability because the claim was of the duty to maintain and repair the premises. The trial court also erred in granting summary judgment in favor of one of the contractors on the basis that it did not actually perform the excavation work because the claim of negligent inspection and supervision was not based upon the contractor's actual performance of the excavation, but of the contractor's inadequate inspection after the excavation was complete.

Outcome
The court reversed the judgment of the trial court, which granted summary judgment to the contractors in the pedestrian's negligence action.

LexisNexis® Headnotes

Civil Procedure > ... > Summary
Judgment > Motions for Summary
Judgment > General Overview

Evidence > ... > Documentary
Evidence > Writings > General Overview

Civil Procedure > Judgments > Summary
Judgment > General Overview

Civil Procedure > ... > Summary
Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary
Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] Summary Judgment, Motions for Summary Judgment

In reviewing a trial court's decision regarding a motion for summary disposition brought pursuant to Mich. Ct. R. 2.116(C)(10), an appellate court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. The court then determines whether a genuine issue of material fact exists on which reasonable minds could differ. The court reviews de novo a trial court's grant or denial of a motion for summary disposition. Although summary disposition is not favored in a negligence action, summary disposition is appropriate where the plaintiff has failed to establish a prima facie case of negligence.

Torts > Negligence > Elements

Torts > Negligence > General Overview

Torts > ... > Elements > Causation > General Overview

HN2[] Negligence, Elements

To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.

Torts > Negligence > Defenses > General Overview

Torts > ... > Elements > Duty > General Overview

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Government Officials

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Premise Owners

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

Torts > ... > General Premises Liability > Defenses > General Overview

Torts > ... > Duty On Premises > Invitees > General Overview

HN3[] Negligence, Defenses

The "open and obvious danger" doctrine applies to premises liability. Social policy imposes on possessors of land a legal duty to protect their invitees on the basis on the special relationship that exists between them. The rationale for imposing liability is that the invitor is in a better position to control the safety aspects of his property when his invitees entrust their own protection to him while entering his property. A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless risk of harm remains unreasonable despite its obviousness.

Torts > ... > Elements > Duty > Foreseeability of Harm

Torts > ... > Elements > Duty > General Overview

HN4[] Duty, Foreseeability of Harm

Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. Duty of care not only arises out of a contractual relationship, but it also arises by operation of law, a general duty owed by defendant to the public of which plaintiff is a part.

Torts > ... > Elements > Duty > General Overview

Torts > Negligence > Defenses > General Overview

Torts > Premises & Property Liability > General

Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

HN5 **Elements, Duty**

The defense of open and obvious danger relates to a claim of a duty to warn, but will not exonerate a defendant from liability where the claim is one of a duty to maintain and repair the premises.

Judges: Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the court's order granting summary disposition in her negligence action in favor of defendants Post Electric Co. and Broadcast Design & Construction, Inc., pursuant to MCR 2.116(C)(10). Post Electric cross-appealed, claiming that the trial court erred in failing to grant summary disposition in its favor on additional grounds. We reverse.

This litigation arises from injuries plaintiff suffered after falling in the parking lot of William Beaumont Hospital in Troy, where plaintiff was an employee. Plaintiff alleged that she had stepped onto ground which collapsed beneath her, causing her fall. There had been a project involving underground wiring which required excavation work in the parking lot prior to plaintiff's fall. Defendant Post Electric was the general contractor. Defendant Broadcast Design was a subcontractor who performed the excavation work. Plaintiff alleges that **[*2]** the trial court erred in granting summary disposition to both Post Electric and Broadcast Design based on its finding that the ground which allegedly caused plaintiff's fall was an open and obvious danger. We agree.

HN1 In reviewing a trial court's decision regarding a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. Stevens v Inland Waters, Inc, 220 Mich App 212, 214; 559 NW2d 61 (1996). This Court then determines whether a genuine issue of material fact exists on which reasonable minds could differ. *Id.* This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Id.* Although summary disposition is not favored in a negligence action, summary disposition is appropriate where the plaintiff has failed to establish a prima facie case of negligence. Richardson v Michigan Humane Society, 221 Mich App 526, 528; 561 NW2d 873 (1997). ***HN2*** To establish a prima facie case of negligence, a plaintiff must demonstrate that **[*3]** (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Id.*

The trial court in ruled favor of defendant Broadcast Design based upon its finding that the area where plaintiff fell was an open and obvious danger. ***HN3*** The "open and obvious danger" doctrine applies to premises liability. Social policy imposes on possessors of land a legal duty to protect their invitees on the basis on the special relationship that exists between them. Bertrand v Alan Ford Inc, 449 Mich 606, 609; 537 NW2d 185 (1995). The rationale for imposing liability is that the invitor is in a better position to control the safety aspects of his property when his invitees entrust their own protection to him while entering his property. *Id.* A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless risk of harm remains unreasonable despite its obviousness. Singerman v Municipal Service Bureau, 455 Mich 135, 142-143; **[*4]** 565 NW2 383, 565 N.W.2d 383 (1997); Bertrand, supra at 610.

We find that the trial court's reliance on the "open and obvious danger" doctrine, and on premises liability in general, was erroneous. Defendants here were not possessors of the land on which plaintiff's injury took place. Defendants were independent contractors hired by the landowner, Beaumont Hospital, to perform work on Beaumont's land. The duties and policy reasons behind premises liability which would apply to Beaumont do not apply to defendants.

However, defendants still owed plaintiff a duty of ordinary care. ***HN4*** Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. Osman v Summer Green, 209 Mich App 703, 708; 532 NW2d 186 (1995). "Duty of care not only arises out of a contractual relationship, but it also arises by operation of law, a general duty owed by defendant to the public of which plaintiff is a part." Id. at 710.

Therefore, defendants owed plaintiff a duty of ordinary care. The record indicates that plaintiff was an employee of the hospital which hired defendants. Plaintiff parked her car in **[*5]** the parking lot near the area where defendants performed construction work. Plaintiff walked over an area previously excavated by defendants, and contends that an air pocket resulting from their excavation activities caused her to fall and suffer injury. Defendants removed or permitted removal of the construction barriers from around the area following the excavation work, but did not personally walk on the re-filled area. Construing these facts in favor of plaintiff, we find that plaintiff has established a prima facie case for negligence on the part of defendants, and that reasonable minds may differ as to the cause of her injury.

Both defendants emphasize the fact that the control of the traffic area was turned over to Beaumont one to two weeks prior to plaintiff's injury, and therefore, they should not be held liable. However, as premises liability doctrine is not applicable, there is no requirement under an ordinary duty of care to assert that defendants remained in control of the property in question in order to be held liable. Those *foreseeably* injured by the negligent performance of a contractual undertaking are owed a duty of care. *Osman, supra 708*. It **[*6]** was foreseeable that employees of the hospital, who park in the lot where the excavation work was performed, would walk over the recently excavated area after the barricades were taken down. If the area was not properly inspected, and a hollow pocket existed underground, it was foreseeable that plaintiff may be injured as a result of stepping onto such a hollow pocket. Accordingly, the trial court's grant of summary disposition in favor of defendants based upon the "open and obvious danger" doctrine of premises liability was erroneous.

In addition, even assuming premises liability law was applicable, it would have been error to dismiss all of plaintiff's theories of negligence based upon its finding of an open and obvious danger. ***HN5***[⬆] The defense of open and obvious danger relates to a claim of a duty to warn, but will not exonerate a defendant from liability where the claim is one of a duty to maintain and repair the premises. *Walker v Flint, 213 Mich App 18, 22; 539 NW2d 535 (1995)*. Plaintiff claimed negligent maintenance in her complaint.

Next, plaintiff argues that the trial court erred in granting summary disposition in favor of Post Electric on the **[*7]** basis that it did not actually perform the excavation work. We agree.

Plaintiff's complaint asserted that Post Electric was liable based on the theories of negligence, including ordinary negligence; failure to inspect; negligent inspection; failure to supervise; negligent supervision; and failure to warn. The trial court ruled that Post Electric was not liable because it did not perform the actual excavation work at the site. However, as we already stated, an independent contractor may owe a plaintiff a duty regardless of the lack of contractual privity. *Osman, supra at 710*. Plaintiff's claims of negligent inspection and negligent supervision, and negligent removal of construction barriers, are not based upon Post's actual performance of the excavation. Post Electric was the general contractor in charge of the project. The record indicates that a Post employee stated that he inspected the work area after the excavation was complete, but did not personally walk on it. A reasonable trier of fact could conclude that this inspection was inadequate.

In addition, there appears to be a material issue of fact as to which party ordered the removal of the construction barriers **[*8]** and as to which party actually removed the barriers from the site prior to plaintiff's accident--Post, Broadcast Design, or Beaumont. Plaintiff refers to the statement by Dennis Kruszyma, a Post employee, that he inspected the area after the barricades were removed. Kruszyma did not say who removed them. Post refers to the deposition of Richard W. Brandow, an employee of Beaumont Hospital, who contended that Beaumont removed the barriers or permitted their removal. However, Brandow also stated that the "sub-contractor" was permitted to remove the barriers, and that the "contractors" were "responsible" for removing the barriers. Accordingly, summary disposition in favor of Post Electric due simply to the fact that it did not perform the excavation work was improper.

Reversed.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

/s/ Roman S. Gribbs

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN, Plaintiff, v. RED OAK MANAGEMENT CO, INC, WESTVELD SERVICES, LLC, and ~~BOB'S ASPHALT PAVING, INC~~, Defendants.	Case No.: 2022-S-28824-NO Hon. Ronald J. Schafer

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DEFENDANT RED OAK'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

NOW COMES the Defendant, Red Oak Property Management, Inc., by and through its attorney, Wheeler Upham, P.C., and pursuant to MCR 2.116(C)(10) requests that the Court grant summary disposition to it for the reasons stated in the accompanying brief.

Respectfully submitted:

Date: February 22, 2023 By:

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

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BRIEF IN SUPPORT OF DEFENDANT RED OAK'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

INTRODUCTION

This lawsuit arises out of a trip and fall incident that occurred on October 30, 2021. Plaintiff tripped and fell due to a "trench" in the parking lot at an apartment complex managed by Defendant Red Oak. However, Defendant Red Oak has no liability under MCL 554.139. The trench did not render the parking lot fit for its intended use. Plaintiff knew the trench was there, it was readily visible and avoidable, and Plaintiff otherwise had no concerns about the parking lot. Nor did Red Oak violate any state or local laws. Moreover, the trench was open and obvious. Accordingly, Defendant Red Oak is entitled to summary disposition.

FACTS

Plaintiff Jan Bowerman has resided at Stanton Park Apartments in Stanton for about eight years, having lived in apartment #20 for the last two years or so, including at the time of the October 30, 2021 incident. (**Exhibit A** – Plaintiff's Deposition Transcript at 6.)

Before she retired in 2018, Plaintiff was an employee of Defendant Red Oak for over 19 years. (*Id*. at 9.) In fact, she was the site manager at Stanton Park Apartments for nine or ten years before retiring. (*Id*. at 12.). She both lived and was the site manager at Stanton Park Apartments for about four years.

Around October 14, 2021, Defendant Westveld performed some concrete work at the Stanton Park Apartments. Perhaps as a remnant of her the site manager days, Plaintiff maintained detailed notes about the condition of the property even after she retired. Plaintiff's notes indicate that on 10/14/21, the dumpster was moved to the grass area. (**Exhibit B** – Plaintiff's Notes.) the dumpster was moved so the cement in front of it could be replaced. On the top of the next page is a picture showing the location of the dumpster after it was moved:

See also **Exhibit C**. The dumpster is to the west of the slab.

Plaintiff's notes state that the sidewalks were torn out on 10/14/21. She noted that the cement company left after it started raining. She noted no signs, caution tape, or cones were put out. Plaintiff's notes state that cement work resumed on 10/18/21.

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

See **Exhibit D**.[1] This was caused by the form Westveld used to pour the concrete. (**Exhibit E** – Randy Westveld Deposition Transcript at 14, 18.) The plan was for Bob's Asphalt to come in right after Westveld was done, and Bob's Asphalt would have filled in the trench (as they eventually did) when it performed its work. (**Exhibit F** – Eric Koch Deposition Transcript at 45-46.) However, Bob's Asphalt was delayed. (*Id*. at 46.)

The subject accident occurred on October 30, 2021, when Plaintiff was taking her trash out to the dumpster. The day before, Plaintiff had brussel sprouts. (Ex. A at 16.) She did not finish them all and put the rest in the trash. (*Id*.) The next morning, Plaintiff got up at 6:00 a.m. and made coffee. (*Id*.) She realized the brussel sprouts in the trash were causing an odor in her apartment. (*Id*.) Her brother, Larry Munson, who lives in the apartment across the hall, came over for coffee for about an hour. (*Id*.) After he left, Plaintiff went to take the trash out. (*Id*.)

She turned left out of her door and walked south down the interior hallway to a door on the south end of the building. (*Id*.) This was the route she "always" took to take her trash out and to get to her car. (*Id*. at 15.) When she got to the door on the south end of the hallway, she saw that it was still dark out. (*Id*. at 17.) But "that particular morning, [she] did not wait" to take the trash out. (*Id*.)

She exited the building, turned right/west, and walked down a handicap sidewalk that leads down to the parking lot. (*Id*. at 16.)[2] There is a sidewalk that runs (north-south) alongside the parking lot. (*Id*. at 21.) When Plaintiff reached that sidewalk, she turned left/south. (*Id*. at 16.) The sidewalk soon turns to the right/east and slopes down toward the new cement slab. (*Id*.) She started

[1] The photos attached as Exhibit D were produced by Plaintiff and are an exhibit at her deposition.
[2] Attached as **Exhibit G** are blueprints of the premises to assist in seeing the path Plaintiff took. The redline, drawn by Defendant Red Oak's counsel, shows Plaintiff's path based on her testimony, although the exact point she reached in the parking lot before beginning to walk toward the dumpster is unclear.

walking east down the sloped sidewalk toward the dumpster. (Ex. A at 23.) The dumpster was straight ahead of her on the other side of the slab.

Plaintiff was well aware of the trench in front of the slab. She testified:

Q. . . . you knew there was a trench in front of –

A. Oh, yes.

Q. -- that cement slab?

A. Yes. (*Id*. at 29.)

She had seen the trench everyday for perhaps two weeks, and perhaps at nighttime as well. She testified:

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. (*Id*. at 62.)

There were no trenches on the lengthwise sides of the slab. Randy Westveld testified there was only a trench on the front end. (Ex. E at 41.) The sidewalk slopes right down to the slab. The slab took at most 36 hours to cure before it could be walked on (*Id*.), and there was no tape signaling to stay off it.

Plaintiff decided to walk through the parking lot and around the front of the slab to get to the dumpster. She stepped off the sidewalk and began walking into the middle of the parking lot to go around the trench. Plaintiff testified:

A. . . . 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. (*Id*. at 17.)

* * *

A. I was walking out on the parking lot to come around on the other side of where that slab is and put my trash in the dumpster . . . (*Id*. at 27.)

* * *

A. . . . I knew I had to get on the parking lot and walk away from that trench area and get myself over to the other side. (*Id*. at 29.)

* * *

A. My goal was to not fall in any trenches. (*Id*. at 35.)

* * *

A. Walk away from the pad, stay away from the trenches even if it took me a little longer. I was just going to make a safe trip to empty my trash, and I chose to go out to the parking lot . . . (*Id*. at 36.)

Plaintiff described her path as follows:

Q. . . . so you got off the . . . sidewalk, stepped into the parking lot, and then am I correct that you at that point walked around the cement slab sort of in a C shape?

A. No. ***I walked way out toward the middle of the parking lot*** to get it to stay away from that area. (*Id*. at 28.)(Emphasis added.)

* * *

A. . . . So I went on that sidewalk . . . and then got off there, ***walked straight to the middle of the parking lot***.

Q. . . . You were doing a big semicircle path to walk around the pad because you were concerned about the trenches?

A. That's right. . . . (*Id*. at 35.)(Emphasis added.)

* * *

Q. . . . because you said you kid of did, like, this semicircle path to –

A. I didn't do a semicircle. I knew I was too close to the trench yet. ***I went way out close to the – close to the entrance door*** . . . (*Id*. at 63.)(Emphasis added.)

* * *

A. . . . ***I went way out*** and then came back.

Q. Like a – Like a U?

A. Yeah, or a checkmark.

Q. Okay.

A. Like a V . . .

Q. . . . the bottom of the V, was it off this picture, like you walked –

A. Yes, yes.

Q . -- off to the left of this picture?

A. ***I went way out.*** Yes.

Q. Okay. And then –

A. Came back. (Ex. A at 64.)(Emphasis added.)

Although there are lights along the side of the parking lot (see Ex. G and the photos), Plaintiff claims that when she got into the middle of the parking lot it was dark. She testified as follows:

A. . . . And once I got in the middle of the parking lot, it was all black. I couldn't see . . . (*Id*. at 17.)

* * *

A. . . . But the parking lot, once I got in the middle of the parking lot, it was dark, I mean, dark. I couldn't see where anything was . . . (*Id*. at 23.)

* * *

A. . . . I didn't know exactly where I was once I got on the blacktop. I couldn't see. ***It was all dark, but I just kept going straight*** because I knew the slab was not that way. (*Id*. at 28.)(Emphasis added.)

* * *

A. . . . I didn't realize I couldn't – I didn't know exactly where I was at . . .

Q. When you say when you were in the parking lot, you didn't know where you were at, can you explain that to me?

A. I didn't know exactly. I – I knew I was in the parking lot, but it was complete darkness . . . (*Id*. at 36.)

Plaintiff testified that from the middle of the parking lot she saw the dumpster and, keeping her eye on the dumpster, began walking toward it when she suddenly fell.

A. . . . then I spotted the dumpster. . . . 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. (*Id*. at 17.)(Emphasis added.)

* * *

A. . . . and I spotted the dumpster, reflection of the dumpster, over on this side of the – opposite of the slab going toward the street. So I started walking through the middle of the parking lot, and then I spotted the dumpster and started going toward the dumpster. (*Id*. at 23.)

* * *

A. . . . So I got in the middle of that parking lot, spotted the dumpster reflection light over on the opposite side and started – then started walking toward the dumpster 'cause I see the reflection, the reflector, on the dumpster. (*Id*. at 28.)

* * *

A. . . . I seen the reflection of the dumpster and I started heading toward that dumpster where the light – where I could see. (*Id*. at 36.)

* * *

A. . . . I just started going toward that light where the dumpster was. (*Id*. at 36.)

Aside from the trench, Plaintiff had no concern about walking in the parking in the dark. Plaintiff testified:

Q. So aside from the trenches, did you have any concerns about walking through the parking lot even though it was completely dark?

A. No, I mean, other than the trenches.

Q. Well, right. You weren't concerned about walking through the parking lot as long as you avoid the trenches; is that right?

A. That's correct.

Q. You weren't concerned about tripping on anything in the parking lot other than just avoid those trenches; is that correct?

A. That's correct. (*Id*. at 37.)

According to Plaintiff, Picture No. 8 shows "how black it was out there." (*Id*. at 34.)[3] Yet, the light gray cement slab is readily visible in Picture No. 8.

[3] Plaintiff testified Picture No. 8 was taken by her brother Larry Munson. Mr. Munson denied taking the picture. Apparently, Plaintiff's son took the picture. When and how it was taken is unknown at present time. Defendant Red Oak does not admit that Picture No. 8 accurately depicts the lighting in the parking lot at the time of the incident.

Because Plaintiff "kept her eye on the dumpster" as she was walking across the parking lot, she did not see the readily visible light gray cement slab, and she stepped into the west edge of the trench in front of the northwest corner of the slab. As a result, she fractured her right ankle. The photo below, taken shortly after the incident, shows a box, which Plaintiff was carrying, in the location of her fall. (Ex. A at 24.)

STANDARD OF REVIEW

Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." When ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10), the Court must look to the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in the light most favorable to the nonmoving party. *Major* v *Auto Club*, 185 Mich App 437, 440; 462 NW2d 771 (1990). The Court must be satisfied that the non-moving party's position cannot be supported at trial because of a deficiency that cannot be overcome. *Lichon* v *American Universal Insurance*, 435 Mich 408, 414; 459 NW2d 288 (1990); *Stalzer* v *Shape Corp*, 177 Mich App 572, 575; 442 NW2d 648 (1989).

To overcome a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the non-moving party must establish the existence of a material factual dispute. If the non-party fails to establish that a material fact is in dispute, a motion is properly granted. *Amorello* v *Monsanto*, 186 Mich App 324, 329-330; 463 NW2d 487 (1999). The non-moving party cannot rely upon opinion evidence, conclusionary evidence or inadmissible hearsay to establish the existence of a material factual dispute, but rather must rely upon admissible evidence. *Id*.

ARGUMENT

I. Defendant Red Oak did not violate MCL 554.139, and therefore Red Oak is entitled to summary disposition.

Plaintiff'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. [Emphasis added.]

By its plain language, the covenant of "fit for intended use" in subsection (a) applies to both "premises" and "common areas," whereas the covenant of "reasonable repair" in subsection (b) applies only to "premises," not "common areas." See also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 435 (2008). 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 is not applicable to the parking lot.

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

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. A "[m]ere inconvenience" on the property does not render a common area unfit for its intended use. *Id*.

Whether there is a breach of subsection (a) depends on the primary intended use of the common area at issue. The primary intended use of a sidewalk is walking. *Benton,* 270 Mich.App. at 444, 715 N.W.2d 335. In contrast, the primary intended use of a parking lot is parking vehicles. *Allison,* 481 Mich at 430. Accordingly, "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.

In *Spitz v Occidental Dev, LLC*, No. 351082, 2020 WL 6938048 (Mich Ct App, November 24, 2020)(**Exhibit H**), the plaintiff was walking on the sidewalk at the apartment complex where he leased an apartment when he stepped in a depression on the sidewalk and fractured his right foot. He sued the defendant landlord under MCL 554.139. "Plaintiff testified that there was nothing preventing him from walking around the depression at the time of the incident. Additionally, during the four to five months before the concrete was repaired, plaintiff walked around the depression. Because plaintiff was able to walk around the depression, the depression was a mere inconvenience." *Id*. at *2. The sidewalk was not unfit for its intended purpose, and the defendant was entitled to summary disposition. The Court also held the depression was open and obvious.

Similar to *Spitz*, Ms. Bowerman knew about the trench adjacent to the slab. It had been there for 14 days. She saw it every time she took her trash out, which was every day. She documented the trench in her notes. On September 30, there was nothing that prevented Ms. Bowerman from walking around the trench. When she went to take her trash out that day, she specifically selected a path to walk around the trench. However, because she was looking solely at the dumpster, and not at the ground, she did not see the readily visible light gray cement slab, and stepped in front of it, right where she knew the trench was and stepped into the west end of the trench. Moreover, while the condition in *Spitz* was on the sidewalk, for which the defendant had a more onerous duty, the condition, in this case, was on the parking lot, for which Defendant Red Oak had a less onerous duty.

Contrary to her assertions, Plaintiff did not step into the trench because the parking lot was underlit.[4] Plaintiff's exemplar photo of the lighting conditions establishes that Ms. Bowerman could have avoided the trench. Ms. Bowerman was well aware of the trench; she had seen it at least 14 times beforehand. The trench was as long as the slab was wide. The bright gray slab can be readily seen in this photo. Indeed, the front edge (or face) of the slab can be readily seen indicating the existence of empty space in front of the slab, i.e., the trench. Regardless of whether or not the actual trench could be seen, Ms. Bowerman did not need to see the actual trench to avoid it. All she had to do was steer clear of the slab, which is readily visible, and she would have avoided the trench.

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. As noted above, she could have just walked well around the front-end of the readily visible slab to avoid the trench. 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. (Plaintiff at 37.) While the trench was a known and visible inconvenience, it did not render the parking lot unfit for its intended purpose.

[4] Plaintiff's expert contends the parking was underlit but admits he has no opinion whether that was a proximate cause of the incident. (**Exhibit I** – Albert Kerelis Deposition Transcript at 37.) Plaintiff's expert also admits that no state or local law required the parking lot to have any specific amount of lighting. (*Id*. at 34-35.)

II. To the extent Plaintiff now asserts a common law, premises liability claim, Defendant Red Oak is entitled to summary disposition because the trench was open and obvious doctrine.

To the extent Plaintiff asserts a common law claim, Defendant Red Oak is entitled to summary disposition because the trench was open and obvious. The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law." *Riddle* v *McLouth Steel Prod Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

As a general matter, "landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land." *Hoffner* v *Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). Invitees must "exercise common sense and prudent judgment when confronting hazards on the land." *Id*. Invitees have an "obligation to assume personal responsibility to protect themselves from apparent dangers." *Id*. at 640. Premises possessors need not maintain their premises in perfect condition:

> Perfection is neither practicable nor required by the law, and "[u]nder ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary [conditions] 'foolproof.'" [*Hoffner* at 460.]

Accordingly, in *Lugo v Ameritech,* 464 Mich 512; 629 NW2d 384 (2001), the Michigan Supreme Court explained that a premises possessor generally owes no duty to invitees with respect to open and obvious conditions:

> In general, a premises possessor owes a duty an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *However, this duty does not generally encompass the removal of open and obvious dangers:*
>
> > *Where the dangers are known to the invitee or are so obvious that the invitee may reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.* [*Lugo* at 516 (citations omitted)(emphasis added).]

In *Hoffner*, the Michigan Supreme Court explained that a premises possessor owes no duty with respect to open and obvious dangers because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id*. at 460-461.

The open and obvious doctrine is not an exception to the duty generally owed to invitees; rather, it is an integral part of the definition of the duty. *Lugo* at 516. In other words, the plaintiff must show that the condition is not open and obvious before a duty can be imposed. *Sanders*, *supra*; see also *Novotney v Burger King Corp* (*On Remand*), 198 Mich. App. 470, 475; 499 N.W.2d 379 (1993). The test to determine whether a danger is open and obvious is whether a reasonably prudent person would have discovered it upon casual inspection. *Hoffner* at 461.

In this case, the trench was open and obvious. First, the front edge or face of the slab could be seen, revealing the trench in front of it. Second, the existence of trench was well known. Ms. Bowerman knew about it. Her brother Larry Munson knew about it. It had been there for two weeks. The light gray slab is readily visible in the photo Plaintiff claims shows how dark it was. Plaintiff's expert admits the slab, and the front of the slab is visible. (Ex. I at 38.) Because the trench was known, and the light gray slab was readily visible, the trench was discoverable upon casual inspection.

There are no "special aspects" that make the open and obvious doctrine inapplicable. See *Lugo*. The trench was not "effectively unavoidable." *Id*. Michigan courts have rejected claims of effective unavoidability where a plaintiff chose to confront a hazard despite other alternatives, including the existence of alternative routes into a building or the simple fact that a visit to a structure could have been delayed to another day. See, e.g., *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002); *Corey v Davenport College of Business*, 251 Mich App 1, 6–7; 649

NW2d 392 (2002). In this case, Plaintiff did not need to encounter the trench. She could have walked around it. Moreover, Plaintiff did not need to take her trash out when it was dark out. If, in fact, Plaintiff got to the middle of the parking and "couldn't see once I got out there" (Ex. A at 36), she should have walked back the way she came, toward the light, and waited a half hour or so to take her trash out.

The trench also did not pose "impose an unreasonably high risk of severe harm," e.g., "an unguarded thirty-foot deep pit in the middle of a parking lot." *Lugo* at 518. In *Corey*, where the plaintiff fell on a stairway that consisted of three steps and was elevated only a couple of feet, the Court held that "[f]alling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit." *Id*. at 7. Similarly in this case, Plaintiff tripped due to a ground-level condition and fell to the ground, which is not at all like falling into a 30-foot pit.

CONCLUSION

Defendant Red Oak is entitled to summary disposition because it did not violate MCL 554.139. The parking lot was fit for its intended purposes. The known and detectable trench was only an inconvenience that did not render the parking lot unfit for its intended purpose. Defendant Red Oak did not violate any state or local laws. Moreover, the trench was open and obvious and no special aspects apply.

Respectfully submitted:

Date: February 22, 2023 By: Daniel James

Daniel J. James (P75147)
WHEELER UPHAM, P.C.
Attorneys for Defendant Red Oak

9/05/21 - Lady Came into Laundry Room & Says her name is Kim Labey (Says Shes Chelsey's Boss) She had a Large amount of individual Laundry keys Laying on a washer, Was trying to open the 4 machines to Collect the Laundry money. (I Called Ron office Left message as to the insident that had just occured.

9/05/21 - Also on this Date the Parking Lot Lights (All of them) And also the Entrance Door out-Side Lights (All 4) were out - We was in Complete Darkness outside. It was reported to the Site Manager on the A.M. Hours of 9-06-21

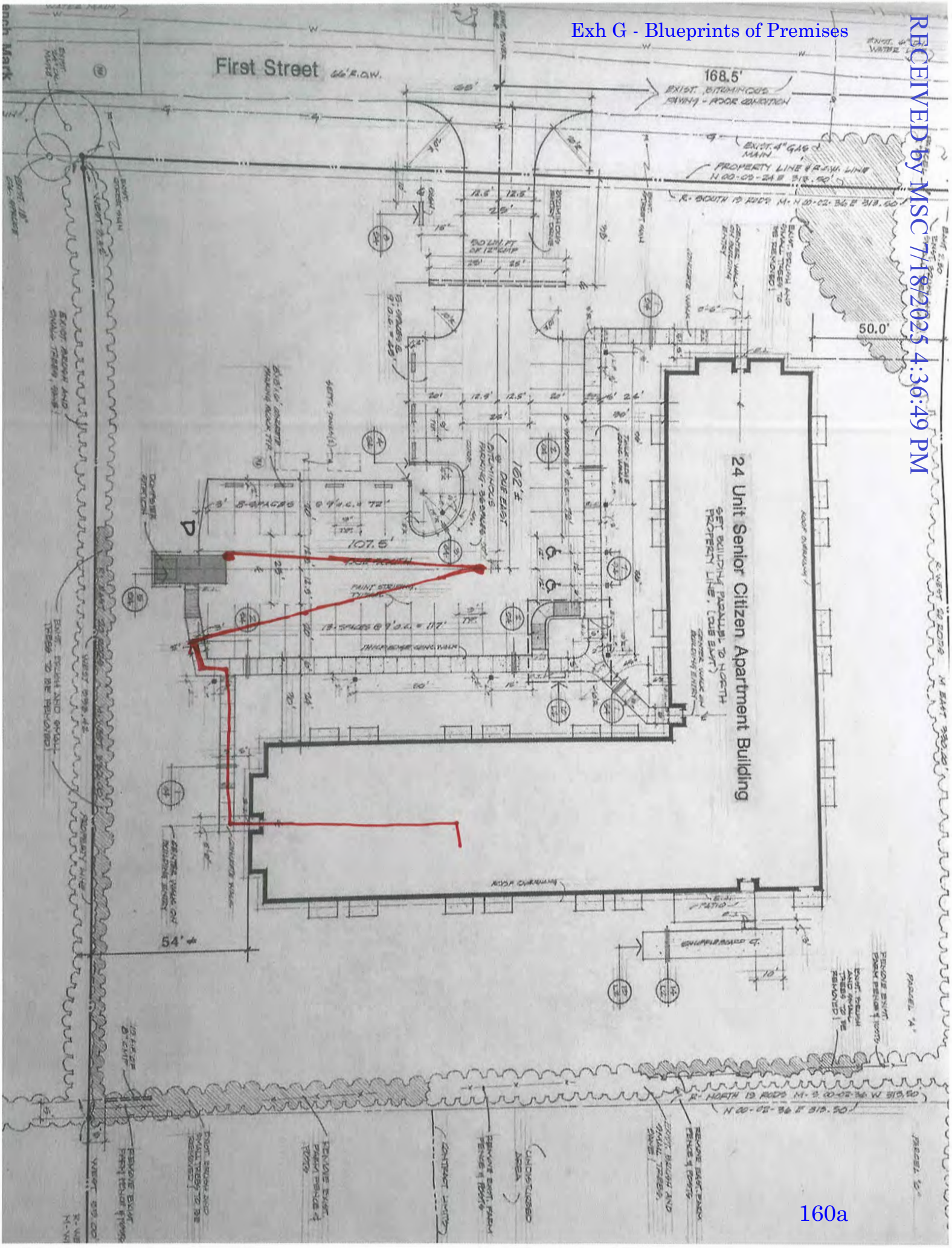
9-14-21 - The Lights on the parking Lot were put Back on on this DAy. Only the parking Lot - which are very Dim Entrance Door Lights were Still out. During the period of Complete Darkness - 2 Cars in the parking Light were vandelized. Police were Called.

10-14-21 Dumpster was moved to grass area.

10-14-21 - Side walks were being teared out Started to rain The Company Left (Cement and trash Left Laying on parking Lot areas. No Signs - Caution tapes - No Cones was put out. From the 14th of Afternoon to 10-17-21 Nothing was Done on Side walks

10-18-21 Side walk repairs Started up Again - [redacted]

10-20-21 I Fell into trench took My trash out at 7:30 A.M was Dark. Called Ambulance (My Brother Called)



2020 WL 6938048
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

James SPITZ, Plaintiff-Appellant,

v.

OCCIDENTAL DEVELOPMENT, LLC, Defendant-Appellee.

No. 351082
|
November 24, 2020

Eaton Circuit Court, LC No. 2019-000119-NO

Before: Markey, P.J., and Meter and Gadola, JJ.

Opinion

Per Curiam.

***1** In this premises liability action, plaintiff leased an apartment in a complex defendant owned and operated. Plaintiff left his apartment one evening, descending the stairs to the sidewalk below, which led to the parking lot. Plaintiff stepped in a depression in the sidewalk, fracturing his right foot. Plaintiff filed this action, asserting defendant violated its duty under MCL 554.139 to keep the sidewalk in reasonable repair and fit for its intended use, breach of the lease agreement, and negligence. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) and dismissed all claims. Plaintiff now appeals as of right, and we affirm.

I. STANDARD OF REVIEW

We review a trial court's ruling on a motion for summary disposition de novo. *Pugno v. Blue Harvest Farms LLC*, 326 Mich. App. 1, 11; 930 N.W.2d 393 (2018). Summary disposition under MCR 2.116(C)(10) is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "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 N.W.2d 468 (2003).

II. MCL 554.139

Plaintiff first argues that there was a genuine issue of material fact as to whether defendant was potentially liable based on the sidewalk being unfit for its intended use under MCL 554.139(1)(a). We disagree.

MCL 554.139(1)(a) provides that in every lease or license of residential premises, the lessor or licensor covenants that "the premises and all common areas are fit for the use intended by the parties." "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 v. AEW Capital Mgt., L.L.P.*, 481 Mich. 419, 425; 751 N.W.2d 8 (2008). The following analytical framework applies when determining liability under MCL 554.139(1)(a):

> First, the court is to determine whether the area in question is a "common area." Then, the court is to identify the intended use of the common area. Lastly, the court must determine if there could be "reasonable differences of opinion regarding" whether the conditions made the common area unfit for its intended use. [*Estate of Trueblood v. P&G Apartments, LLC*, 327 Mich. App. 275, 285; 933 N.W.2d 732 (2019).]

In this case, it is undisputed that the sidewalk within the apartment complex was a common area and that "the intended use of a sidewalk is walking on it ...." *Benton v. Dart Props., Inc.*, 270 Mich. App. 437, 442-444; 715 N.W.2d 335 (2006). However, plaintiff argues that there could be a reasonable difference of opinion regarding whether the depression made the sidewalk unfit for its intended use. We disagree.

First, contrary to plaintiff's assertion, the trial court did not apply the open and obvious danger doctrine when analyzing whether defendant violated MCL 554.139. "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 v. AEW Capital Mgt., L.L.P.*, 481 Mich. 419, 425; 751 N.W.2d 8 (2008). In a premises liability action, the plaintiff must establish the elements of negligence:

duty, breach, proximate cause, and damages. *Benton v. Dart Props., Inc.*, 270 Mich. App. 437, 440; 715 N.W.2d 335 (2006). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 516; 629 N.W.2d 384 (2001). "Absent special aspects, this duty does not extend to open and obvious dangers." *Estate of Trueblood*, 327 Mich. App. at 285 (quotation marks, citations, and alteration omitted).

***2** In this case, the trial court separated its analysis of the open and obvious danger doctrine from its analysis of MCL 554.139. The trial court first analyzed Count III of plaintiff's complaint, the negligence count, and concluded that the open and obvious danger doctrine applied. It then applied the analytical framework for determining liability under MCR 554.139(1)(a) as outlined above without explicitly or implicitly referring to the open and obvious danger doctrine. Therefore, there is no indication that the trial court applied the open and obvious danger doctrine when analyzing MCR 554.139(1)(a).

In addition, the trial court did not err by concluding that defendant did not violate MCL 554.139(1)(a). The trial court properly concluded that the sidewalk was a common area, that the intended use of the sidewalk was to walk on it, and that the sidewalk was fit for its intended use. Therefore, as the trial court concluded, "defendant did not breach any duty owed to ... plaintiff pursuant to statute."

In this case, plaintiff argues that the depression was not a mere inconvenience because it was large enough to break his foot. The dimensions of the depression are unclear based on the record. According to defendant's incident report, the depression was approximately four inches wide and approximately one inch deep. According to a photograph that was referenced during depositions taken in the case, the depression was less than one inch wide and was approximately two inches deep. Plaintiff's counsel asserted that the depression was "five inches by about four and about two inches deep." Plaintiff's counsel also stated that the parties agreed that 10 percent of the concrete square was unfit for its intended use and the other 90 percent was fit for its intended use. Finally, although the trial court believed that plaintiff had testified that the depression was "two inches deep to five feet (sic) wide," plaintiff actually testified that he did not know how deep the depression was and that he never measured it. Thus, viewing the evidence in the light most favorable to plaintiff, the depression was up to four inches wide and up to two inches deep and, contrary to plaintiff's assertion, the trial court did not err by concluding that the depression was not "big enough to be called a pothole."

Regardless of the size of the depression, plaintiff testified that there was nothing preventing him from walking around the depression at the time of the incident. Additionally, during the four to five months before the concrete was repaired, plaintiff walked around the depression. Because plaintiff was able to walk around the depression, the depression was a mere inconvenience. See *Estate of Trueblood*, 327 Mich. App. at 291. Contrary to plaintiff's assertion, the size and presence of the depression did not render the sidewalk unfit for its intended use. See *Allison*, 481 Mich. at 430. Therefore, the trial court did not err by concluding that the sidewalk was fit for its intended use, i.e., walking on it, under MCL 554.139(1)(a). Accordingly, the trial court did not err by granting defendant's motion for summary disposition with respect to Count I of plaintiff's complaint.[1]

III. NEGLIGENCE/PREMISES LIABILITY

Next, plaintiff argues that the trial court erred by failing to consider a photograph of a downspout as evidence of defendant's active negligence. Plaintiff also argues that defendant breached its duty of care because it had actual or constructive notice of the dangerous condition and therefore should have repaired the depression. We disagree.

***3** In this case, the community manager of the apartment complex testified that when snow melts, it can get into the cracks of the concrete and that when it refreezes, it can cause the sidewalk to crack or "heave." At the hearing on defendant's motion for summary disposition, plaintiff's counsel argued that defendant created the hazardous condition because it placed a downspout close to the apartment building, which contributed to the freezing and refreezing problem. The trial court declined to consider the photograph on foundational grounds.

We conclude that the trial court did not err by not considering the photograph of the downspout. "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v. Trinity Continuing Care Servs.*, 296 Mich. App. 685, 692; 822 N.W.2d 254 (2012). Claims of ordinary negligence are based on the defendant's duty to conform

conduct to a particular standard of care. See *Laier v. Kitchen*, 266 Mich. App. 482, 493; 702 N.W.2d 199 (2005). In contrast, claims of premises liability are based on "the defendant's duty as an owner, possessor, or occupier of land." *Buhalis*, 296 Mich. App. at 692. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id.*

Plaintiff's amended complaint alleges "negligence." However, "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis*, 296 Mich. App. at 691. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v. Adams (On Reconsideration)*, 276 Mich. App. 704, 710-711; 742 N.W.2d 399 (2007).

In this case, as the trial court stated, plaintiff's claim sounds in premises liability, not ordinary negligence. Specifically, plaintiff alleged that a condition on the land, i.e., the depression in the sidewalk, constituted a dangerous condition on the property that gave rise to his injuries. Further, plaintiff alleged that based on defendant's status as a premises possessor, it had the duty to protect him from unreasonably dangerous conditions. Because plaintiff's claim is based on defendant's duty as the premises possessor and not defendant's ability to conform to a particular standard of care, plaintiff's claim sounds in premises liability. Alleging that defendant created the condition giving rise to his injury did not transform the claim into one for ordinary negligence. See *Buhalis*, 296 Mich. App. at 692. Plaintiff has failed to show that the photograph of the downspout was relevant and would be admissible with respect to his claim of premises liability. Therefore, the trial court did not err by failing to consider the photograph of the downspout.

We also find no merit in plaintiff's argument that defendant breached the applicable duty of care. "In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton*, 270 Mich. App. at 440.

It is undisputed that plaintiff was an invitee. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 516; 629 N.W.2d 384 (2001). A premises possessor breaches this duty if it "knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v. Lanctoe*, 492 Mich. 450, 460; 821 N.W.2d 88 (2012). "Absent special aspects, this duty does not extend to open and obvious dangers." *Estate of Trueblood*, 327 Mich. App. at 285. A condition is "open and obvious" if "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich. at 461. A premises possessor does not have the duty to protect or warn of open and obvious dangers because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id.*

***4** In this case, the trial court did not err by concluding that the condition was open and obvious. Plaintiff testified in his deposition that the depression was visible and admitted that if he had looked where he was walking, he could have avoided the area. Therefore, as in *Kennedy v. Great Atlantic & Pacific Tea Co.*, 274 Mich. App. 710, 714; 737 N.W.2d 179 (2007), there is no genuine issue of material fact that plaintiff "would have noticed the potentially hazardous condition had he been paying attention." Because an average person with ordinary intelligence would have reasonably discovered the depression upon casual inspection, see *Hoffner*, 492 Mich. at 461, the trial court did not err by concluding that the open and obvious danger doctrine applied in this case. Thus, absent special aspects, *Estate of Trueblood*, 327 Mich. App. at 285, defendant did not have the duty to "fix the defect, guard against the defect, or warn [plaintiff] of the defect," *Hoffner*, 492 Mich. at 460.

The trial court also did not err by concluding that no special aspects existed. "Special aspects" make the open and obvious condition "unreasonable." *Hoffner*, 492 Mich. at 461. Our Supreme Court has recognized that special aspects exist in two situations—"when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Id.* at 463.

In this case, because plaintiff was able to walk around the area in question, the danger of the depression was not effectively unavoidable. Further, as the trial court stated, the depression in the sidewalk did not present a substantial risk of severe harm or death. Because the condition was open and obvious

and no special aspects existed, defendant did not have the duty to exercise reasonable care to protect plaintiff from the depression. Therefore, contrary to plaintiff's assertion, defendant did not breach its duty of care by failing to identify and repair the depression. Accordingly, the trial court did not err by granting defendant's motion for summary disposition on plaintiff's negligence claim.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 6938048

Footnotes

1 Plaintiff also argues that the trial court erred by granting defendant's motion for summary disposition on his breach of lease claim. We decline to address this argument because plaintiff did not present this issue in the statement of questions presented. *Bouverette v. Westinghouse Electric Corp.*, 245 Mich. App. 391, 404; 628 N.W.2d 86 (2001); MCR 7.212(C)(5).

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,

Plaintiff,

v.

CASE NO.:22-S-28824-NO

JUDGE: RONALD J. SCHAFER

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

Defendants.
_____/

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_____/

PLAINTIFF'S RESPONSE TO DEFENDANT RED OAK'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

NOW COMES Plaintiff, JAN BOWERMAN, by and through her attorneys, JOHNSON LAW, PLC, responds to Defendant Red Oak Property Management's Motion for Summary Disposition brought pursuant to MCR 2.116(C)(10) as follows:

For the reasons stated in the accompanying Brief, Plaintiff Jan Bowerman requests that this Court deny Defendant Red Oak Property Management, Inc.'s MCR 2.116(C)(10) Motion for Summary Disposition should be denied in its entirety.

Respectfully submitted,

JOHNSON LAW, PLC

By: _____

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Dated: March 16, 2023

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT RED OAK'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

INTRODUCTION

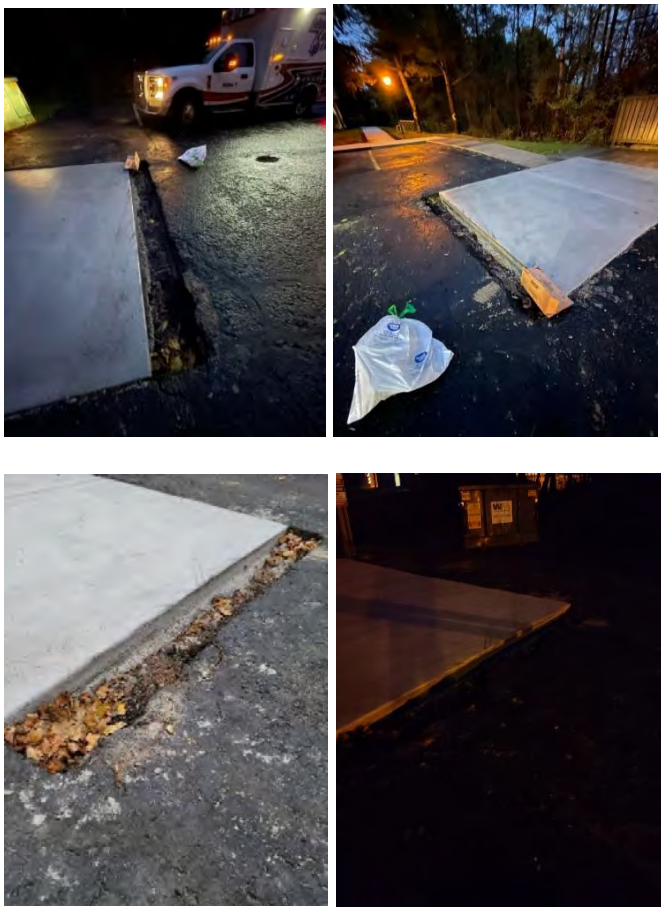
On October 30, 2021, Ms. Jan E. Bowerman, a 75 year old woman, was a tenant of Stanton Park Apartments located at 200 E. First St., Stanton, Michigan. **Stanton Park Apartments is a 24-unit multi-family residential property for seniors over the age of 62 and those with physical disabilities**. The single-story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

On October 30th, while taking out her trash at approximately 7:15 a.m., an hour before sunrise (sunrise in Stanton was at 8:13 a.m. on that day), she stepped into a trench created by the excavation for a recently poured concrete slab, fell, and was injured. Specifically, at her deposition on page 17 of Exhibit 1, Plaintiff testified as to how she fell as follows:

> A. Well, that particular morning, I didn't wait. I looked out the side door, and I noticed that I could see the sidewalk. **It was still dark**, but there was still light on the sidewalk. I went down the sidewalk, and when I -- I knew I was going to have to go to the parking lot to miss some of the area, but – so I went out to the parking lot. **And once I got in the middle of the parking lot, it was all black**. I couldn't see, so then I spotted the dumpster. They had moved it off the patio slab it was on. I -- I seen that because it had like

> a reflector on it, and there was a little light coming from the trees from the streetlight. So I kept my eye on that dumpster, and I started walking toward it. And before -- before I knew it, my foot went right to the edge. At that time, I didn't know what it was, but it went right to the edge of that trash, and I fell right down -- right down in the hole. (Emphasis added)

Plaintiff's description of how the accident happened is borne out in the pictures on and around the time of the accident. Exhibit 2.



The top two (2) photographs were taken approximately an hour after the accident and the cardboard box on the corner of the ditch is where Bowerman fell. The bottom two (2) photographs were taken several days after the accident. The bottom right-hand photograph gives the reader a sense of the conditions of darkness at the time of accident. As a result of the accident, Ms. Bowerman suffered a displaced trimalleolar fracture of her right lower leg which had to be surgically repaired with plates and screws. Ms. Bowerman was confined to a wheelchair for 16

weeks and she was in cast for approximately 5 months. After the cast was removed, Bowerman was given a boot for 8 weeks and she had to use a walker for 2 months.

The following facts are undisputed: 1) On October 21, 2021 (nine days before the accident), Defendant Red Oak inspected the concrete patio area where the garbage dumpster was located and **knew there was no caution tape and/or cones warning pedestrians about the ditch**, and 2) Defendant Red Oak knew and acknowledged that the trench/ditch was a trip hazard. As will be seen in this Brief, and contrary to Defendant Red Oak's argument, MCL 554.139(1)(a) and (1)(b) create a genuine issue of material fact that Defendant Red Oak is liable in this matter Furthermore, as will demonstrated later in this Brief, the open and obvious doctrine is inapplicable legally and factually to the present case.

STANDARD OF REVIEW

Defendant Red Oak seeks summary disposition pursuant to MCR 2.116(C)(10). When a motion is brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Furthermore, all inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 617-618 (1995). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183 (2003). In the context of MCR 2.116(C)(10), the Michigan Court of Appeals has stated that it "is liberal in finding a genuine issue of material fact," *Benton v Dart Properties, Inc*, 270 Mich App 437 (2006), and it is well-established that factual determinations are reserved for juries, as opposed to Courts. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 130 (2010).

FACTS PERTINENT TO THE DISPOSITION OF DEFENDANT RED OAK'S MCR 2.116(C)(10) MOTION FOR SUMMARY DISPOSITION

(a) Introduction

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

In order to completely understand how this accident happened Plaintiff must first examine the testimony of Plaintiff, Randy Westveld – owner and operator of Westveld Services, LLC, Eric Koch – Defendant Red Oak's maintenance manager and the testimony of Albert Kerelis – Plaintiff's construction and safety expert.

(b) Jan Bowerman (Exhibit 1)

- Bowerman was born February 7, 1946. *Id* at 5.
- Bowerman has been a tenant at Stanton Park Apartments since 2013. *Id* at 6.
- Although she was aware of the trench/ditch in front of the garbage dumpster patio, she **never** – during this time – took her trash out at night. *Id* at 50-53, 62.
- Because of the darkness and the fact she could not see the trench in front of the garbage dumpster patio, **Bowerman took a parabolic course to the dumpster on the grassy area on this day at this time**. *Id* at 22-29.
- The cardboard box in the pictures is where she fell. *Id.*

Clearly, despite her knowledge of the existence of the trench/ditch, Bowerman's inability to see the trench/ditch contributed to why she came in contact with trench/ditch. As will be seen later in this Brief, Plaintiff's expert's – Albert Kerelis – opinion is that the parking lot was poorly illuminated under these circumstances and contributed to the fall.

(c) Randy Westveld (Exhibit 3)

- Owner and operator of Defendant Westveld Services, LLC. *Id* at 7.
- Westveld Services, LLC, was hired to perform the demolition, excavation, and replacement of the concrete flatwork. *Id* at 10-12.
- Trenches that were created for their wood formwork were partially filled in with sand and asphalt millings. *Id* at 13-14.
- He always puts out caution tape and cones to warn of wet cement and other things. *Id* at 14-16.
- He created the trench in front of the garbage dumpster patio that caused the accident and the trench was 10 feet long. *Id* at 18-21.
- Westveld relocated the dumpster to a grassy area at the south edge of the parking lot and to the west of and near the area where work was being performed. *Id* at 20.
- **Westveld filled in most of the trenches with sand and/or asphalt millings he created throughout the parking lot except for the trench in front of the garbage dumpster patio**. *Id* at 21-23.
- **He also testified that the trench in front of the garbage dumpster patio where Plaintiff fell was a trip hazard**. *Id* at 30-31.

- Westveld testified that they used caution tape at the end of each day except before leaving the jobsite when he did not guard the active construction site with caution tape. *Id* at 26-29.
- Westveld completed the job on or about October 21, 2021. *Id* at 27.

(d) Eric Koch (Exhibit 4)

- Eric Koch is a "construction specialist" for Defendant Red Oak Management. He inspects and maintains 44 properties for Defendant Red Oak. *Id* at 6 and 10.
- He has been in the construction industry since 2003 and was a licensed general contractor in the State of Michigan at the time of the incident. *Id* at 6-8.
- The demographic that Stanton Park Apartments serves is disabled people and people over the age of 62. *Id* at 11.
- Koch was responsible for hiring and managing the contractors for the concrete sidewalk and dumpster pad replacement project. He testified that there were no discussions about the use of yellow caution tape before the start of the job. *Id* at 17-21.
- Defendant Westveld filled in the trenches around the sidewalks but not the garbage dumpster patio where the accident happened. *Id* at 20.
- **Koch inspected the work performed by Defendant Westveld on October 21, 2021. He stated that there were no cones or yellow caution tape placed around the unfinished construction project around the garbage dumpster patio where the accident happened**. *Id* at 24-25.
- Koch testified the trench in front of the garbage dumpster was a trip hazard and that yellow caution taped needed to be placed in that area. *Id* at 22-23, 25.

- Koch testified that orange cones and caution tape would make the trench near the garbage dumpster patio more obvious to a person. *Id* at 32-33.

(e) Albert Kerelis – Construction And Building Expert

Albert Kerelis' CV is attached as Exhibit 5. According to Exhibit 5, Kerelis is a licensed architect in the State of Michigan and eight other states and is certified by the National Council of Architectural Registration Boards (NCARB). Mr. Kerelis is a residential property manager. He has earned the certification of Accredited Residential Manager (ARM) through the Institute of Real Estate Management (IREM). Mr. Kerelis is employed as a forensic architect and property management expert by Robson Forensic, Inc. and provides investigations, analysis, reports, and testimony toward the resolution of litigation involving personal injury (slip, trip and fall incidents), construction claims, property management standards, and other architectural and property management issues.

Exhibit 6 is a summation of Mr. Kerelis' opinion in this matter. Exhibit 6, paragraph 6 indicates that Kerelis performed a site investigation on December 16, 2022. At approximately 6:00pm, an hour after sunset, Kerelis took light meter readings at various locations on the site including in the hallway (5.9 fc) where Ms. Bowerman had exited from, the outside covered entryway (3.4fc), at various points along the sidewalk leading to the parking lot (0.4 fc, 0.1fc, 0.8 fc), the parking lot (0.1 fc), **at the incident location (0.0fc), and in front of where the dumpster had been relocated during the construction project (0.0fc)**[1]. In paragraph 13 of Exhibit 6, Kerelis opines that: 1) the trench was inconspicuous in the underlit parking lot and was a dangerous trip hazard, 2) those responsible for the construction site should have known that not guarding against or providing warnings of the hazardous condition was dangerous to residents and; 3) the

[1] Fc stands for foot candles which is a unit of light measurement. Exhibit 7, page 18.

failure of those responsible for the construction site to prevent residents from encountering the trench did not meet the standard of care for construction site safety and exposed residents to the dangerous condition that caused Ms. Bowerman's fall and injury.

Exhibit 7 is the deposition of Albert Kerelis that was taken on January 17, 2023. In his deposition, Mr. Kerelis elaborated upon his opinions found in Exhibit 6:

- There are standards set by the Illuminating Engineering Society and ASTM International which govern how much illumination there should be to safely walk in an asphalt parking lot. Exhibit 7, pages 22-25.
- The City of Stanton in its ordinances recognizes the standards created by the Illuminating Engineering Society of North America and **based upon Bowerman's age – 75 at the time of the accident – an asphalt parking must have at least 0.5 foot candles everywhere in the parking lot in order to be considered safe to walk**. *Id* at pages 26-33.
- Kerelis' opinion about the lighting in the parking lot confirms Bowerman's testimony - the parking lot was dark and that she could not see and the fact that Kerelis got a 0.0 foot candle reading where the accident happened confirms that it was dark and the parking was under lit compared to the safety standards outlined by the Illuminating Engineering Society of North America. *Id* at pages 34-36.
- Kerelis also opined that **Stanton City Ordinance 192 – Rental Housing incorporates the BOCA 1990 Code Section 3006.0 which states that whenever a building or structure is erected, altered, removed or demolished, the operation shall be conducted in a safe manner and suitable protection for the general public shall be provided**. *Id* at pages 38-40.

- Reasonable safety measures suitable to protect the public would include caution tape and traffic cones. *Id* at pages 41-43.
- Kerelis also opined that there was a violation of MCL 554.139(1)(a) and (b). *Id* at pages 43-44.

Exhibit 8 is the City of Stanton, Michigan Ordinance No. 192 – Rental Housing. In Appendix A of Exhibit 8 are definitions and one definition is for the term "Building Code" at number 5 which states as follows:

> "The Building Code (B.O.C.A. 1990 edition) officially adopted by the City of Stanton and the County of Montcalm for the regulation of construction, alteration, addition, repair, removal, demolition, use, location, occupancy and maintenance of buildings and structures."

LEGAL ANALYSIS

A. THERE ARE GENUINE ISSUE ISSUES OF MATERIAL FACT AS TO PLAINTIFF'S MCL 554.139(1)(a) AND (1)(b) PREMISES LIABILITY CLAIM THAT PRECLUDE MCR 2.116(C)(10) SUMMARY DISPOSITION

(1) Introduction

In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Benton v. Dart Props*., 270 Mich. App. 437, 440 (2006); *Taylor v. Laban*, 241 Mich. App. 449, 452 (2000).

Plaintiff's Complaint (Exhibit 9) does not and never has alleged a common law premises liability claim. In other words, contrary to Defendant's assertions, the duty owed to Plaintiff in this case does not arise from the common law but is based solely on MCL 554.139. MCL 554.139 states, in relevant part that:

> **(1)** In every lease or license of residential premises, the lessor or licensor covenants:

> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located.
>
> (3) **The provisions of this section shall be liberally construed**

Thus, MCL 554.139 creates three (3) separate and distinct covenants in every residential lease in Michigan: (1) that the premises and all common areas are fit for use intended by the parties, (2) that the premises will be kept in reasonable repair during the term of the lease and (3) the landlord's covenant to comply with local health and safety laws. *Sedlecky v. Sun Communities, Inc*., 2020 Mich. App. LEXIS 5495 *4-*6 (Exhibit 10)

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

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

While the *Allison* Court specifically referenced parking lots, the principles set forth apply to all common areas . . . ." *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130 (2010) The relevant question is whether there could be reasonable differences of opinion regarding whether the . . . [walkway] was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall. *Id.* Similar to the intended use of a sidewalk, a walkway's intended use is to walk on it. *Benton v. Dart Props*., 270 Mich. App. 437, 444 (2006). Specifically, the purpose of the walkway at issue was to provide tenants, specifically

plaintiff, reasonable access from the underlit garbage dumpster patio with the trench to plaintiff's apartment. Thus, the only remaining question is whether the removal of the trench in front of the garbage dumpster made that walkway unfit for its intended use of providing plaintiff reasonable access from the garbage dumpster patio to plaintiff's apartment under the circumstances present when plaintiff fell. *Id.* The word "fit" as used in MCL 554.139(1)(a) is defined as "adapted or suited; appropriate." *Allison*, 481 Mich at 429.

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

In the present case, Defendant Red Oak does not dispute that the walkway and area around the garbage dumpster patio in question were part of the premises and that the intended use of these steps was to provide Bowerman the ability to throw out her garbage. At pages 11-14 of Defendant Red Oak's Brief, Defendant Red Oak argues that the walkway and area around the garbage dumpster patio were fit for their intended use, in other words, reasonable minds cannot differ regarding the conditions that made the steps unfit for its intended use.

Nevertheless, before Plaintiff addresses the issue of whether the steps were fit for their intended use and whether the steps were kept in reasonable repair and in compliance with state and local health and safety codes, Defendant Red Oak argues at pages 15-17 of its Brief that the open and obvious defense is applicable to the present case.

(2) The Open And Obvious Defense Is Inapplicable To A MCL 554.139 Premises Liability Claim

As stated previously in this Brief, Plaintiff is not asserting a common law premises liability claim in this matter. In *Benton v. Dart Props*., 270 Mich. App. 437, 441 (2006), the Court of Appeals stated the following:

> "The open and obvious doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b)."

In other words, according to *Benton*, if Defendant breached its duties under MCL 554.139, Defendant would be liable to plaintiff even if the defective steps in question were open and obvious. *Benton*, 270 Mich. App. At 441.

In Exhibit 1, Plaintiff avers that her premises liability claim is solely based upon the covenants found in MCL 554.139. In fact, the verbiage in paragraphs 15 and 16 of Exhibit 9 come directly from the statute. Therefore, Defendant's arguments concerning the open and obvious defense are factually and legally misplaced and irrelevant to the outcome of Defendant's MCR 2.116(C)(10) Motion.

(3) There Is A Genuine Issue of Material Fact As To Whether The Walkway And The Area Around The Garbage Dumpster Patio In This Case Were Fit For Their Intended Purpose Pursuant to MCL 554.139(1)(a).

The facts in this case demonstrate that Defendant Red Oak through Eric Koch knew the following: (1) the trench was a trip hazard, (2) as of October 21, 2021, that there was **no caution tape or cones around the trench in front of the garbage dumpster** and (3) caution tape and/or cones needed to be placed in the trench area to make it more obvious to pedestrians. Albert Kerelis – Plaintiff's construction and safety expert – testified that the area around garbage dumpster patio was underlit in violation of industry standards, that the trench in question was dangerous and

violated the City of Stanton Ordinance 192, MCL 554.139(1)(a) and (b). Thus, according to *Hadden* and *Trueblood*, a reasonable difference of opinion regarding whether the trench in question under these circumstances made the area around the garbage dumpster patio unfit for its intended purpose. In other words, Plaintiff's evidence must be taken in a light most favorable to him for the purposes of an MCR 2.116(C)(10) motion, and thus, reasonable minds could conclude that the trench in front of the underlit garbage dumpster patio posed a hidden danger that denied Jan Bowerman access to the garbage dumpster area to throw out her garbage thus rendering the garbage dumpster patio area unfit for its intended use. *Hadden*, 287 Mich. App at 132.

Nevertheless, Defendant relies heavily on the fact that multiple people – including Bowerman – traversed the garbage dumpster patio area in question before and after Bowerman's fall to support its argument that the garbage dumpster area was fit for its intended purpose. According to *Estate of Trueblood v. P&G Apartments, LLC*., 327 Mich. App. 275, 291-292 (2019), such evidence is not dispositive, as such evidence:

> That others had been able to walk on the [underlit garbage dumpster patio area] without incident might have suggested that the [the trench in front of the did] not completely [hinder pedestrian travel], but it might also have suggested that the others had been walking more carefully on the [underlit garbage dumpster area with the trench] because given that plaintiff had slipped, they were aware that the [underlit garbage disposal area with the trench was] defective."

In other words, while it may be reasonable to infer that Bowerman and other's use of the underlit garbage disposal patio area with the trench demonstrated fitness for intended use, this is neither the only reasonable inference from their usage, nor is it drawn in favor of plaintiff as required by MCR 2.116(C)(10). *Lakeview Commons v. Empower Yourself, LLC*, 290 Mich. App. 503, 506 (2010). Interestingly, "Defendant's fitness for intended use" argument in the present case was rejected by the Michigan Court of Appeals in *Stone v. Boulder Creek Apts., LLC*, 2019 Mich. App.

LEXIS 7562 *7-*9 (Exhibit 11) and *Sedlecky v. Sun Cmtys., Inc.*, 2020 Mich. App. LEXIS 5495 *10-*14 (Exhibit 10).

Defendant's reliance on *Spitz v. Occidental Development*, 2020 Mich. App. LEXIS 7844 is factually distinguishable from the instant case. In *Spitz*, plaintiff testified that was nothing preventing him from walking around the trip hazard and that for the 4-5 months preceding the accident, he was able to walk around the trip hazard. *Id* at *5-*6. There is no indication from *Spitz* that plaintiff encountered the trip hazard in darkness like the Bowerman did in the instant case. Furthermore, Bowerman specifically testified that it was too dark to see the trench that she was trying to avoid.

According to *Stone* and *Sedlecky*, Defendant's argument on this issue and its reliance on *Spitz* should be rejected in the present case. Therefore, there is a genuine issue of material fact as to whether the at-issue steps were fit for their intended purpose and MCR 2.116(C)(10) summary disposition is unwarranted on this issue.

(4) There Is A Genuine Issue of Material Fact As To Whether Defendant Violated MCL 554.139(1)(b) By Not Complying With The City Of Stanton's Ordinance 192 Concerning Rental Housing

Defendant spent the bulk of its Brief discussing whether the steps were fit for their intended purpose, however, this is irrelevant to Plaintiff's MCL 554.139(1)(b) failure to comply with local and state safety and health ordinance's claim because it is a separate covenant in the statute.

As the Court will recall, Plaintiff's expert – Albert Kerelis – opined the following concerning the area where the accident happened: The City of Stanton in its ordinances recognizes the standards created by the Illuminating Engineering Society of North America and based upon Bowerman's age – 75 at the time of the accident – an asphalt parking lot must have at least 0.5 foot candles everywhere in the parking lot in order to be considered safe to walk. Kerelis' opinion

about the lighting in the parking lot confirms Bowerman's testimony - the parking lot was dark and that she could not see and the fact that Kerelis got a 0.0 foot candle reading where the accident happened confirms that it was dark and the parking lot was under lit compared to the safety standards outlined by the Illuminating Engineering Society of North America. Kerelis also opined that Stanton City Ordinance 192 – Rental Housing incorporates the BOCA 1990 Code Section 3006.0 which states that whenever a building or structure is erected, altered, removed or demolished, the operation shall be conducted in a safe manner and suitable protection for the general public shall be provided. Reasonable safety measures suitable to protect the public would include caution tape and traffic cones. A violation of an ordinance is evidence of negligence when the purpose of the ordinance is to prevent the type of injury and harm actually suffered. *Ward v Frank's Nursery & Crafts*, 186 Mich App 120, 135 (1990). Accordingly, there is a genuine issue of material fact that Defendant violated MCL 554.139(1)(b) and summary disposition would be inappropriate as to Plaintiff's premises liability claim.

(5) Assuming Arguendo That The Open And Obvious Defense Is Applicable To The Instant Matter, There Is A Genuine Issue Of Material Fact As To Whether The Trench In Question Was Open And Obvious

A premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). That duty does not, however, extend to a hazardous condition that is open and obvious *Id.* at 516-517. The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238 (2002). This is an *objective standard*, calling for an examination of the objective nature of the condition of the premises at issue. *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012). To be

considered open and obvious, the hazard must have been **wholly revealed** by that casual inspection. *Novotney v Burger King Corp* (On Remand), 198 Mich App 470, 474 (1993).

Due to the darkness, Bowerman tried to avoid the trench by taking a parabolic route to get to the garbage disposal. Bowerman and others have testified that there is no streetlight near the area where she was injured. As to the issue of darkness, in *Abke v Vandenberg*, 239 Mich App 359, 362 (2000), that whether an alleged hazard is open and obvious is affected by the lighting conditions in the area renders a motion for directed verdict or judgment notwithstanding the verdict inappropriate if there are questions of fact regarding whether the area where the plaintiff fell was dark or whether it was adequately lit. In *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 127-128 (1992), the Court of Appeals stated that the lack of adequate lighting created a fact question as to whether a danger was open and obvious and, thus, summary disposition was unwarranted.

The Court of Appeals recently reversed summary disposition in *Thomas v. City of Warren*, 2023 Mich. App. LEXIS 947 (Exhibit 12), where the plaintiff tripped over a 2-inch vertical lip of a sidewalk that she could not see in the darkness. *Id* at *5-*6. At *8-*9 of Exhibit 12, the *Thomas* Court states the following:

> Kane Real Estate Investments 2, LLC also notes that Barnes testified that she had no trouble seeing the condition of the driveway, including the 2-inch lip where it intersected with the sidewalk. Yet, Barnes also testified that she took a nighttime photograph of her driveway from the porch. She indicated that she could not see the lip from the porch, but acknowledged that she could see a "line" in the area. The photograph does, in fact, depict a dark line in the area where the driveway appears to intersect with the sidewalk. The exact nature of the line, however, is unclear. Moreover, Thomas opined that, based upon her experience taking photographs at night, the flash had been used when the photograph was taken. Accordingly, although this evidence would support a finding that the lip would be visible upon causal inspection in the dark, it does not directly refute Thomas's testimony that it was too dark to see the 2-inch lip before or after she stubbed her toe on it. **Thus, as the evidence must be viewed in the light most favorable to Thomas, the non-moving party, there is a genuine question of material fact with regard to the**

> **visibility level of the allegedly hazardous condition. The trial court, therefore, erred by summarily dismissing Thomas's premises liability claim**. (Emphasis added.)

Accordingly, there is a genuine issue of material fact as to whether the open and obvious defense is applicable to the instant case and MCR 2.116(C)(10) summary disposition is unwarranted under these circumstances.

(6) The Open and Obvious Doctrine Should Be Abrogated

As the Michigan Supreme Court has stated, Michigan's approach toward premises liability is based on the Restatement of Torts, 2d. *Bertrand* at 611; *Lugo* at 516-517. The Supreme Court has interpreted the Restatement as providing that a landowner owes no duty to an invitee to warn of a hazardous condition where that condition is open and obvious.

The Restatement of Torts, 2d, addresses premises liability in two separate sections: §343 and §343a. Pursuant to §343,

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Then, §343(a) provides that;

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance

indicating that the harm should be anticipated.

As Justice Cavanagh explained in his concurring opinion in *Lugo*, the above-quoted provisions never mention the concept of duty. *Lugo*, 464 Mich at 531. Instead, the Restatement implies that a possessor of land owes a duty of care to an invitee and then further implies that the applicable duty of care does not require the possessor to warn of hazards that would be obvious *unless* the possessor should anticipate that harm will occur despite the obviousness of that hazard.

CONCLUSION

As demonstrated in this Brief, there are genuine issues of material fact as to Jan Bowerman's Premises Liability claim pursuant to MCL 554.139(1)(a) and (1)(b) against Defendant Red Oak that render MCR 2.116(C)(10) Summary Disposition unwarranted and inappropriate. For this reason, Defendant Red Oak's Motion for Summary Disposition should be denied in its entirety.

Respectfully submitted,

JOHNSON LAW, PLC

By: _____

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Dated: March 16, 2023

EXHIBIT LIST

1. Jan Bowerman deposition transcript
2. Photographs
3. Randy Westveld deposition transcript
4. Eric Koch deposition transcript
5. Albert Kerelis C.V.
6. Albert Kerelis report
7. Albert Kerelis deposition transcript
8. City of Stanton, Michigan Ordinance No. 192 – Rental Housing
9. Complaint
10. *Sedlecky v. Sun Communities, Inc*., 2020 Mich. App. LEXIS 5495 *4-*6
11. *Stone v. Boulder Creek Apts., LLC*, 2019 Mich. App. LEXIS 7562 *7-*9
12. *Thomas v. City of Warren*, 2023 Mich. App. LEXIS 947

Should any provision or part of the within ordinance be declared by any court of competent jurisdiction to be invalid or unenforceable, the same shall remain in full force and effect.

Sec. 9. EFFECTIVE DATE

This ordinance shall take effect immediately. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

ORDINANCE NO. 192 – RENTAL HOUSING

THE CITY OF STANTON

An Ordinance to add a new Section H entitled "Rental Housing Code" to the Ordinance of the City of Stanton.

The City of Stanton ordains:

A new Section H (Ordinance 192) is added to the Ordinance of the City of Stanton to read as follows:

SECTION H – RENTAL HOUSING CODE

ARTICLE I – PURPOSE AND APPLICABILITY

Section 1.100 – Purpose. The purpose of this Ordinance is to regulate rental dwellings for the purpose of maintaining adequate sanction and public health, to protect the safety and welfare of the people, and to encourage the maintenance of properties by legislation which shall be applicable to all rental dwellings now in existence or hereafter constructed by:

1. Establishing minimum standards for basic equipment and facilities in rental housing.
2. Fixing the responsibilities of the City, owners, operators and occupants of all rental structures.
3. Providing for administration and enforcement of rental housing standards.

Section 1.101 – Matters Covered. The provisions of this Ordinance shall apply to all rental structures and premises, with respect to: Structure, premises, protection against fire hazard, equipment or maintenance, inadequate provisions for light and air, lack of proper heating, unsanitary conditions, or over-crowding, or other conditions which may be deemed to constitute a menace to the safety, health or welfare of their occupants.

Section 1.102 – Applicability. Every portion of a building or premises used or intended to be used for rental dwelling purposes shall comply with the provisions of this Ordinance.

Section 1.103 – Application of Building Code. Any alterations to buildings, or changes of use therein, which may be caused directly or indirectly by the enforcement of this Ordinance shall be done in accordance with all applicable building codes.

Section 1.104 – Application of Zoning Law. All rental Housing shall be subject to applicable provisions o the City of Stanton's Zoning Ordinance.

Section 1.105 – Other Regulations. The provisions in this Ordinance shall not be construed to prevent the

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enforcement of other provisions of the City of Stanton's Ordinances or governmental regulations which prescribe additional or other standards applicable to rental housing.

Section 1.106 – Existing Buildings. This Ordinance establishes minimum requirements for the occupancy of all rental structures and does not replace or modify requirements otherwise established for the construction, repair, alterations or use of buildings, equipment or facilities.

ARTICLE II – DEFINITIONS

Section 1.107 – Applicability. All definitions related to this Ordinance are contained in Appendix A and are applicable to this Ordinance only.

Section 1.108 – Terms Not Defined. Where terms are not defined in this Section or Appendix A or under other provisions of this Ordinance or the Building Code, they shall have ascribed to them their ordinarily accepted meanings or such as the context herein may imply.

Section 1.109 – Comprehensive Inclusion. Whenever the words "multi-family dwelling" , "residence building", dwelling unit", "rooming house, rooming unit', or "premises" are used in this Ordinance, they shall be construed as though they were followed by the words "or any part thereof."

ARTICLE III – ADMINISTRATION AND ENFORCEMENT

Section 1.110 – CEO. The Code Enforcement Officer shall be a person or persons designate by the Mayor. It shall be the duty and responsibility of the CEO to enforce the provisions of this Ordinance.

Section 1.111 – Relief from Personal Liability. Neither the City, the CEO nor any other officer, agent or employee of the City who acts in good faith in the discharge of duties in the enforcement of this Ordinance shall be liable for any damage accruing to any person or property as the result of such acts or alleged failure to act.

Section 1.112 – Administration and Enforcement Procedures and Criteria. The Administration and enforcement procedures and criteria necessary to insure the implementation and compliance with the provisions of the Housing Rental Ordinance are contained in Appendix B, which is an integral part of this Ordinance.

ARTICLE IV – REGISTRATION OF RENTAL UNITS

Section 1.113 – Registration of Rental Unites; Fees.

1. Annually on or before July first of each year, every owner of a rental unit or unites shall register the same with the City Clerk and make application for an annual license. Each registration and application for license shall be accompanied by an appropriate fee.
2. Should the title to the property, which is the subject of the application and registration, be obtained more than six (6) months after the annual registration date for that year as here in above specified, then the license fee to be paid by the applicant shall be one-half the annual fee for such property. The license issued the applicant shall be valid until the following July first, the regular annual application and registration date.
3. In the event an owner shall fail to comply with the provisions of this Ordinance on or before July first of each year, the owner shall pay in addition to the filing fee a late filing fee according to the schedule of fees applicable to this Ordinance.

4. Fees for registration, inspection, complaint inspections and re-inspections shall be provided by resolution of the City Council.
5. An initial Schedule of Fees applicable to this Ordinance will be established by resolution of the City Council. Thereafter, on an annual basis as part of the budgeting process, the fee structure will be evaluated and the fees to be charged determined as follows:
    a. If fee changes are proposed from the previous year, and owners and their responsible agents, if any, listed on the "Registry of Owners" maintain by the CEO will be notified by mail.
    b. If no fee changes are proposed, the existing schedule of fees will continue in force.

Section 1.114 – Registry of New Rental Dwellings.

1. The owner of the new rental dwelling or of any dwelling newly converted to a rental dwelling prior to allowing occupancy of any new rental units.
2. Owners of any dwelling that was a rental and is removed from that status by sale shall provide proof of sale to the City Clerk.

Section 1.115 – Change in Register Information. The owners of rental unites previously registered with the City Clerk shall notify the City Clerk within thirty (30) days of any change in registration information. A new owner of any registered rental unit (s) shall re-register such unit(s) within thirty (30) days of the date of transfer of ownership. No new fees shall be charged for change of registration.

Section 1.116 – Register of Rental Dwellings. Application for registration and license shall be made in such form and in accordance with such instructions as may be provided by the CEO and shall include:

1. The address of the rental unit.
2. The number of dwelling units.
3. The name, residence address, and phone number of the owner.
4. The name, address, and phone number of the manager or agent designated by the owner.
5. The date of registry and registration identifications number.
6. Total amount of registration fees.

Section 1.117 – Registry of Owners. The City shall maintain a registry of owners (and their responsible agents, if any) of all rental units in the city.

Section 1.118 – Issuance of License. The City Clerk in coordination with the CEO shall issue a license if the applicant shall have registered and furnished all the information the dwelling has been inspected and in compliance with this ordinance.

Section 1.119 – Revocation of License. The CEO may revoke a rental housing license and notify the City Clerk of the same if the owner or applicant has either:

1. Misrepresented ownership or the state of condition of the rental property , or
2. The property is in violation of this Ordinance or any other applicable provision of the City of Stanton's Ordinances.
3. Failed to correct a violation within stated time on notice.

Section 1.120 – Temporary Certification Authorized. When a Certificate of Compliance is required pursuant to this Ordinance, the CEO may issue a temporary Certificate of Compliance for the following reasons only:

1. For a newly registered rental dwelling until such time as the CEO has made a compliance inspection.
2. To coincide with compliance time periods set forth in a Notice of Violation if such periods extend beyond the expiration date of an existing Certificate of Compliance.

ARTICLE V – INSPECTION BASIS

Section 1.121 – Inspections. The CEO is authorized to make inspections of all rental units in the City occupied or held for rental. Inspections may be made to determine compliance with the standards of this Ordinance in the following instances:

1. The CEO shall make inspections of rental units licensed under this Ordinance at least once every three (3) years period.
2. When an application is received for the initial registrations and licensing of a rental unit or units.
3. When a complaint is received and determined to be valid and have merit by the CEO that a rental unit or rental premises is not in compliance with the provisions of this Ordinance.
4. Upon observation by the CEO of a violation of the provisions of this Ordinance.
5. When an emergency condition is observed by the CEO or reasonably believed to exit.
6. When an owner requests that the Department of Social Services make vendor payments for shelter to the owner on behalf of a tenant.
7. To determine compliance with a Notice of Violation or any order issued by the CEO or any other City Official.

ARTICLE VI – ENVIRONMENTAL, EXTERIOR AND INTERIOR REQUIREMENTS

The provisions of this Article shall govern the minimum standards for rental unites, rental properties and structures thereon. Every residential property shall comply with the following requirements:

Section 1.122 – Exterior Property Areas. No person shall rent or let another for human habitation any structure or premises which does not comply with the following requirements:

1. *Animals.* Animals kept or allowed within a rental until shall not be permitted by the tenant to create any unsafe, odorous or unsanitary condition or cause property damage. Animals kept or allowed in a yard or in a accessory structure shall not be permitted to create any unsafe, odorous or unsanitary conditions. All feces shall be regularly removed by the tenant. Keeping of animals in rental units and/or on rental premises shall be subject to all other provisions of the City of Stanton Ordinances which are applicable and to all existing written agreements between owner and tenant.
2. *Accessory Structures.* All accessory structures, including detached garages, shall be maintained structurally.
3. *Grading and Drainage*. All yard areas shall be graded and maintained so as to prevent the accumulation of stagnant water thereon, or within any building or structure located thereon.
4. *Insect and Rodent Harborage*. All exterior property areas hall be kept free from infestation of insects, rodents, vermin, and pests other than those normal for the particular season. The owner shall be responsible for the extermination of insects, rodents, vermin, or other pests in all exterior areas of the premises, expect that the occupant shall be responsible for such extermination in the case of a single-family dwelling.
5. *Noxious Weeds*. All exterior property areas shall be kept free from species of weeds or plant growth

which are noxious or detrimental to the public health and shall be in compliance with the requirements of Ordinance 184 of the City of Stanton.

6. *Sanitation.* All exterior property areas shall be maintained in a clean and sanitary condition free from any accumulation of rubbish or garbage.
7. *Trash Stored Outdoors.* Any trash placed outdoors for a period of longer then six (6) hours shall be kept in rigid containers which are closed with a tight fitting lid or shall be bundled so as not to scatter on the ground, blow about, be unsafe or unsanitary. No container except an approved commercial dumpster shall be stored outside for more than twenty-four (24) hours, unless the container or bundled trash is kept in a side or rear yard out of sight from the public right-of-way.
8. *Outdoor Storage of Materials.* Outdoor storage of materials of value shall not be permitted in front yard or in a side yard. Materials of value kept outside shall be stored in a safe and sanitary manner.
9. *Residential Parking.* Off-street parking spaces shall be provided adequately for each rental unit. Non-conforming parking, existing on the effective date of this Ordinance, will continue to be allowed when no feasible space exists on the rental property. Parking spaces shall be used solely for the parking of licensed and operable passenger automobiles. Parking is prohibited in any portion of the front yard or side lawns. the street right-of-way and the public sidewalk.

Section 1.123 – Structure Exterior. No person shall rent or let another to rent for human habitation any structure or portion thereof which does not comply with the following regulations:

1. *Foundations, Walls and Roof.* Every foundation, exterior wall, roof and all other exterior surfaces shall be maintained in a workmanlike state of maintenance and repair and shall be kept in such conditions as to exclude rodents.
2. *Exterior Walls.* All exterior surface material must be pained or maintained in good repair. Chimneys shall be maintained structurally sound and in a safe, operable condition.
3. *Roof and Gutters.* The roof shall be structurally sound, tight, and have no major defects which admits rain. Butters and downspouts shall be firmly affixed and maintained free from defects.
4. *Stairs, Porches and Railings.* Stairs and other exit facilities shall be adequate for safety as provided in the Building Code and shall comply with the following sections:
    a. Structural Safety: Every outside stair, every porch and every appurtenance attached thereto shall be so constructed as to be safe to use and capable of supporting the loads as required by the Building Code; and shall be kept in sound condition and good repair.
    b. Handrails: Every flight of stairs, which are more than three (3) risers high, shall have handrails which shall be located as required by the Building Code. Porches, balconies or raised floor surfaces located more than thirty (30) inches above the floor or grade below thirty-six (36) inches in height. Every handrail balustrade shall be firmly fastened and shall be maintained in good condition. Non-conforming handrails, existing on the effective date of this Section, will be allowed if there is no hazard to the health and safety of the occupants.
5. *Windows, Doors, and Hatchways.* Every window, exterior door, and basement hatchway shall be substantially tight and shall be kept in sound condition and repair.
6. *Windows to be Openable.* Windows shall be capable of being easily opened and held in position by window hardware.
7. *Door Hardware.* Every exterior door, door hinge and door latch shall be maintained in good condition.
8. *Window and Door Frames to Fit In Wall.* Every window, door and frame shall be constructed and maintained in such relation to the adjacent wall construction so as to exclude rain as completely as

possible, and to substantially exclude wind from entering the dwelling or structure.

9. *Basement Hatchways*. Every basement hatchway shall be capable of being opened from the inside and without the use of a key.
10. *Exit Doors*. Every door available as an exit shall be capable of being opened from the inside easily and without the use of a key.
11. *Basement*. Every basement or cellar window used or intended to be used for ventilation, and every other opening to a basement which might provide an entry for rodents, shall be supplied with a screen or the other device as will effectively preclude such entry.

Section 1.124 – Structure Interior. No person shall rent or let to another for human habitation, any structure or portion thereof which does not comply with the following requirements:

1. *Free from Dampness*. Every building, cellar, basement and crawl space shall be maintained free from excessive dampness to prevent conditions conductive to decay or deterioration of the structure.
2. *Structural Members*. The supporting structural members of every building shall structurally sound, showing no evidence of deterioration as to load bearing capacity.
3. *Interior Stairs and Railings*. Stairs and handrails shall be provided in every structure as required by the Building Code, except where non-conforming stairs and handrails, existing on the effective date of this Section, are found to be safe and sound and present no hazard to the health and safety of the occupants by the CEO.
4. *Maintained in Good Repair*. All interior stairs of every structure shall be maintained in sound condition and good repair by replacing treads and risers that evidence excessive wear or are broken, warped or loose.
5. *Sanitation*. The interior of every dwelling and structure shall be maintained in a clean and sanitary condition free from accumulation of rubbish or garbage.
6. *Insect and Rodent Harborage*. Buildings shall be kept free from insect and rodent infestations, and where insects and rodents are found, they shall be promptly exterminated by safe and acceptable processes. Every owner of a dwelling, or multi-family dwelling shall be responsible for the extermination on insects, rodents, vermin or other pests whenever infestation exists in two or more of the dwelling units or in the shared or pubic parts of the structure. The occupant of a single family dwelling shall be responsible for such extermination within the unit occupied whenever such dwelling is the only unit in the building that is infested. Notwithstanding the foregoing provisions, whenever infestation of rodents is caused by failure of the owner to maintain any dwelling or multi-family dwelling in a rodent-proof condition, extermination of such rodents shall be the responsibility of the owner.
7. *Interior Walls, Ceilings and Floors*. All interior walls, ceilings and floors shall be structurally sound, in good repair and properly maintained.

ARTICLE VII – BASIC EQUIPMENT AND FACILITIES

Section 1.125 – Ventilation. Every habitable room shall have at least one (1) window or skylight which can be easily opened for adequate ventilation, except where there is supplied ventilation from an electric-powered, mechanical system. Non-conforming ventilation existing on the effective date of this Ordinance, will be allowed if there is no hazard to the health and safety of the occupants.

Section 1.126 – Bathroom Light and Ventilation. Every bathroom and toilet compartment shall comply with the light and ventilation requirements for habitable rooms, except that no window or skylight shall be required in

adequately ventilated bathrooms and toilet compartments equipped with a mechanical ventilation system. Non-conforming ventilation existing on the effective date of this Ordinance, will be allowed if there is no hazard to the health and safety of the occupants.

Section 1.127 – Electrical Facilities. Every building and rental unit shall be adequately and safely provided with an electrical system in compliance with the requirements of this Section. The provisions of subsections (1) through (5) shall be considered absolute minimum requirements. The number of rental units in a building and usage of appliances and equipment therein shall be used as the basis for determining the need for additional electrical facilities. Non-conforming electrical systems existing on the effective date of this Ordinance, will be allowed if there is no hazard to the health and safety of the occupants.

1. *Receptacles*. Every habitable space in a unit shall contain at least two (2) spate and remote receptacle outlets or one (1) receptacle outlet and one (1) ceiling or wall type electric light fixture. Every laundry area, kitchen and bathroom shall contain at least one (1) grounded type receptacle near a water exposure area.
2. *Lighting Fixtures*. Every pubic hall, interior stairway, toilet compartment, bathroom, laundry room and furnace room shall contain at least one (1) electric lighting fixture.
3. *Service*. When an electrical system requires replacement or modification to comply with the provisions of this Section, the service shall be corrected to a minimum of one hundred (100) ampere, three (3) wire service.
4. *Installation*. All electrical equipment, wiring and appliances shall be installed and maintained in accordance with State Electrical Code. All electrical equipment shall be of an approved type.
5. *Defective System*. Where it is found that the electrical systems in a structure constitutes a hazard to the occupants or the structure by reason of inadequate service, improper fusing, insufficient outlets, improper wiring or installation, deterioration or damage, the CEO shall require the defects to be corrected to eliminate the hazard.

Section 1.128 – Heating Facilities. Every rental unit and residential structure shall have heating facilities that are in safe and good working condition, and that are capable of providing adequate heat to all habitable rooms, bathrooms, and toilet compartments located therein. Portable heating equipment employing a flame and heating equipment using gasoline or kerosene as fuel are prohibited. All electric portable heating units must be plugged into an electric wall outlet without the use of any extension cord.

Section 1.129 – Water Heating Facilities. Every rental unit shall be supplied with water heating facilities which are installed in an approved manner, properly maintained, and properly connected with hot water lines to the fixtures required to be supplied with hot water. Water heating facilities shall be capable of heating water to such a temperature as to permit an adequate amount of water to be drawn at every required kitchen sink, lavatory basin, bathtub, shower, and laundry facility or other similar unit of a temperature of not less than one hundred twenty (120) degrees Fahrenheit as required for the reasonable use by occupants.

Section 1.130 – Sanitary Facilities. Each rental unit shall include the following minimum sanitary facilities maintained in sanitary, safe, and working condition:

1. *Toilet*. A toilet within the rental unit, separate from the habitable rooms, which affords privacy.
2. *Lavatory*. A lavatory in the same room with the toilet or adjacent to it.
3. *Bathtub or Shower*. A bathtub or shower which affords privacy to the user.

4. *Kitchen Sink.* A kitchen sink apart from the required lavatory.

Section 1.131 – Water and Sewer Systems. Every installed kitchen sink, lavatory, bathrub or shower and toilet shall be properly connected to a public water and sewer system or approved and permitted private system. All bathroom and kitchen sinks, lavatories, bathtubs and showers shall be supplied with hot and cold running water.

Section 1.132 – Installation and Maintenance. No person shall occupy or let to another person for occupancy, any rental unit or structure which does not comply with the following requirements:

1. *Facilities and Equipment.* All required equipment and all building space and parts in every rental unit or structure shall be constructed and maintained so as to properly and safely perform their intended function in accordance with the provisions of the Building Code.
2. *Maintained Clean and Sanitary.* All rental units and building facilities shall be maintained in a clean and sanitary condition by the responsible person so as not to breed insects and rodents or produce dangerous or offensive gases or odors.
3. *Plumbing Fixtures.* Water lines, plumbing, fixtures, vents and drains shall be properly installed, connected and maintained in working order, free from obstructions, leaks and major defects.
4. *Plumbing Systems.* Every pluming stack and sewer function shall be so installed and maintained as to function properly and shall be kept free from obstructions, leaks and defects to prevent structural deterioration or health hazards. All repairs which require a permit and new installation shall be made in accordance with the State Plumbing Code. Non-conforming plumbing systems or parts thereof, on the effective date of this Section will be allowed, if there is no hazard to the health and safety of the occupants.
5. *Heating Systems.* All heating equipment shall be maintained in good condition. Sufficient venting capacity and combustion air shall be provided.

ARTICLE VIII – UTILITY SERVICES AND EQUIPMENT TO BE MAINTAINED

Section 1.133 – Utility Services. An owner, except as provided herein, shall not cause any of the following utilities, services or equipment to be shut off, disconnected or removed or otherwise terminated or interrupted when the utility, service or equipment is being furnished to or used by the occupant of a rental unit: Water or sewer service, fuel supply, heating or ventilation equipment, hot water supply or electrical service. This Section does not apply to a necessary or temporary interruption of service required for maintenance, repair or replacement, not to any such interruption needed to act upon an emergency or hazardous condition. An owner shall be responsible to the City for payment of municipal water and sewer charges to rental units. Neither an owner nor a tenant shall cause a utility service to be terminated, for non-payment or otherwise, without fiving immediate notice to the other party to the rental agreement.

ARTICLE IX – SPACE AND OCCUPANCY REQUIREMENTS

Section 1.134 – Occupancy Requirements. NO person shall occupy or let to another for occupancy, any rental unit for the purpose of living therein which does not comply with the following requirements:

1. *Minimum Ceiling Height.* Habitable rooms shall have a clear ceiling height over the minimum area required by this Section of not less than seven (7) feet. A ceiling height of less than seven (7) feet will be considered a built-in deficiency and shall be exempt from compliance, provided that such built-in deficiency was in compliance with a building code at the time of construction.

2. *Required Space in Sleeping Rooms.* Every room occupied for sleeping purposes by one (1) occupant shall have a minimum gross floor area of at least seventy (70) square feet. Every room occupied for sleeping purposes by more than one (1) occupant shall contain at least fifty (50) square feet of floor area for each occupant.
3. *Access Limitation of Dwelling Unit to Commercial Uses.* No habitable room, bathroom, or toilet compartment which is accessory to a rental unit shall open directly into or shall be used in conjunction with a food store, barber or beauty shop, doctor's or dentist's examination or treatment room, or similar room used for public purposes.
4. *Location of Rooms.* No dwelling or rental unit containing two (2) or more sleeping rooms shall be arranged so that access to a bathroom or toilet can be obtained only by going through another sleeping room. This requirement shall not apply to single family rental dwellings in which no lodgers are occupants.
5. *Required Space in Efficiency Unit.* Each efficiency rental unit shall include:
    a. A living area not less than two hundred twenty (220) square feet of floor area with an additional one hundred (100) square feet of floor area for each occupant in excess of two (2).
    b. A kitchen sink, cooking appliance and refrigeration facilities, each having a clear working space of not less than thirty (30) inches in front.
    c. A separate bathroom containing a toilet, lavatory and bathtub or shower.
6. *Basement Space not Habitable.* No basement space shall be used as habitable room or rental unit except as provided in this Section. Basement may be used as a recreation room but not used for sleeping purposes.
7. *Basement Dwelling Units.* No basement space shall be used as a dwelling or rooming unit unless:
    a. The floor and walls are impervious to leakage of underground and surface run-off water.
    b. The total window area in each room is equal to at least five (5) percent of the floor area of the room.
    c. The total openable window area in each room is equal to fifty (50) percent of the minimum window area, except where there is supplied a mechanical ventilation system to the outside air capable of completely changing the air in the room every thirty (30) minutes.
    d. The ceiling height throughout the unit is at least seven (7) feet.
    e. It is separated from heating equipment, incinerators, or other hazardous equipment by an approved partition.
    f. Access can be gained to the unit without going through a furnace room.
    g. Two (2) independent means of egress are provided from every basement space containing more than one dwelling unit or one rooming unit.

Section 1.135 – Mobile Home, Camper, or Motorhome.

a. No mobile home, camper or motorhome, whether mobile or not, shall be occupied as a rental unit within the City, except in a legally established mobile home park. Non-conforming mobile homes used as rental existing on the effective date of this Ordinance, will be allowed to continue as rentals, if there is no hazard to the health and safety of the occupants.
b. Mobile homes, campers or motorhomes occupied by anyone other than the registered owner will be assumed to be rentals. Certified proof of ownership shall be provided to the City upon request.

ARTICLE X – MINIMUM STANDARDS FOR ROOMING HOUSES; BED & BREAKFAST; HOTEL; ETC

Section 1.136 – Rooming Houses; Bed & Breakfasts; Hotels; etc minimum Standards. Every rooming house in the City shall be in compliance with the applicable minimum standards and requirements of this Ordinance, and shall be subject to the following additional requirements:

1. *Basic Equipment.* At least one (1) flush toilet, one (1) lavatory basin and one (1) bathtub or shower shall be provided for each eight (8) occupants. The number shall include members of the family of the owner or operator in they share the use of the facilities. In a rooming house in which both sexes are accommodated, there shall be a minimum of two (2) flush toilets and lavatory basins located in separate rooms which are conspicuously marked.
2. *Location of Toilets, Baths.* Every toilet, lavatory basin and bathtub or shower required by this Section shall be located in a room which has the following characteristics:
    a. Affords privacy and is separate from the habitable rooms.
    b. Is accessible from a common hall without going outside the rooming house.
    c. Is not more than one story removed from the rooming unit of any occupant sharing the facilities.
3. *Bedding, Bed Linen, Towels.* Where bedding, bed linens or towels are supplied, the owner shall maintain the bedding in a clean and sanitary manner, and shall furnish clean bed linen and towels at least once each week and prior to the letting of any room to any new occupant.
4. *Means of Egress.* When the rooming house, bed & breakfast, or hotel is more than two (2) stories in height or when there are accommodations for ten (10) or more persons in a second story or higher shall Be no less than two (2) exits.
5. *Sanitary Maintenance by Owner.* The owner shall keep all walls, floors, and ceilings in a clean, safe and sanitary condition.
6. *Garbage and Rubbish Containers.* The owner shall provide approved containers for the storage of garbage or rubbish.

ARTICLE XI – FIRE SAFETY, PREVENTION, AND PROTECTION REQUIREMENTS

Section 1.137 – Safety Requirements. All rental units shall be subject to the following safety and fire prevention requirements:

1. *Smoke Detectors.* The owner shall install and maintain, and replace when defective, an Underwriters Laboratory (U.L.) approved smoke detector in each sleeping area of every rental unit.
2. *Flammable Materials.* Highly flammable matter, including paints, volatile oils, cleaning fluids, or combustible refuse, including waste paper, boxes or rags, shall not be accumulated or stored except in reasonable quantities consistent with normal usage.
3. *Egress Doors.* Egress doors shall be readily openable from the inner side without the use of keys.
4. *Egress Provisions.* There will be an unobstructed means of egress from the interior of every residential building to a street, or to a yard, court, or passageway leading to a public open area at ground level.
5. *Vehicles and Machinery.* No vehicle or machinery of any type containing gasoline or a flammable liquid shall be repaired, operated or stored in a basement of any other living area of the unit.
6. *Exits.* Every residential building exceeding two (2) stories in height above ground, not including basements shall have two (2) independent exits from each floor above the second floor. Two (2) story buildings containing four (4) units or less shall have one (1) approved independent exit from the second floor. Exit signs, when required, shall be illuminated and easily visible by occupants.

ARTICLE XII – VIOLATIONS

A. Any person, corporation or firm who violates, disobeys, omits, neglects or refuses to comply with any provision of this ordinance shall be guilty of a civil infraction. Notice shall be given in writing by the CEO and shall be served by registered mail or personal service.

B. Each and every day a violation of this ordinance continues shall be a separate and distinct violation of this ordinance. Each violation is a separate punishable offense.

C. The sanction for each violation of this ordinance shall be a civil fine of not less than $100 or more than $500 plus costs and other sanctions for each infraction.

D. Increased civil fines may be imposed for repeated violations of any requirements or provision of this ordinance. Unless otherwise specifically provided by this ordinance for a particular municipal civil infraction violation, the increased fine for a repeat offense shall be as follows:

1. The fine for any offense which is a first repeat offense shall be no less than $250 plus costs.
2. The fine for any offense which is a second repeat offense or any subsequent repeat offence shall be no less than $500 plus costs.

E. In addition to civil fines, the court may determine cost of the action which shall not be limited to the cost taxable in ordinary civil actions and may include all expenses, direct and indirect, to which the plaintiff has been put in connection with the civil infraction up to the entry of judgment.

F. In addition to any remedies available at law, the City may bring an action for an injunction or other process to restrain, prevent or abate any violations of this ordinance.

ARTICLE XIII – LANDLORD/TENANT RESPONSIBILITIES

Section 1.148 – Owner Responsibilities. In addition to all other responsibilities under the terms of this Ordinance, the following provisions shall apply to owner:

1. *Compliance Prior to Rental*. No owner shall rent, lease or otherwise offer or provide for occupancy a rental unit which does not meet the requirements of this Ordinance.
2. *Eviction of Tenants*. If an owner is prevented from complying with the provision of this Ordinance due to the actions or negligence of a tenant, it shall be the responsibility of the owner to promptly terminate the tenancy and cause the tenant to be evicted as permitted by law.
3. *Shared or Public Areas*. All shared or public areas of a rental premises containing two (2) or more rental units shall be maintained in a clean and sanitary condition by the owner and/or tenants.
4. *Utility Services*. Owners shall make available utility services as are required and permitted pursuant to Section 1.137 of this Ordinance.
5. *Accessory Structures and Fences*. Every accessory structure and fence on rental premises shall be maintained in good repair by the owner or in lieu thereof, the owner shall cause the same to be removed.
6. *Extermination of Insects*. Owners shall be responsible for the extermination of insects, rodents and other pests as provided in Section 1.126 of this Ordinance.
7. *Sale of Rental Unit*. Upon the sale or change of use of a rental unit, the owner shall promptly notify the CEO.
8. Owner shall notify tenant of requirements of this Ordinance.

Section 1.138 – Responsibility of Tenants. In addition to all other responsibilities under this Ordinance, the following provision shall apply to tenants:

1. *Sublet, Etc*. No tenant shall sublet a rental unit or allow non-tenants to occupy a rental unit except upon specific consent of the owner; or permit an excessive number of occupants to occupy a rental premises in

violation of this Ordinance.

2. *Sanitary Conditions*. Every tenant shall maintain their rental unit and all other parts of a rental premises for which he or she is responsible in a clean and sanitary condition.
3. *Cooperation with Owner*. Tenants shall promptly notify the owner of any known violation of this ordinance and shall cooperate with the owner in maintaining the rental premises. Tenants shall inform the City upon lack of responses by the owner to such notifications.
4. *Plumbing Facilities*. All plumbing fixtures and toilet facilities shall be maintained in a clean and sanitary condition at all times.
5. *Parking Requirements*. Tenants shall comply with all off street parking requirements as provided in this Ordinance.
6. *Extermination of Insects and Pests*. Tenants shall promptly cause all insects, rodents or other pest to be exterminated when it is their responsibility to do so under the provision of this Ordinance.
7. *Exterior Areas*. Tenants shall, when required by this Ordinance, maintain all exterior area of a rental premises in a clean, sanitary and orderly condition.
8. *Rubbish and Garbage*. Tenants of single family dwelling units shall furnish their own rubbish and garbage disposal facilities.
9. *Enforcements*. The tenant responsibilities under this Ordinance shall be enforced by the CEO using the same enforcement provisions as are applicable to violations of this code by owners.

ARTICLE XIV – SEVERABILITY

Should any part or provisions of this Ordinance be declared invalid or unenforceable by any court of competent jurisdiction, such invalid or unenforceable part or provision shall not affect the validity or enforceability of the remainder of their Ordinance, if the remainder thereof can be given effect without such part or provision thus declared to be invalid or unenforceable.

EFFECTIVE DATE

This Ordinance shall be effective on the _____day of _____, 2004, following the adoption thereof and after legal publications and in accordance with the provisions of the State Act governing same.

_____ C. Robert Perry, Mayor

Attest:

_____ Janet Miller, City Clerk

APPENDIX A

DEFINITIONS

1. Approved: Approved as applied to a material, device or method of construction shall mean approved by the Code Enforcement Official (CEO), or approved by other authority designed by law to give approval on the matter in questions.
2. Basement: A portion of the building partly underground, having more than half of its clear height below the average grade of the adjoining ground.

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.
4. Boarding House: See "Dwelling."
5. Building Code: The Building Code (B.O.C.A., 1990 Edition) officially adopted by the City of Stanton and the County of Montcalm for the regulation of construction, alteration, addition, repair, removal, demolition, use, location, occupancy and maintenance of buildings and structures.
6. Certificate of Occupancy: A certificate issued by the Code Enforcement Official (CEO) stating that a structure or portion thereof complies with the requirements of this Ordinance and other applicable provisions of the City Ordinances.
7. Code Enforcement Official: The official designation by the Mayor and approved by the City Council to enforce the provisions of this Ordinance, or his or her duly authorized representative (hereinafter referred to as the "CEO")
8. Dwelling Unit: One or more rooms and a single kitchen designed as a unit for occupancy by one family, with provisions of cooking, living, sanitary and sleeping facilities.
9. Dwellings:
    a. One Family Dwelling – A detached building contained one (1) dwelling unit. (see Dwelling Unit)
    b. Two-Family Dwelling. A building containing two (2) dwelling units. (See Dwelling Unit"
    c. Multi-Family Dwelling. A building containing three (3) or more dwelling units. (See Dwelling Unit)
    d. Boarding House, Rooming House, Lodging House or Tourist Home. A building arranged or used for temporary lodging for compensation for more than three (3) and not more than twenty (20) persons where the renters use common facilities such as hallways and bathrooms. A rooming house shall not include hotels and motels.
10. Emergency: A condition of imminent danger calling for immediate action in order to avoid possible death, injury or illness to a human being or the destruction or severe damage to real or personal property.
11. Exterior Property Areas: The open space on the premises and on adjoining property under the control of owners or operators of a rental premises.
12. Family: An individual or couple and the children thereof with not more than two other persons related directly to the individual or couple by blood; living together as a single housekeeping unit in a dwelling unit.
13. Garbage: The animal and vegetable waste resulting from the handling, preparation, cooking and consumption of food.
14. Good Repair and Workmanship: Completing a task of construction, repair or replacement to industry standards and installed so as to be functional for its present and intended use and to be safe and sanitary.
15. Gross Floor Area: The total area of all habitable space in a building or structure.
16. Ground Level: The finished grade touching the outside foundation or a wall. The tops of a window well structure shall be considered as ground level.
17. Habitable Floor Area: The square foot floor area of a habitable room or habitable rooms, excluding any part of a room where the ceiling is less than five (5) foot above the floor.
18. Habitable Room: Any room which meets all light, ventilation and area standards.
19. Hazardous: A condition which the CEO has determined to be likely to result in the death, injury or illness of a human being or in the severe damage to real or personal property or in the unauthorized entry into a

dwelling unit or accessory building if corrective measures are not taken expeditiously

20. Heating: The provision of heating facilities that are capable of heating all habitable rooms, bathrooms, and toilet compartments located therein to a temperature of sixty-five (65) degrees Fahrenheit when the outside temperature is ten (10) degrees below zero at a point three (3) feet above the floor and three (3) feet from any exterior wall.
21. Hot Water: Water heated to a temperature of one hundred twenty (120) degrees Fahrenheit at the outlet.
22. Infestation: The presence, within or contiguous to, a structure of premises of insects, rodents, vermin or other pests.
23. Junk: Includes, but shall not be limited to, parts of machinery or motor vehicles, unused stoves or other appliances stored in the open, remnants of wood, metal or other material or other cast-off materials of any kind whatsoever, whether or not the same could be put to any reasonable use.
24. Kitchen: A room used or intended to be used for the preparation of food or for both the preparation and consumption of food, but not for any other living or sleeping purpose.
25. Kitchenette: A portion of a room used or intended to be used for the preparation of food or for both the preparation and consumption of food while the remainder of the room is used or may be intended to be used partially for purposes other than sleeping.
26. Multi-Family Dwelling: (See Dwelling)
27. Occupant: Any person over one(1) year of age (including owner or operator), living and sleeping in a dwelling unit or having actual possession of said dwelling unit or rooming unit.
28. Operator: A person who has charge, care or control of a structure or remises which are let or offered for rental occupancy.
29. Owner: The person (s) or entity to whom a dwelling unit is assessed on the City of Stanton's tax rolls. When the person listed on the tax rolls is the holder of a mortgage on the assessed premises, the owner shall be the person (s) named as the mortgagor (s) on the mortgage document.
30. Plumbing or Plumbing Fixture: What heating facilities, water pipes, gas pipes, garbage and disposal units, waste lavatories, bathtubs, shower baths, installed clothes washing machines , or other similar equipment, catch basins, drains, vents, or other similarly supplied fixtures, together with all connections to water, gas, sewer or vent lines.
31. Premises: A lot, plot or parcel of land including the buildings or structures thereon.
32. Rented: A dwelling unit legally occupied by a person other than the owner or other than the mot her, father, or child of the owner.
33. Rooming House: See "Dwelling – Boarding House"
34. Rooming Unit: Any room or group of rooms in a boarding or rooming house, forming a single habitable unit used or intended to be used for living and sleeping, but not for cooking or eating purposes.
35. Rubbish: Combustible and non-combustible waste materials including garbage and including the residue from the burning of wood and other combustible materials, paper, rages, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metal, mineral matter, glass and dust and other similar material.
36. Sanitary: Free of grease, excrement, dirt, food residue, garbage, rust or similar matter which can harbor bacteria unsafe to human beings or animal, or which produces strong odors or which provides food for, or in an available source of food for animals and insects.
37. Structural Alterations: Any change in the supporting members of a building or structure, such as bearing walls, columns, beams or girders.
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.

39. Tenant: Any person other than a legal title holder, occupying or possessing a dwelling or part thereof.
40. Unfit for Human Habitation: Any dwelling or dwelling unit which is a hazard to the health and welfare of the occupant because it lacks maintenance; is in disrepair; is unsanitary; is vermin or rodent infested; or because it lacks sanitary facilities.
41. Unit: A collective tern for any dwelling unit.
42. Unsafe: A condition which is reasonable likely to cause injury to human beings or property.
43. Vacant: Not being used as a regular place of residence for one or more persons.
44. Ventilation: The process of supplying and removing air by natural or mechanical means to or from any space.
    a. Mechanical – Ventilation by power-driven devices.
    b. Natural – Ventilation through windows, skylights, doors, louvers, or stacks without using a wind or power-driving device.
45. Yard: An open, unoccupied space on the same lot with a building extended along the entire length of a street, or a rear or interior lot line.

APPENDIX B

ADMINISTRATION AND ENFORCEMENT PROCEDURES AND CRITERIA

The following Sections define the administrative and enforcement procedures and criteria to be utilized to insure compliance with the provision of the Rental Housing Ordinance.

Section 1.01B – Time to Correct Violations. All Violations Notices shall provide a specified time period to correct the violation in relation to the seriousness of the violation. The following time limits shall apply:

1. Not more than twenty-four (24) hours for an emergency violation including water, sewer. Electric or hazardous conditions, a time designed by the CEO not to exceed sixty (60) days for all other violations. The CEO may extend the time period for correction of violations if: (a) there are extenuating circumstances; and (b) the responsible party has made a substantial and documented effort to correct the violations within the time allotted. All extensions shall be written and served on the responsible party in the same manner as the Violation Notice.

Section 1.02B – Notice of Violation and Order to Repair. Upon observing the existence of a violation of this Ordinance the CEO shall serve the responsible party a Notice of Violation and Order to Repair. The Notice shall:

1. Specify the date of the inspection and the address where the violation was found.
2. Include a description and location of each violation observed by the CEO
3. Order the responsible party to correct all listed violations by a specified date.
4. State that each violation is separate punishable offence.
5. State that a re-inspection will be made to determine whether all violations have been made by the specified date.
6. Advice the responsible party of applicable re-inspection fees charged by the City.
7. State the failure to comply with the Notice to Repair will result in prosecution.

Section 1.03B – Prosecution. Upon failure of a responsible party to comply with a Notice to Violation and

Order to Repair, the CEO may proceed with prosecution.

Section 1.04B – Emergency Orders. If the CEO determines that a condition exists or is likely to exist which is an emergency, the CEO shall immediately attempt to verbally notify the owner or owner's agent, and all occupants of the rental unit (s) of the nature of the emergency, and verbally order the responsible party to immediately correct the condition (s) causing the emergency. The CEO shall prepare and serve a Violation Notice on the responsible party as soon as practicable after the verbal order has been given or attempted. Failure to comply with an emergency order is a violation of the Ordinance.

Section 1.05B – Inspection Entry. For the purpose of enforcing the provisions of this Ordinance, the CEO is authorized to inspect rental units at any time during reasonable hours with the consent of a responsible party, owner, owner's agent or any occupant. Upon refusal, the CEO may apply to the appropriate court for a court order authorizing entry as provided by State Law.

Section 1.06B – Change of Ownership. The CEO shall immediately issue a new Notice of Violation and Order to Repair, as the case may be, to any new person or persons assuming occupancy, ownership or in status of agency for any rental unit which has been cited for violations. The responsible party who has failed to comply with a Notice of Order to Repair shall not be relieved of the responsibility of having violated any provision of this Ordinance by transferring ownership, occupancy or responsible agent status.

Section 1.07B – Recurrent Violation. A responsible party who fails to pass inspection under this Ordinance, in or about the rental unit or rental units in the same structure, three (3) times in a twelve (12) month period, shall be presumed to be a willful violator of the provisions of this Ordinance and to be causing undue expense to the City in the administration of this Ordinance. In such cases:

1. The CEO shall determine if a violation of this section exists.
2. All inspections and/or re-inspection fees then in effect shall be doubled.
3. The CEO may revoke the responsible owner's license to maintain a rental unit or units.

Section 1.08B – Service of Notices or Orders. A person shall be deemed to be served with a Notice of Violation or Order to Repair or any other official notice or order of the CEO, if a copy is served upon him or her personally; or if a copy thereof is sent by registered mail to his or her last known address and a copy thereof is posted in a conspicuous place in or on the rental unit or structure containing the rental unit affected by such notice or order; or if he or she is served with a copy thereof by any other method authorized by the laws of this State. The time of performance shall commence on the date of personal service or the date of posting or mailing.

Section 1.09B – Structure Unfit for Human Occupancy. Whenever the CEO finds any rental unit or rental unit structure to be:

1. A hazard to the safety, health or welfare of the occupants or to the public because it lacks maintenance.
2. In disrepair, unsanitary, vermin-infested or rodent-infested.
3. In violation of the minimum requirements of this Ordinance, but has not reached the state of complete disrepair as to be subject to condemnation as a dangerous building.
4. Is occupied by more occupants than permitted under this Ordinance or
5. Erected, altered or occupied contrary to law.

The CEO may order it to be posted as unfit for human habitation and license revoked. It shall be unlawful to again occupy such rental unit or structure until it or its occupation, as the cause may be , has been made to conform to the provisions of this Ordinance. Every day of continued occupation after license revocation shall be a repeat violation or separate offence.

Section 1.10B – Order to Vacate. Any rental unit or rental structure found to be unfit for human habitation by the CEO shall be ordered repaired or rehabilitated to correct the conditions rendering the same unfit for human habitation. A notice to Vacate shall be in writing and include:

1. The street number or description of the real estate and rental unit (s) sufficient for identification.
2. A description of the defects, conditions and/or violations of this Ordinance.
3. A directive that the rental unit or rental structure when vacated must remain vacant until the provision of the Notice to Vacate have been complied with and the Notice to Vacate has been withdrawn in writing.
4. A reasonable time for making the repairs, rehabilitation or correction violations of the Ordinance.
5. State the time period in which occupants must vacate the structure.
6. Every day of continued occupation after revocation shall be a repeat violation or separate offense.

Section 1.11B – Posting of Notice. Any rental unit or structure declared unfit for human habitation shall be posted in a conspicuous place or places with a place card bearing the words:
"UNFIT FOR HUMAN HABITATION PER HOUSING ORDINANCE"

Section 1.12B – Sale of Rental Unit. The sale of real estate on which a rental unit or units are located automatically terminates any rental unit license with respect to such rental units (s) . It is the responsibility of the owner to notify the city of the sale within fifteen (15) days.

(3) City Costs. The City may upon proof of the defendant's conviction, recover all the costs including by not limited to inspection, prosecution and administration. Such cost may also be assessed by lien against the subject property tax roll.

ORDINANCE NO. 193 – CABLE TV RATE REGULATIONS & PROCEDURES

AN ORDINACE TO ADPOT REGULATIONS AND PROCEDURES FOR BASIC CABLE TV RATE REGULATION

THE CITY OF STANTON ORDAINS:

Section 1. Definitions. For purposes of the Ordinance, "Act" shall mean the Communications Act of 1934, as amended (and specifically as amended by the Cable Television Consumer Protections and Competition Act of 1992, Pub. L. 102-385), and as may be amended from time to time; "FCC" shall mean the Federal Communications Commission; "FCC Rules" shall mean all rules of the FCC promulgated from time to time pursuant to the Act; "basic cable service" shall mean "basic service" as defined in the FCC Rules, and any other cable television service which is subject to rate regulation by the City pursuant the Act and the FCC Rules; "associated equipment" shall mean all equipment and services subject to regulation pursuant to 47 CFR 76.923; and an "increase" in rate shall mean an increase in rates or a decrease in programming or customer services as provided in the FCC rules. All other words and phrases used in this Ordinance shall have the same meaning as defined in the Act and FCC Rules.

Neutral
As of: March 14, 2023 12:07 PM Z

Sedlecky v. Sun Cmtys., Inc.

Court of Appeals of Michigan

August 20, 2020, Decided

No. 348520

Reporter

2020 Mich. App. LEXIS 5495 *; 2020 WL 4919371

DEBRA SEDLECKY, Plaintiff-Appellant, v SUN COMMUNITIES, INC., SUN COMMUNITIES FUNDING LIMITED PARTNERSHIP, and SUN CUTLER ESTATES, LLC, Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History Leave to appeal denied by *Sedlecky v. Sun Cmtys., Inc., 2021 Mich. LEXIS 694 (Mich., Apr. 27, 2021)*

Prior History: [*1] Kent Circuit Court. LC No. 18-005610-NO.

Core Terms

stairs, pool, intended use, common area, premises, summary disposition, slippery, trial court, stairway, marks, covenant, genuine issue of material fact, light most favorable, swimming pool, defendants', video, reasonable repair, safety law, quotation, handrail, lessor, steps

Judges: Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

Opinion

PER CURIAM.

In this negligence and premises liability action, plaintiff appeals as of right the trial court's grant of summary disposition pursuant to *MCR 2.116(C)(8)* (failure to state a claim on which relief can be granted) and *(C)(10)* (no genuine issue of material fact, and the movant is entitled to judgment as a matter of law) in favor of defendants. We reverse the trial court's order dismissing plaintiff's claims and remand for further proceedings.

In 2015, plaintiff lived in a residential mobile home community owned and operated by defendants. The community has a swimming pool available for use by community residents and their guests. On July 5, 2015, while entering the swimming pool from one of its stairways, plaintiff slipped and fell, incurring injuries. Plaintiff filed a complaint in 2018 against defendants alleging that they violated Michigan administrative codes

and their statutory duties to keep the premises in reasonable repair and ensure they were fit for their intended use, and that defendants maintained an unreasonably dangerous condition on their land. Specifically, plaintiff alleged that the **[*2]** stairway in the pool did not have slip-resistant treads, did not have steps with contrasting colors on the front edge, did not have a handrail that was reachable for the length of the stairway, and did not have a handrail in compliance with applicable handrail codes. Plaintiff further alleged that the stairs were slippery because of a lack of slip-resistant treads and defendants' failure to regularly clean the pool, which created a "slippery condition to exist on the stairway leading into the pool."

Defendants moved for summary disposition pursuant to *MCR 2.116(C)(8)* and *(10)*.[1] They argued that video footage established that plaintiff fell due to her own physical limitations and not because of any issue with the stairs themselves, and that defendants violated no statutory duties. Plaintiff responded that genuine issues of material fact existed pertaining to problems with the stairs and the pool's maintenance, that the cause of her fall was a question of fact for the jury to determine, and that the pool stairs were not, in fact, fit for their intended use. The trial court granted summary disposition in favor of defendants, opining that the slippery nature of the stairs was open and obvious, subject to no **[*3]** special aspects, and that the steps, which constituted a common area, were fit for their intended use such that no statutory violations occurred. The trial court denied plaintiff's later motion for reconsideration, and this appeal followed.

On appeal, plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition as to her statutory claim premised upon *MCL 554.139(1)(b)* in light of this Court's opinion in *Estate of Trueblood v P & G Apartments, LLC, 327 Mich App 275; 933 NW2d 732 (2019)*. We agree.

We review de novo a trial court's decision to grant summary disposition. *Bowden v Gannaway, 310 Mich App 499, 503; 871 N.W2d 893 (2015)*.

> A motion under *MCR 2.116(C)(8)* tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under *MCR 2.116(C)(8)* may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood, 461 Mich 109, 119-120; 597 NW2d 817 (1999)* (citations and quotation marks omitted).]

When reviewing a motion for summary disposition pursuant to *MCR 2.116(C)(10)*, a court considers "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving

[1] Defendants filed two separate motions for summary disposition approximately two wee s apart and the trial court considered both motions at a single hearing.

party." **[*4]** *Patrick v Turkelson, 322 Mich App 595, 605; 913 NW2d 369 (2018)* (quotation marks and citation omitted). Summary disposition "is appropriate under *MCR 2.116 (C)(10)* if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, reasonable minds could differ on the issue." *Trueblood, 327 Mich App at 285*.

MCL 554.139(1) provides, in relevant part:

> (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.

Our Supreme Court gave due regard to the Legislature's use of "premises and all common areas" in *(1)(a)* but only "premises" in *(1)(b)*. See *Allison v AEW Capital Mgmt., L.L.P., 481 Mich. 419, 431-433; 751 N.W.2d 8 (2008)*. The *Allison* Court defined "common areas" as "those areas of the property over which the **[*5]** lessor retains control that are shared by two or more, or all, of the tenants. A lessor's duties regarding these areas arise from the control the lessor retains over them." *Id. at 427*. It further defined "premises" as "a tract of land including its buildings or a building or part of a building together with its grounds or other appurtenances." *Id. at 432* (quotation marks and citation omitted). However, the *Allison* Court determined that "'premises' does not encompass 'common areas' and that the covenant to repair under *MCL 554.139(1)(b)* does not apply to 'common areas.'" *Id. at 432, 435*.

However, in *Trueblood*, we concluded "that a landlord's covenant to comply with local health and safety laws is distinct from its covenant to make reasonable repairs." *Trueblood, 327 Mich App at 295*. The *Trueblood* Court interpreted *Allison*'s holding to only apply "to the covenant to make reasonable repairs, not to the covenant to comply with local health and safety laws." *Id. at 294*. Therefore, the use of the term "premises" contained in the covenant to comply with local health and safety laws did not exclude "common areas" as the covenant to make reasonable repairs did. *Id. at 295-296*. It was undisputed that the swimming pool in question was considered a common area.

The complaint contained allegations, which **[*6]** must be "accepted as true and construed in a light most favorable to the nonmovant," *Maiden, 461 Mich at 119*, that defendants failed to comply with Michigan statutes and administrative codes. Specifically, plaintiff cited the administrative rules governing public swimming pools, R 325.2134(4), which the Michigan Department of

Environmental Quality (MDEQ) was given authority to regulate under the Public Health Code, MCL 333.1101 et seq., to allege that defendants did not have slip-resistant treads on the pool stairs, that the front edge of each step was not marked in a color that contrasted with the background, and that the handrail was not reachable for the length of the stairway. Under *Trueblood*'s holding, defendants were required to comply with local health and safety laws "where the premises were located." *Id. at 295*.

Moreover, a motion under MCR 2.116(C)(8) disallows the moving party from relying on affidavits, depositions, admissions, or other documentary evidence to support its position. See MCR 2.116(G)(2). Only the pleadings may be considered, which include the complaints, cross-claims, counterclaims, third-party complaints, answers, and replies to answers. See MCR 2.110(A). Therefore, defendants cannot rely on the MDEQ inspection to support dismissal of plaintiff's (1)(b) **[*7]** claim, and the trial court could only rely on plaintiff's complaint and defendants' answer. Contained in plaintiff's complaint were the well-pleaded facts that defendants did not comply with one of the administration codes governing public swimming pools. Therefore, dismissal under MCR 2.116(C)(8) was inappropriate.

Furthermore, we conclude that dismissal under MCR 2.116(C)(10) was also inappropriate. In considering a motion for summary disposition pursuant to MCR 2.116(C)(10), the trial court may consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. See MCR 2.116(G)(5); *Maiden, 461 Mich at 120*. Importantly, the trial court's consideration is "in the light most favorable to the party opposing the motion." *Maiden, 461 Mich at 120*. Plaintiff submitted two affidavits, one from herself and one from the pool attendant. Contained in the pool attendant's affidavit were statements that "[r]ubbery blue non-slip paint marks the edge of the pool steps and the point at which the pool transitions to a greater depth. During the summer of 2015, I constantly had to clean pieces of this blue substance out of the pool's filters because it was flaking off." Plaintiff's affidavit also contained a statement that she "did not see the hazardous condition of the pool **[*8]** surfaces, stairs, and handrail, despite careful observation, before or after [she] fell." There was also photo evidence of the stairs that depicted there was little to no slip-resistant tread on the second step, which was the step that plaintiff was stepping to when she fell, and there was little to no marking on the front edge of the step that contrasted with the background.

Defendants' reliance on the MDEQ inspection and video footage of plaintiff's fall to demonstrate that no genuine issue of material fact exists is misguided. The MDEQ inspection came approximately two weeks before plaintiff's accident, which could indicate that the stairway was noncompliant at the time plaintiff fell. Plaintiff offered an affidavit from the pool attendant that stated that she had to constantly clean the pool filter of the blue non-slip paint marks because it was constantly flaking away. This could indicate that, at the time of

flaking away. This could indicate that, at the time of plaintiff's fall, the second step no longer contained the blue non-slip mark as required by the regulation. Moreover, plaintiff's photo exhibits demonstrate that the second step has little to no marking. With respect to the video, defendants advance an argument concerning **[*9]** only the *weight* of such evidence. The video is not dispositive of whether plaintiff slipped, as she contends, or whether plaintiff's knee gave out, which defendants contend. All that the video provides is a question of fact for the jury to decide as to the cause of plaintiff's fall. See *Highfield Beach at Lake Michigan v Sanderson*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 343968 and 345177); slip op at 8 ("For purposes of MCR 2.116(C)(10), a trial court is not allowed to weigh the evidence, assess credibility, or resolve factual disputes.").

Still, defendants assert that *Trueblood* was wrongly decided and contradicts our Supreme Court's holding in *Allison*. Defendants invite us to disregard the rule of stare decisis, which we decline to do. A published opinion of this Court has precedential effect under the rule of stare decisis and binds lower courts and tribunals. See Catalina Mktg Sales Corp v Dep't of Treasury, 470 Mich 13, 23; 678 NW2d 619 (2004). Likewise, a decision of this Court published on or after November 1, 1990, binds subsequent panels of this Court. See *MCR 7.215(J)(1)*; see also Allison, 481 Mich at 435-438 (discussing the circumstances under which a decision of the Court of Appeals becomes the rule of law under *MCR 7.215(J)(1)*). Until and unless the Supreme Court overrules our decision in *Trueblood*, "all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that **[*10]** it was wrongly decided or has become obsolete." See Paige v Sterling Hts, 476 Mich 495, 524; 720 NW2d 219 (2006). And, our Supreme Court denied leave to appeal (see *Estate of Trueblood v P&G Apartments, LLC, 505 Mich. 982; 937 NW2d 687 (2020)*), which created binding precedent because the *Trueblood* decision became a final adjudication. See *MCR 7.305(H)(3)* ("If leave to appeal is denied after a decision of the Court of Appeals, the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms."); see also Nuculovic v Hill, 287 Mich App 58, 68; 783 NW2d 124 (2010). Because *Trueblood* is binding precedent, we cannot refuse to follow the rule of law established.

Plaintiff also argues that the trial court erred in granting defendants' motion for ***summary disposition*** under MCR 2.116(C)(10) with respect to her MCL 554.139(1)(a) claim. Again, we agree. MCL 554.139(1)(a) provides, in relevant part:

> (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.

In *Allison*, as aptly summarized by the *Trueblood* opinion,

> our Supreme Court addressed the analytical framework to be used when determining liability under MCL 554.139(1)(a). First, the court is to determine whether the area in question is a "common area." Then, the court is to identify the intended use of the common area. Lastly, the court must determine if there **[*11]** could be "reasonable difference of opinion regarding" whether the conditions made the common area unfit for its intended use. [*Trueblood, 327 Mich App at 289*, quoting *Allison, 481 Mich at 430*.]

In this case, as noted above, it was undisputed that the swimming pool in question was considered a common area under MCL 554.139(1)(a). With respect to the intended use of the common area, as this Court stated, "[t]he primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure." *Hadden v McDermitt Apartments, LLC, 287 Mich App 124, 130; 782 NW2d 800 (2010)*. The trial court in this case also stated that "the intended use of the stairs is entry and exit from the pool. MCL 554.139(1)(a) requires that the stairs be suited for the purpose of entry and exit."

With the first two steps in the analytical framework satisfied, it must be determined whether there can be "reasonable difference of opinion regarding whether the conditions made the common area unfit for its intended use." *Trueblood, 327 Mich App at 289* (quotation marks omitted). As noted by the *Hadden* Court, "a tenant uses a stairway for its intended use solely by walking up and down it." *Hadden, 287 Mich App at 132*. Defendants and the trial court rely on the video footage that multiple people used the stairs before and after plaintiff's fall to support their finding that the stairs were fit for **[*12]** their intended purpose. However, such evidence is not dispositive, as such evidence

> does not overcome the other evidence. Specifically, if the [stairs were] completely covered in [an unusually slippery/oily substance], then [the stairs] were not fit for [their] intended use. That others had been able to walk on the [stairs] without incident might have suggested that the [stairs were] not completely covered in [an unusually slippery/oily substance], but it might also have suggested that the others had been walking more carefully on the [stairs] because given that plaintiff had slipped, they were aware that the [stairs were] slippery. [*Trueblood, 327 Mich App at 292*.]

As in *Trueblood*, plaintiff presented "more evidence than simply the presence of [normally slippery stairs] and someone falling." *Id. at 291-292*. The trial court's reliance on the fact that "[t]he very nature of pool stairs is that they are under water" ignores plaintiff's evidence that the stairs were *unusually* slippery. Although MCL 554.139(1)(a) does not require that the stairs be in perfect condition, but must provide access in and out of the pool, an unusually slippery stairway presents more than a mere inconvenience to pool goers. See *Hadden, 287 Mich app at 132*. Likewise, plaintiff's **[*13]** evidence must be taken in a light most favorable to her for

purposes of an MCR 2.116(C)(10) motion, and we find that "[r]easonable minds could conclude that the presence of [an unusually slippery substance—possibly caused by the failure to allow fresh paint to fully dry—] posed a hidden danger that denied tenants reasonable access [to the pool] and rendered the stairway unfit for its intended use." Hadden, 287 Mich App at 132.

Therefore, in light of plaintiff's evidence, reasonable minds could differ on whether defendants breached their duty under MCL 554.139(1)(a) "to maintain [the stairs] in a manner that was fit for [their] intended use." If there was an unusually slippery substance that created a higher risk of slipping than normal pool stairs present, then defendants would have breached their duty to maintain the pool stairs in a manner fit for their intended use. Accordingly, a genuine issue of material fact existed whether defendants breached their duty under MCL 554.139(1)(a), and ***summary disposition*** under MCR 2.116(C)(10) was inappropriate. Similarly, because we conclude that a genuine issue of material fact exists whether defendants violated their statutory duties under MCL 554.139(1), the trial court erred in granting defendants' motion for ***summary disposition*** on the basis of **[*14]** the open and obvious danger doctrine. See Trueblood, 327 Mich App at 289 ("[T]he open and obvious danger doctrine is not available to deny liability for a statutory violation under MCL 554.139(1).") (quotation marks and citation omitted; alteration in original).

We ***reverse*** and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Deborah A. Servitto

/s/ Anica Letica

End of Document

Stone v. Boulder Creek Apts., LLC

Court of Appeals of Michigan

November 26, 2019, Decided

No. 346252

Reporter

2019 Mich. App. LEXIS 7562 *

KRISTEN STONE, Plaintiff-Appellant, v BOULDER CREEK APARTMENTS, LLC, and USA ASSET FUND, LLC Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Genesee Circuit Court. LC No. 15-104551-NI.

Stone v. Boulder Creek Apts., LLC, 2017 Mich. App. LEXIS 1753 (Mich. Ct. App., Oct. 31, 2017)

Core Terms

stairway, landing, stairs, snow, intended use, sidewalk, summary disposition, common area, apartment building, measures, walking

Judges: Before: CAMERON, P.J., and CAVANAGH and SHAPIRO, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants in this slip-and-fall premises liability action involving the duty of landlords to keep common areas fit for their intended use under *MCL 554.139(1)(a)*.[1] We reverse and remand.

At the time of the incident, plaintiff was leasing an apartment from defendants. At approximately 11:00 a.m. on December 15, 2013, plaintiff was leaving her apartment building to go shopping. She took one step out the door of her building and encountered snow and ice that was completely covering the landing and 10 to 12 step stairway, which caused her to slip, fall, and then slide down each step until she landed at the bottom of

[1] In a prior opinion, we affirmed the summary dismissal of plaintiff's case based on a theory of common law premises liability, but remanded for consideration of whether plaintiff should be allowed to amend her complaint to raise a statutory claim. See *Stone v Boulder Creek Apartments, LLC*, unpublished per curiam opinion of the Court of Appeals, *issued October 31, 2017 (Docket No. 333355), 2017 Mich. App. LEXIS 1753*. On remand, the trial court allowed the amendment.

Ex. 11

the stairway. Plaintiff testified that she had only taken one step out the door and still had her hand on the doorknob when she lost her footing, but could not regain her footing before falling and then sliding down the stairs feet-first. Plaintiff lay on the ground at the bottom of the stairs with an injured ankle until her neighbor, 17-year-old Jordan Hunt (Hunt), heard her [*2] calling for help and came to her aid. Hunt assisted plaintiff back into her apartment building and called his mother, who then called building maintenance.

In her deposition, plaintiff was asked if she slipped on snow or ice, and she replied that she only saw snow, but there was "a lot of ice." Hunt testified that it had been 'pretty snowy" and there was about four to six inches of snow on the ground. Hunt could see where plaintiff slid down the stairs because there was snow and ice on the stairway. And about 15 minutes after plaintiff had fallen, Hunt noticed that maintenance was approaching the building so he grabbed a cell phone and took a picture of the steps. He estimated that in the course of assisting plaintiff back into her apartment and then into the car to go to the hospital, he went up and down this same stairway four times within an hour of plaintiff's fall.

Defendants filed a motion for summary disposition under *MCR 2.116(C)(10)*, arguing that "no reasonable person could conclude that the stairs and landing were not reasonably fit for their intended use at the time of the incident, notwithstanding the presence of snow and ice." Defendants argued that *MCL 554.139(1)(a)* did not require the landing and stairs [*3] at issue to be maintained in ideal condition; they merely had to be fit for ingress and egress. And they were. There was no hidden danger. In fact, Hunt had used the same stairs several times after plaintiff's fall without incident, which demonstrated that the stairs were useable for their intended purpose. Plaintiff responded, arguing that reasonable minds could differ regarding whether plaintiff or anyone could navigate the icy, snow-covered landing and stairs without falling. While Hunt used the same stairway, he did so after seeing that plaintiff had already fallen down those stairs.

The trial court disagreed with plaintiff. Given that Hunt had successfully used the stairs, the trial court concluded "that the stairs apparently were completely useable shall we say for the purpose intended which was to go up and down," and that "there's no evidence the stairs themselves were not fit for the purpose intended." Therefore defendants' motion for summary disposition was granted. This appeal followed.

Plaintiff argues that the trial court erred in determining that no genuine issue of material fact existed regarding whether the landing and stairway were fit for their intended use. We agree. [*4]

We review de novo a trial court's decision to grant a motion for summary disposition. *Lakeview Commons v Empower Yourself, LLC, 290 Mich App 503, 506; 802 NW2d 712 (2010)*. A motion brought under *MCR 2.116(C)(10)* tests the factual support of a plaintiff's

claim and should be granted if, after consideration of the evidence submitted by the parties in the light most favorable to the nonmoving party, no genuine issue regarding any material fact exists. *Id.*

MCL 554.139 states, in relevant part:

> (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.

There is no dispute in this case that the landing and stairway at issue were "common areas" within the meaning of the statute. And there is no dispute that the intended use of the exterior landing and stairway were to get into and out of the apartment building, including to the parking lot area. At issue is whether a reasonable person could conclude that the condition of the landing and stairway rendered them unfit for their intended use.

Defendants admitted that there was snow and ice on the landing and stairway, but argued that because Hunt went up and down the stairs several times after plaintiff's fall, they were fit for their intended **[*5]** use. Defendants never claimed that they performed *any* preventive maintenance to clear the landing and stairway of snow and ice on the day of this incident. That is, defendants never claimed to have shoveled or salted to remove the accumulations of snow and ice on this exterior landing and 10 to 12 step stairway, although it had snowed four to six inches and plaintiff did not fall until about 11 am. According to defendants, they did not have to shovel or salt this exterior landing and stairway for them to be considered fit for their intended use.

In *O'Donnell v Garasic, 259 Mich App 569, 581; 676 NW2d 213 (2003)*, abrogated in part on other grounds by *Mullen v Zerfas, 480 Mich 989; 742 N.W.2d 114 (2007)*, we held that the open and obvious doctrine did not apply to a defendant's statutory duty to maintain the premises in reasonable repair. Thus, if defendants breached their duty under *MCL 554.139(1)(a)*, defendants would be liable even if it was obvious to plaintiff that the landing and stairway were snow-covered.

In *Denton v Dart Properties, Inc, 270 Mich App 437, 443-444; 715 NW2d 335 (2006)*, we held that a landlord has a duty to remove ice from outdoor sidewalks located within an apartment complex because the intended use of a sidewalk is walking on it and a sidewalk covered with ice is not fit for walking. In *Denton*, the defendant actually took some preventative measures to address ice and **[*6]** snow accumulations, but there still remained a genuine issue of material fact whether the defendant's preventative measures constituted reasonable care considering the weather conditions. *Id. at 444-445*.

In this case, defendants do not dispute that they had a duty to take reasonable measures to ensure that the landing and stairway were fit for their intended use; but, they argue, even covered in snow and ice they were fit to use as evidenced by the fact that Hunt used the

stairway without incident after plaintiff's fall. According to defendants' argument, landlords would never have to remove the accumulations of snow and ice from their common areas—including sidewalks and stairways—as long as a single person traversed the area without incident. But that position is unreasonable and untenable.

While it is true that MCL 554.139(1)(a) does not require perfect maintenance or that the common area at issue be in the most ideal condition,[2] a landlord still must take *reasonable measures* to ensure that the common area is fit for its intended use. Denton, 270 Mich App at 444. In this case, defendants took *no* measures to remove the snow and ice from the exterior landing and stairway in an effort to ensure that they were fit for their intended use. Because **[*7]** of the depth of the snow on the landing and steps—4 to 6 inches—plaintiff could not see whether ice lay hidden beneath the snow. And the snow-covered landing and stairway posed an inordinate danger considering that it was a 10 to 12 step stairway. In fact, plaintiff testified that she still had her hand on the doorknob when she lost her footing, but because the landing was so slippery she could not regain her footing which led to her falling down and then sliding feet-first down the 10 to 12 steps to the bottom of the stairway. Clearly, the landing was especially slippery, as were the steps, and the conditions presented more than mere inconvenience; they were dangerous. If plaintiff wanted to leave her building, she would necessarily have to confront these dangers—not only on the landing, but on each of the 10 or 12 steps as she walked down the stairway.

In Estate of Trueblood v P&G Apartments, LLC, 327 Mich App 275; 933 NW2d 732 (2019), this Court explicitly rejected the notion that one person's ability to traverse a common area is dispositive of fitness for intended use. As we explained in *Trueblood*, "[t]hat others had been able to walk on the sidewalk without incident might have suggested that the sidewalk was not completely covered in ice, but it might also **[*8]** have suggested that the others had been walking more carefully on the sidewalk because given that plaintiff had slipped, they were aware that the sidewalk was slippery." Id. at 292. Here, the trial court relied exclusively on evidence that Hunt was able to traverse the stairs on which plaintiff fell when it concluded that "there's no evidence the stairs themselves were not fit for the purpose intended." While it might be reasonable to infer that Hunt's use of the stairs demonstrated fitness for intended use, this is neither the only reasonable inference from his usage, nor is it drawn in favor of plaintiff. See Lakeview Commons, 290 Mich App at 506. Hunt did not attempt to use the stairs at issue until after plaintiff had fallen and may only have been able to successfully navigate them because, seeing that plaintiff fell, he knew they were slippery.

The legislature has directed that the provisions of this landlord-tenant statute are to be liberally construed.

[2] See Allison v AEW Capital Mgt, LLP, 481 Mich. 419, 430; 751 N.W.2d 8 (2008); Hadden v McDermitt Apartments, LLC, 287 Mich App 124, 130; 782 NW2d 800 (2010).

MCL 554.139(3). And in reviewing a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10), we are to consider the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of that nonmoving party—which is plaintiff in this case. See **[*9]** Joseph v Auto Club Ins Ass'n, 491 Mich 200, 206; 815 NW2d 412 (2012); Dextrom v Wexford Co, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). "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 N.W.2d 468 (2003).

Under the circumstances of this case, a question of fact exists regarding whether defendants breached their duty under MCL 554.139(1)(a) to maintain the landing and stairway in a manner that was fit for their intended use. Defendants presented no evidence showing that they took any action whatsoever to minimize the potential hazards of using the snow and ice covered landing and stairway for their intended purpose of entering and leaving the apartment building. Plaintiff has sufficiently raised a material question of fact because reasonable minds could conclude that the landing and stairway were in dangerous condition and unfit for use, denying tenants like plaintiff reasonable access to and from the apartment building. See Hadden, 287 Mich App at 132. Accordingly, we reverse the trial court's order granting defendants' motion for summary disposition and remand this case for further proceedings.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Plaintiff is entitled to costs as the prevailing party. See MCR 7.219(A).

/s/ Thomas **[*10]** C. Cameron

/s/ Mark J. Cavanagh

/s/ Douglas B. Shapiro

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STATE OF MICHIGAN

EIGHTH JUDICIAL CIRCUIT COURT - MONTCALM COUNTY

JAN BOWERMAN,

Plaintiff,

v File No. 22-S-28824-NO

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

Defendants.

_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE RONALD J. SCHAFER, CIRCUIT JUDGE

Stanton, Michigan - Monday, March 27, 2023

APPEARANCES:

For the Plaintiff:	MR. MICHAEL E. FREIFELD (P48198) 140 E. 2nd St., Suite 201 Flint, Michigan 48502 (810) 695-6100
For Defendant Red Oak:	MR. DANIEL J. JAMES (P75147) 250 Monroe Ave., NW, Suite 100 Grand Rapids, Michigan 49503 (616) 459-7100
For Defendant Westveld:	MR. CHRISTOPHER K. COOK (P35034) 2025 E. Beltline SE, Suite 600 Grand Rapids, Michigan 49546 (616) 272-7974
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WITNESSES

None

EXHIBITS:

None

Stanton, Michigan

Monday, March 27, 2023 - 1:48 p.m.

THE COURT: Okay. So calling the case of Bowerman versus Red Oaks Management and Westveld Services. Today is the date and time scheduled for a motion for summary disposition by both Defendants. And so before I begin, who do we have on behalf of Plaintiff?

MR. FREIFELD: Mike Freifeld appearing on behalf of the Plaintiff, your Honor.

THE COURT: Freifeld?

MR. FREIFELD: Yes.

THE COURT: Okay.

And then who do we have for Red Oak?

MR. JAMES: Dan James, your Honor.

THE COURT: James. Okay.

And then Westveld?

MR. COOK: Your Honor, Chris Cook appearing in place of Justin Cole, my partner, to argue the motion on behalf of Westveld.

THE COURT: Okay. And then Mr. Cook, you're able to hear the other attorneys?

MR. COOK: I am, your Honor. Thank you.

THE COURT: Okay. So I don't know who you want to start with. Mr. James is present. So it's his motion, and then obviously, it'd be Mr. Cook's motion next. So it

makes sense to the Court that we start with Red Oak. Does anybody have an objection to the same?

MR. COOK: No, your Honor.

THE COURT: Okay. Mr. James, go ahead.

MR. JAMES: Thank you, your Honor. This is Red Oak's motion for summary disposition pursuant to MCR 116(C)(10), and there is -- there is one claim, one provision, that Plaintiff's lawsuit has been brought against Red Oak, and this is the provision in the Michigan code about the covenants that landlords make to tenants regarding the -- the premises they're renting. There was -- in our brief, we address the open and obvious doctrine just because we were at least uncertain whether a common-law premises liability claim was also being asserted, and the Plaintiff has made clear in their response brief that they are not making a common-law premises claim, just a -- a statutory claim.

So the circumstances are that my client, Red Oak, is the property manager of the apartment complex where the Plaintiff resides, and there was some concrete and asphalt work that was being done, and Defendant Westveld was responsible for the concrete work. They show up. They removed a bunch of concrete, and in the process of doing that, there's this concrete slab where the dumpster goes, and when they pour it, they have a form in

the very front that's used. Pour the slab. Once it's hard, they pull the -- the form, and there's what we've been calling a trench, in this case, in front of the slab. And it was there for approximately nine days before the subject incident. I think the record reflects that the work Westveld did was completed around October 21, and the subject incident happened on October 30.

And during that period of time, the Plaintiff herself, as well as her brother, Larry Munson, who gave deposition testimony, they were aware that this trench was there. They both testified that they -- they took their trash out every single day. They would have walked past it. They go out to their cars or car. I don't know whether it was every single day, but that was another occasion for going out into the parking lot.

So the existence of this trench, which is directly in front of this light gray, newly-poured concrete pad was well known to them, and it is something that they had walked around perhaps multiple times as day for more than a week. And so on the date of the incident -- it's early in the morning -- the Plaintiff decides she needs to take her trash out at that hour because she had had some Brussels sprouts the day before, and they were leaving an odor in her apartment. So she walks out into the parking lot. First, she walks down the pathway, as

I've described in the brief. She gets to the parking lot, and there's a walk, a sidewalk, running right alongside it, and she goes to her left very slightly, and then there is another sidewalk that declines down towards this light gray cement slab. And one could have, even in a wheelchair, rolled down that sidewalk across the slab onto the asphalt on the other side and in front of where the dumpster has been relocated because of this work. There were no trenches on the sides, only in the front, and so that was one access path to the dumpster, just down this handicap-accessible route.

Well, the Plaintiff believed that there were trenches on the sides, and she testified to that in her deposition, so instead of going straight down and across the light gray slab to the other side where she could have accessed the dumpster, she gets about halfway down this sidewalk and decides -- because she's aware that this trench is there, she's going to walk around in front of it. And so she proceeds to do that, and when she gets out into the middle of the parking lot, she appreciates for the first time how dark it is, and at that point, instead of turning around and just walking in the exact same route she took, and she could have gone -- there is a light post. She had walked right past it alongside the -- the parking lot. Could have walked right back the way she had

come and waited maybe 30 minutes, 60 minutes, and there would have been more than enough light for her, but instead, she carries on determined to get to the dumpster. And she orients herself. She sees the dumpster. She sees some light from a light post, I believe on another property, an adjacent property, reflecting off a reflector on the dumpster, and she -- she focusses on that and just started walking directly towards the dumpster. And unfortunately, as I've pointed out in the brief, this light gray cement slab was readily visible, and she knew the trench was right in front of that cement slab. I mean, the slab itself was sort of the warning sign, hey, there's a trench here. You know there's a trench here. You know it's exactly this wide. All she had to do was take a peek, and she would have seen the -- the slab, and -- but she's focused on the dumpster and just, you know, she miss -- you know, she hits it by inches, a couple inches this direction, and -- and this accident wouldn't have happened.

So the claim here is that the -- the parking lot is unfit for its intended purposes, and I've cited the law about that provision in my brief. And what our position is here is that this is -- this is an inconvenience, the trench. It doesn't render the parking lot unfit, and we've cited some cases where the courts

have held that where you've got a -- in the ice case, you have cases where, yes, there's ice on the parking lot, but it's here. It's there. There's a path to your vehicle without having to walk on the ice. You can go around it. In contrast, courts have held that where a parking lot is completely covered in ice, yeah, then it is unfit for its intended purpose. This is unlike those cases because the whole parking lot itself was not one big trench. It was just the trench in front of the visible cement slab.

And so we also cited a case where, I think somewhat similar case, where the plaintiff stepped in a depression on a sidewalk. And I would note for the Court that the obligations with regards to sidewalks as opposed to parking lots is more onerous. But in that case, the plaintiff stepped on a depression, fractured his foot. The depression had been there for quite some time. He was aware of it. He had walked around it before, and the Court in that case characterized the depression as a mere inconvenience as opposed from concluding that the sidewalk was unfit for its intended purpose.

And then the -- the other part of the -- the statutory claim being made against Red Oak is that they violated health and safety laws, and that's under Section 1(b). And as I laid out in the reply, we did not violate any -- any laws. The two main contentions are that the

parking lot was insufficiently lit, but even the Plaintiff's expert can conceded that the Stanton code did not incorporate these illuminants standards for purposes of residential property, and as I noted in the reply, the only thing they incorporated for purposes -- with respect to these -- this IES standards was the measurement standards, not illuminant standards, but measurement standards, and only in regards to commercial, industrial, and nonresidential property. So Red Oak did not violate any Michigan law or City of Stanton law regarding lighting in the parking lot.

The other contention is that we violated a -- what I think is a rather general provision in the building code, which we've been calling BOCA in our briefs, and I've laid out in the reply why we did not violate BOCA. You know, the first thing I'd like to point out is in the -- in the rental housing ordinance, 192 of the City of Stanton, Section 1.103 says, "Application of Building Code. Any alterations to buildings...shall be done in accordance with all applicable building codes," and I left out a little bit in the middle there, but that's the operative part, buildings. Now, if you fast-forward to the appendix where they have the definitions, they define building code as BOCA, and it's a little bit inconsistent here, but it -- it says it applies for construction,

alteration, addition, repair, removal, demolition, use, location, occupancy, and maintenance of buildings and structures. Well, our position is the parking lot's -- it's clearly not a building, so BOCA wouldn't apply to it, and further, the -- the City of Stanton ordinance defines a structure in a way that excludes driveways and sidewalks, and as I pointed out, this -- it's a parking lot. This is like a sidewalk. This is like a driveway, and so it's our position that BOCA just doesn't apply because this is a parking lot. It's not a structure. It's not a building.

And then lastly, this is -- the BOCA provision, it's just titled "General," and it says things need to be done safely. And when asked by me what that meant at his deposition, the Plaintiff's expert said, "Well, that means cones and caution tape," and I asked him, "Well, what part of BOCA says cones and caution tape are required?" and he said, "Well, there isn't one."

So in short, we -- this parking lot was fit for its intended use, and we do not intend that we violated any -- any health or safety law that would be applicable to Section 1(b). So unless the Court has anything else, I don't have anything further right now.

THE COURT: I have no questions.

MR. JAMES: Thank you, your Honor.

THE COURT: Mr. Freifeld, response please.

MR. FREIFELD: Your Honor, I want to start out by talking about the motion that's before you today, and specifically, Red Oak's, because Westveld's is a little bit different than -- than West -- than Red Oak's. A motion for summary disposition pursuant to 2 -- to a (C)(10) specifically states in a matter of very simple terms that this is not a trial by paper. This is not a bench trial. This is a motion to determine whether there is a genuine issue of material fact to be decided by a jury, and one of the most important principles associated with a (C)(10) motion is that all reasonable inferences from the facts are to be construed in favor of the nonmoving party, who is the Plaintiff. So what does that mean? That means for today's purposes, the Defendants' slant on the facts is irrelevant. The Defendants' slant on the law is irrelevant as applied to the facts. The Defendants' interpretation of the Stanton ordinance 192 and the BOCA code is not how it is supposed to be dealt with under this motion. Under this motion, any reasonable inference from the ordinance, from the BOCA code, and from the facts associated with it are to be construed in favor of the Plaintiff.

Now, what are the facts in this case? The facts are very simple. Ms. Bowerman, who, by the way, is here

today, was -- had -- there's no question she was aware that there was repairs being done in the parking lot. There were trenches all over the place. There were trenches not only in the pat -- in the front of the patio area, but there were trenches by the sidewalks in the apartment complex. Interesting enough, Westveld had filled in some of those trenches, with the exception of the one in front of the patio. Despite knowing that the -- that the trench was there, you have to remember, she testified that when she would typically take out her garbage, it would be during daylight hours so she could see the trench and where she was going. The unique situation here is this -- the unique situation is this -- this occurred about 7:00 a.m. on October 30, 2021. The sun did not rise here in Stanton until 8:13 a.m. that day, so it was dark. My expert went out approximately an hour after sunset to determine how dark it would have been comparably, and he determined, using footcandles, which is the amount of light a candle generates a foot away from you, that as you approach the front of the patio in this parking lot, the number of footcandles goes down to zero, and that means that that type of darkness, although it's not impossible to see, requires a great deal of adjustment for the eye, and even more so for a 70-year-old woman.

Now, despite knowing that there was a trench

there, it was too dark for her to see. So what did she decide to do? She took a parabolic route to get to the dumpster, which was on the other side of the patio. Unfortunately, there was a corner. As you know, this trench was 10 feet long and 4 inches deep. She clipped the corner. The photographs that I gave you show you exactly where she fell. Also, there is a photograph that gives you a sense of what the darkness does to this patio, concrete, and the area around it. Now, just to remind you, the one picture that denotes the darkness, there were car lights in the back. You have to remember, there were no car lights on the day of this accident, so the reason why you can see the gray patio in that picture is because there is a car's headlights in the background, and somebody is taking a picture of it.

In any event, under these circumstances, under these circumstances, whether or not the Plaintiff knew that this trench existed beforehand, whether or not her brother knew, the courts have said in the context of a motion for summary disposition pursuant to MCR 2.116(C)(10), that information, although relevant, there are other inferences that can be drawn from it, and that's the whole thing. You have to draw the inferences in favor of the Plaintiff today, and the Plaintiff says that it was too dark, that the parking lot in that area -- I'm not

saying the parking lot in its entirety, but the parking lot in that area was underlit to the point that she could not see it.

And basically, as Counsel stated, there are three -- three covenants in every lease, residential lease, in the state of Michigan, one, that the property is fit for its intended use, that it's kept in reasonable repair, and that it complies with local health and safety laws. So the courts tell you how you analyze a fit for intended use. You, first of all, see if it's in a common area. I don't think there's a dispute that it's in -- it's in a common area. Then it asks you, What is the intended use? Now, Counsel here is describing this as the parking lot in its entirety. That's not what I'm focusing on. I'm focusing on the area that's in front of this patio, for this garbage dumpster. What is the intended use? The intended use for that area is to allow residents to get from their apartments with their garbage to the dumpster to throw out their garbage. That is the intended use.

And then finally, if there's reasonable differences of opinion as to whether or not that is the intended use or that was the intended use under these circumstances, then the issue goes to the jury.

Now, what do we have here in terms of facts? The facts are that the patio concrete was being redone, that

there was a 10-foot by 4-inch-deep trench in front of the patio. It was also -- at the time of this accident, there was not enough light for Ms. Bowerman to see where she was going. And number three, and finally, the dumpster is supposed to be -- where is the dumpster supposed to be? The dumpster is supposed to be on the patio in the back in a fenced-out area. Where was the dumpster this time? The dumpster was over to the -- way over to the side off the patio, and the reason why it was off the patio was -- was because they didn't want the garbage truck to drive over the concrete and break the concrete, so they moved the dumpster all the way to the side, which required Ms. Bowerman not to use the route that she would typically -- would require her to take a parabolic route in order to avoid the trench that ultimately broke her leg.

There are -- clearly, there is a genuine issue of material fact as to whether or not there are reasonable differences of opinion as to whether or not this particular area of the parking lot was fit for its intended use, and I would say the summary disposition is -- is inappropriate on that issue. But putting that aside for a minute, putting that aside for a minute, I'm not saying that this was in -- whether there was reasonable repair. That is not the issue in this case. Let's get to safety laws. Let's look at the Stanton ordinance 192

concerning rental housing. What does it incorporate? It incorporates BOCA, the 1990 BOCA requirements, and in those BOCA requirements, there is a section called 3006 which states that alterations or building -- of building or structures must be conducted in a safe manner suitable for protection of the public. Now, you can quibble over what -- what building -- I mean, building is clear. Structure -- the patio area in front of this garbage dumpster is a structure. It is part of the parking lot in front of where the dumpster is located where the people are -- where the residents are supposed to put their garbage, and because of that BOCA requirement, there had to have been some kind of warning to the residents that there is a trench there and that they should avoid it, and the way they do that is using caution tape, usually yellow caution tape, and-or cones or both. That is the reasonable inference drawn from that portion of the ordinance in this particular case. And even if it's -- we can't find a fact question on fit for intended purpose, there's definitely a fact question as to whether or not it -- they followed the Stanton city ordinance.

And our expert also testified that it may be true that the illumination standards from the Illuminating Engineers of America may not be specifically in the ordinance, but that is a standard that says that parking

lots, asphalt parking lots, are supposed to be at least 0.5 footcandles in every area of the parking lot, which it was not in this case.

So -- and I -- I appreciate Defense Counsel conceding the issue of open and obvious, because this is a statutory claim. As I put in my brief, open and obvious does not apply to 554.139, and I would -- for the reasons stated, I just stated on the record, and for the information I just put in my brief, I would say that there is a genuine issue of material fact as to Red Oak's motion pursuant to MCR 2.116(C)(10). And if the Court has any questions, I'll be happy to answer those.

THE COURT: I do. So it's your position that that pad area -- and nobody's addressed this, but in the Court's review of this, I would assume that that pad area is -- is the place for the dumpster, which generally would be there but for this construction. But it's your position that that area would fall under BOCA because the pad area would be classified as a structure?

MR. FREIFELD: Or it's part of a -- it is -- it actually is because if you -- as you stated earlier, correctly, under normal circumstances, without the repairs going on and all that stuff, the dumpster and the patio would be -- would be where the dumpster area structure would be for where you dump your garbage as a resident of

Stanton Park Apartments.

THE COURT: But from the pictures, and even the testimony that I read in here, the only thing that was in that area that could be at least -- you correct me if I'm wrong -- that the Court could latch on to and say maybe this is a structure would be the dumpster itself, right?

MR. FREIFELD: There's -- there's also -- I don't know if you noticed --

THE COURT: And is a dumpster a structure?

MR. FREIFELD: Well, I don't know if you noticed; in one of the pictures I gave you, --

THE COURT: Um-huh.

MR. FREIFELD: -- there is a wooden fence that goes -- when the dumpster is put in the correct place, and I don't know if you can --

THE COURT: I see the fence and --

MR. FREIFELD: And the fence goes up around the dumpster, so if you're looking straight on to the dumpster, you have the patio. You have the dumpster, and then you have a fenced-in --

THE COURT: Which is sort of --

MR. FREIFELD: -- area around the --

THE COURT: -- the back of it.

MR. FREIFELD: -- house, which is in the back of the dumpster, and I would consider all of that put

together as a structure.

THE COURT: Okay.

MR. FREIFELD: At least there's a reasonable inference that is a structure.

THE COURT: So what's in BOCA that the Court could rest its hat on, so to speak, that that pad, the dumpster, and the fence is a structure?

MR. FREIFELD: It's a structure as defined in 3 -- 3006.0. I don't know if the term "structure" itself is defined in BOCA. I just know that the term is used and incorporated, and incorporated, by the City of Stanton and the county of Montcalm as part of their ordinances, that it must -- that any alteration, demolition, anything associated with anything related to a building or structure must be conducted in a safe manner suitable for the protection of -- by the public, and that's what I -- now, whether BOCA has a specific definition of structure, that, I don't know, and I apologize.

Do you have any other questions, sir?

THE COURT: I don't. Thank you, Mr. Freifeld, and I'll go to --

Yeah, Mr. James, go ahead.

MR. JAMES: Thank you. Just real brief, your Honor. I wanted to -- first of all, to make clear just how BOCA works with the City of Stanton rental ordinance, and

I -- I do believe this is a legal question for the Court as opposed to something that should be inferred. As I mentioned before, Section 1.103 references BOCA in regards to buildings, just buildings, not structures. Now, the definition of building code does refer to buildings and structures, and structure is specifically defined in the Stanton ordinance, and it -- like I said, it excludes driveways and sidewalks, but it also excludes fences, and that's Definition 38. It's on page 6 of my reply brief, so even if we consider a fence and everything in this area, it's argued that none of this is a structure. It's -- it's not a building either.

And the other thing I would submit is that there are specific sections in the Stanton code that refer to BOCA more specifically, such as 1.123 in the "Structure Exterior," and paragraph 4(a) and (b), mention things about structural safety like outside stairs and porches, and then it says, "...as required by the building code," and then there's some rules about handrails, "...as required by the building code." So there are six instances in the code where they specifically say stairways, ceiling heights, handrails need to be done by the done by the code, and none of those scenarios apply here where we're talking about a parking lot area.

As far as the open and obvious doctrine goes, I

-- I agree. The open and obvious doctrine that exists in the common law claims does not apply to the statutory claim, but that does not mean that some of those concepts aren't relevant for determining whether or not this parking lot is fit for its intended purpose. And the issue here is in a lot of these cases where there's a defect in a parking lot or a sidewalk, whether it's a depression or whether it's snow and ice, it's -- well, is it avoidable? Is it -- you know, the classic words are "Is it a mere inconvenience?" So there's an element of hey, it's there. It's known. It's visible. You can walk around it. So it's not the open and obvious doctrine that we all think of, but some of those concepts are there in the analysis.

And so -- oh, the last thing I was going to say was the Plaintiff's expert in regards to the lighting, I asked him, "So if the light had been 0.5 footcandles, would this have been -- would that have prevented this accident from happening?" and he says, "I don't know." You know, it still might have happened.

And then as far as the -- the car headlights on the picture, the dark picture, that's the first time I've heard that that picture does not accurately reflect what the Plaintiff contends were the conditions. At her deposition, she was shown that picture, and she said that's how dark it was. There was never a mention about,

in fact, it was actually darker because there were headlights in that photo. So the light gray cement pad, I think, it's very important in this case that it was visible in the lighting conditions that existed, and it was known by the Plaintiff that there was a trench in front of the slab. Thank you.

THE COURT: Okay. Then, Mr. Cook, are you ready to proceed on your motion, sir?

MR. COOK: I am, your Honor. Thank you.

THE COURT: Okay. Go ahead.

MR. COOK: All right. Thank you. Your Honor, we represent Westveld, the contractors that poured the pad, and it's been referred to as a patio, but I think the Court clarified that as -- commented about the pad. This is a -- this is a concrete pad in the very back of the parking lot that is intended to be the base for the dumpster after it's cured and after the fact the asphalt company came along and finished filling in that trench in the very front of the pad.

But our position is -- is different than -- than -- than the Defendant's apartment complex in that we're being sued under a negligence claim, so we brought a (C)(8) motion based on the pleadings alone, and a genuine issue of material fact doesn't apply to a (C)(8) motion. We're -- we're arguing to the Court that we have no duty

as the general contractor once we leave the premises with respect to Ms. Bowerman. And I would like to say, knowing Ms. Bowerman is in the courtroom, that we're really sorry that this happened to her, and I know how difficult that can be, but by the same token, we have to look at liability from a legal perspective, and it's our position as the contractor, and I think it's well-supported in the law, that there's not a legal duty to Ms. Bowerman as it pertains to what we did at that premise. We were there under the terms of the contract with Red Oak to pour that replacement pad. We did that. Nothing in that contract required us to maintain the security of that pad after we were done with our job. There was nothing in the contract that said we had to stake it out or flag it out or cone it out or anything of that nature, place a security guard there, nothing like that in the contract.

So the -- so the analysis that the Court has to undertake is, Was there a separate duty owed to the public at large during the performance of our contract that extended after we were done and after we left the premises that extended to everybody that may come in contact with that? So I think what's really outcome-determinative of that is just really two cases. No matter which way you look at it, these two cases hold that we do not have a duty. And the first one we cited in our brief is the

Fianazzo versus Fire Equipment case. That's a 323 Mich App 620 case, a reported case, 2018. And in the *Fianazzo* case, the contractors were laying in a cable for an internet service in the commercial building, and the security guard tripped and fell over the cable that was laying loose on the ground waiting for the dropped ceiling to be removed so it could be lifted into place. And the security guard brought suit against the installers under a negligence theory, and the Court -- the Court in that scenario held that any claim for injury that is associated with the condition of a premise is not a negligence case, but it's a premises liability case. So in that case, they held that -- that the cable laying on the ground was readily observable by the security guard, and the fact that he tripped and fell was really -- the condition was open and obvious, and there was no special aspect of that condition that would otherwise prevent the -- the contractor from asserting premises liability defense of open and obvious, and that's because the premises liability law springs out of the idea that the owner or possessor of the property is in the best position to correct any hazards on the property. And the fact that a -- and that Court -- that Court conclusively held that a contractor who is under contract to perform services on the premises is, in fact, a possessor of the property who is entitled to the use of

that defense.

THE COURT: Mr. Cook, can I just interrupt? Because I try to follow along, --

MR. COOK: Yes, sir.

THE COURT: -- and I've read these briefs. I'm not finding the case in your brief that you're citing here.

MR. COOK: *Fianazzo versus Farm Equipment*, 323 Mich App 620.

THE COURT: Where is that --

MR. COOK: I'm not sure I have the brief --

THE COURT: Where is that in your brief?

MR. COOK: -- pulled up.

THE COURT: You rely on --

MR. COOK: It's at the very end, your Honor. It --

THE COURT: -- *Fultz* and -- at the very end under --

MR. COOK: Yeah.

THE COURT: -- open and obvious?

MR. COOK: *Fianazzo*. I'll have to pull up -- I didn't -- I'm not the author of the brief, so I couldn't --

THE COURT: Okay.

MR. COOK: -- pinpoint the exact location, but I

can pull it up here --

THE COURT: Well, on this --

MR. COOK: -- and cite the --

THE COURT: It's at the very end, *Fianazzo* -- there you go -- which is -- which is --

MR. COOK: There you go.

THE COURT: -- under your argument about special aspects?

MR. COOK: Yes. Yeah. That -- from -- when I read the brief, to be honest with you, your Honor, I would have appreciated that *Fianazzo* case being in front so you can talk about the law first before there was a discussion on open and obvious mostly. But in any event, that -- that is the -- that is the central holding of the *Fianazzo versus Fire Equipment* case, is that you -- a claim that arises out of a premise -- an allegation of a defect in the premise is not an negligence claim. It's a premises liability claim, which seems counterintuitive, but when you look at the analysis, it does then make sense that -- and that was actually -- the Supreme Court also upheld that in the *Fultz* decision, but that -- that being you want to put the court responsibility on the owner or possessor of the premise who is in the best position to rectify the hazard.

And then that case was further illuminated --

and I'm going to apologize for this because this wasn't in the brief. This was a reference from the *Fianazzo* case. It's the -- it's a court of appeals decision in *Moss versus Joe Young Excavating*. It's pretty much foursquare with what the Court is looking at today, and so I ask permission to address this briefly with the Court, but I think it does clarify and has a direct application to our analysis here, and that's *Moss versus Joe Young Excavating*. That's a 220 Westlaw 6231903 case, a per curiam opinion from Borrello, Jansen, and Swartzle. And in that case, a contractor that they -- a contractor laying -- pouring cement in a residential driveway and cordoned off the cement pad with stakes and string and told the owner, "Leave that in place for seven days to let that concrete cure and don't -- don't park on that concrete." And about five days later, somebody visiting that home parked adjacent to the pad. There was -- the stakes had been removed. The string had been removed, and the lady exited her car and walked along next to the concrete pad and stepped in a depression that was covered with sand and had a severe injury and then brought a negligence claim against the contractor for similar argument, not -- not cordoning that off, etcetera, even though those stakes had been removed by somebody unknown, but sued on both a negligence doctrine and on a premises liability. And the

court -- the trial court dismissed on open and obvious saying that where you walk near this area, where there was obvious construction and you should have avoided that area, and then also -- but did not address the duty question. On appeal, the court of appeals reversed on open and obvious saying that's a fact question but did say that the contractor had no continuing duty, no longer possessed or controlled the property after he left, so he wasn't in possession or control at the time of the injury. That duty, if any, fell upon the owner of the property, being the -- the residential owner of the property, so the court upheld the dismissal but for other grounds, and that is, on duty.

So I don't want to rehash extensively the open and obvious piece, but if the Court were to say in this particular ruling that the premises liability did survive after we left the premises, as to us, I think it's clearly open and obvious. Ms. Bowerman did acknowledge seeing this trench on a number of occasions, avoiding it on a number of occasions. And I do realize that it was dark that morning, but I haven't heard anything on this record, nor have I seen anything in the deposition transcripts that suggest that she had to take her garbage out at 7:00 a.m., and this is an apartment complex for basically retirees. I didn't hear anything and see anything in the transcripts

that suggests that she had to take her garbage out at 7:00 a.m., and certainly, if you get into a parking lot knowing that there's trenches -- and I think Plaintiff's attorney said there's trenches everywhere -- and you can't see where you're going, it doesn't make a lot of sense to keep pushing forward into darkness, especially when it comes just to dumping out garbage, so -- and I'm not being critical. I'm just talking about the liability piece of it.

There -- you know, that could have been easily avoided by just turning around. So even looking out the door, I think her testimony presented to the Court was, "I looked out the door and realized it was dark, and but I decided to go ahead." So I think that's -- that's a situation where you have an open obvious -- open and obvious danger that was known to Ms. Bowerman, and there's no special aspect. Darkness isn't a special aspect. Darkness can be avoided by not going out. So in that scenario, I think under (C)(8) and (C)(10) we would prevail, and similarly, under the scenario of premises liability, if you don't -- if you don't have control or possession at the time of the injury, there's no duty to a third person. It doesn't arise out of the contract, and it is not a separate and independent duty, other than our duty to pour that pad as required in the contract.

So thank you, your Honor. That's our position.

THE COURT: All right. Mr. Freifeld?

MR. FREIFELD: Your Honor, this motion is a little bit different than the previous motion. As you know, it's -- we have a (C)(8) motion. Let me address that one first.

The question is: Does the Defendant Westveld have a duty in this case, and as I pointed out in my brief, that there is -- and even in a case that was cited by the Defendant, which is the *Loweke* case, which is a published case with the Supreme Court in 2011. At the very end of the portion that I take out, it says, "...and the generally recognized common-law duty to use due care in undertakings." What does that mean? That means that in the state of Michigan, the common law states that everybody who does something, undertakes any project, whether it be digging a ditch or anything else, including driving -- because I know -- I know there are statutes on that, but even driving, you have a duty of due care, and here, I gave you one, two, three -- I know they're unpublished. I know they're unpublished. Actually, I know they're all unpublished, but I gave you three unpublished cases that reaffirm that concept, and I state at the end of it, while these cases are not precedential because they're unpublished, they are instructive and persuasive because

they follow the teachings of the Supreme Court in *Loweke*.

Now, what -- what should have Westveld done in this case? Well, there's no question Westveld created the trench, no question about that. So they had an undertaking. The undertaking was to lay down this concrete and create the trenches associated with it because of the wood forms that they put in place. They knew the trench was there, and they had, because they undertook to do that, a duty of due care. What was part of their duty of due care? There are two things that Westveld should have done in this case. Number one, they should have filled -- temporarily filled in the trench like they did for the other trenches throughout the parking lot, and number two, use caution tape and cones. Those are the two things that they should have done. And the case that I cite to you from 2019, the *Harper versus Ashgrove Apartments* case, which is also unpublished, is almost virtually identical to the case in -- to the case -- this case here, especially when it came to suing the contractor BBK in that particular case.

So your Honor, the contractors cannot rely upon premises liability law, and there's two primary reasons why. Actually, the primary reason why the contractors cannot rely on premises liability law is because premises liability law only applies to possessors of land. Westveld

is not the possessor of land in this case. Red Oak is the possessor of land in this case. So that's a big part of the reason why premises liability and open and obvious don't apply.

The second reason is, and it's spelled out in the complaint, and I think I spelled it out here in our brief, this is a negligence action. They asked me, What's the duty? The duty is the duty of due care in undertakings, which is recognized by the Michigan Supreme Court. So because it's a negligence action, there is a series of cases that I cite to where said -- that says that open and obvious is -- open -- excuse me. Open and obvious and premises liability do not apply to negligence actions. I gave you another unpublished case, *Vandall versus Post Electric*, which is directly on point, which says that the contractor in that case is not a possessor of land. The landowner was Beaumont in that case. Vandall -- Post Electric was doing work for Beaumont, and they specifically cannot use premises liability law. Why? Because they're not the possessor of the land. And that's also reaffirmed in the Michigan Court of Appeals -- Court of Appeals published opinion of *Lair verus Kitchen*. Open and obvious and premises liability law does not apply to Westveld in this case. It just -- there is no -- I mean, I -- I'm not so sure that the case that's cited to by the

Defendant exactly says -- exactly says that, but for purposes of what you have in front of you, I've given you a Michigan Supreme Court case from 2011 that says that if you undertake something like digging a ditch, you have a duty of due care, and that is a big part of the reason why both premises liability and open and obvious do not apply to this case.

Thank you -- unless you have any questions, your Honor. I would be happy to answer any questions you have.

THE COURT: I don't at this point, Counsel. Thank you.

Mr. Cook, anything in rebuttal?

MR. COOK: Just quickly. Yeah, just quickly, your Honor.

As it -- as it pertains to the general duty of care that the Plaintiff's attorney is citing to -- to affix liability to us, he forgot the second half of that quote from the caselaw, and it's that -- that everyone has a general duty of due care not to create an unreasonable risk of harm to others. So that's the general duty of due care, which the Court dispensed with in the -- in the *Fianazoo versus Farm Equip* -- or *Fire Equipment* case that I cited. Here's the specific language that -- that gives the contractor possessory status to allow the contractor to assert the defense of open and obvious if, in fact, the

Court holds that we were still in control of this premise. But it's:

> "One who on the behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or condition while the work is in his charge."

And in this case, that's the operative language, "...while the work is in his charge." So if -- if the allegation is the work was still in our charge seven days after we left the property, we're entitled to use the open and obvious defense. Our position is the work was no longer in our charge once we finished our contract, and the legal liability, if any, or the duty, if any, was on the owner of the premise. So the -- I think the law is clear in that regard as it pertains to either our work on the premise, that you were to be injured while we were still working on the premise, or if the injury occurs after the job was done and we've left the premise.

THE COURT: Okay.

MR. COOK: So nothing further here.

THE COURT: Mr. Freifeld, can I ask you on a very last point here: What's your position on the idea that if the work has been completed, that this -- this idea that Defendant Westveld could then rely on open and obvious? And then also, I'm a little bit curious on the idea that has been posed here in rebuttal. If I understand Mr. Cook correctly, the first thing that we need to look at is whether Westveld, the contractor here, created an unreasonable risk of harm, and, What does that look like? What kind of direction do the courts give us about unreasonable risk of harm if we talk about that first hurdle, so to speak?

MR. FREIFELD: Yeah. And reasonable risk of harm that Westfeld created here was they created a 10-foot by 4-inch-deep trench without filling it in like they did for the other tren -- in the other trenches, so --

THE COURT: Right. But that's what I'm getting at. So is a 4-inch --

MR. FREIFELD: Deep.

THE COURT: -- deep trench --

MR. FREIFELD: That's --

THE COURT: -- an unreasonable risk of harm? And when I think of anything -- a lot of people probably could step in a 4-inch trench and have zero injury.

MR. FREIFELD: And there's a lot of -- and

there's a lot people who specific -- specifically, if you look at the demographic that lives at this apartment complex, the majority of the people that live there, by their own stan -- by their own bylaws, they can -- got to be over the age of 62 or 65, and they have to be either that or disabled, so that --

THE COURT: Well, these are interesting points. I like that.

MR. FREIFELD: So --

THE COURT: But --

MR. FREIFELD: So these people that live there actually have to be given a higher standard of care than you and I, your Honor. You and I can walk normally. We could probably, you and I in a 4-inch trench, and probably may not get hurt. I don't know about you; I'll definitely get hurt, but that's beside the point.

THE COURT: You're not giving yourself enough credit.

MR. FREIFELD: I know. However, people over the age of 62 or old people over the age of 70 --

MR. COOK: Careful.

MR. FREIFELD: I know. I know.

MR. COOK: Be careful.

MR. FREIFELD: I know. I'm almost there, so don't -- so don't -- don't throw me under the buss just

yet -- have to be given a higher standard of care for people who are creating trenches that are 4 inches deep and 10 feet wide.

THE COURT: Well, can I ask you, then, because I'm -- maybe it exists, and I'm not familiar with it. So when we're talking about either the statute, 554139, and-or just a general negligence claim, is there anything in either one of those that would suggest there's a higher duty of care for special conditions, be it age, disability?

MR. FREIFELD: I can tell --

THE COURT: Is there something that you could point to that would suggest that that's the standard --

MR. FREIFELD: Can I -- can I --

THE COURT: -- or a different standard?

MR. FREIFELD: Can I point to a case? I don't -- not unless I do the research.

THE COURT: Okay.

MR. FREIFELD: However, I could suggest to you that under general common-law negligence standards, stuff that we learn in law school, we are all taught that depending -- the Plaintiff has taken -- it's the eggshell skull rule. You take the Plaintiff as you find them. Now, if the Plaintiff is at a certain age where walking, ambulating, is an issue or can be an issue, then we have

to create a duty that is a standard that's higher than we normally would, or the Defendant just has to take the Plaintiff as she finds them, and these Plaintiffs -- or this Plaintiff was 70 years old, and it was eminently reasonable to conclude that if you're going to have people who are in their 70's walking in and around this trench, that number one, it should have been temporarily filled in so that they don't trip over it, or two, there be caution tape and cones to let them know it's there, because somebody in their 70's is more likely than not going to be more substantially injured by this trench than you or me or anybody else approximately our ages. So that should have been taken into --

THE COURT: Can I ask you a more general question too, because it's one thing, just to be frank, that's been troubling to the Court in reviewing for this. Mr. James suggested to the Court that when we're talking about open and obvious -- which at least with that Defendant, Red Oak, is not at issue here. It's under the -- under the statute.

MR. FREIFELD: Correct.

THE COURT: But the Court doesn’t have to abandon those concepts. I think he said something along those lines, and they can remain relevant.

MR. FREIFELD: I've never seen any case that

says that.

THE COURT: Well, let me ask you that about it, because the troubling part to the Court is, generally, when I've dealt with these, it's been a surprise to the injured individual, and then we do get into these -- and with these premises liability, these arguments about open and obvious that, you know -- I can think of one I did recently that, you know, I walked by that big scale in the vet's office that's on the floor on my way to the bathroom, and I've been there several times, and I saw it, and then on the way back from the bathroom, I don't know why I cut the corner too short and -- and it surprised me, which is different than an occasional visit to the vet. That's where I'm getting -- going with this. Your client is uniquely positioned, when I read this, and I read her deposition, in that she has, maybe because of her past employment, either -- or out of habit or whatever, she's uniquely positioned that she seems to document what's going on around the building, what's been done, what's not been done, and was what I could characterize as highly aware of this. How do I -- going back to Mr. James' thoughts, that these concepts of open and obvious can be relevant. Mesh that with the idea that your client undeniably was clearly aware of this 4-inch trench.

MR. FREIFELD: Well, first and foremost, you

have to remember, once again, as I stated at the outset of my argument, what this -- what this motion is. As I stated, this is not a trial by paper. This is just simply a motion for summary disposition under (C)(10) which just simply asks for a genuine issue of material fact and that all reasonable inferences are drawn in favor of the non-moving party, okay? In this particular case, her previous knowledge -- there's a case, a published case, the *Trueblood*, the state of *Trueblood*, that's directly on point with this, where the court says to the lower courts, the knowledge of the Plaintiff, or anybody else for that matter, about the condition that caused the injury is really, at this stage, not as relevant as you think, because you're -- what you have to do is -- there's a lot of different things you can assume. You can assume that other people use due care. You can assume that the Plaintiff used due care in other instances, but not this one, and that's for the jury to decide, not to be decided by the judge on a motion for (C)(10).

THE COURT: Well, let me ask you that. We can -- we don't have to assume in this case -- and this is from deposition transcripts. We don't have to assume that there was a -- a path to the dumpster in its location when this incident occurred from the north and the south. We don't have to assume that your client was very familiar with its

location when this incident occurred because she had documented in notes for -- for nine days. So those are all things that are part of the record. They're not assumptions. Would you concur with that?

MR. FREIFELD: It's not that they're -- I'm not saying that they're assumptions. I'm just saying that you take that evidence in the light most favorable to a nonmovant. Now, in *Trueblood*, the court of appeals -- and I'll say this again: The court of appeals in *Trueblood* said you can take all that evidence. You can take all that evidence. You can review all that evidence, but in the grand scheme of things, because of the nature of the motion, because it's a (C)(10) motion, --

THE COURT: Um-huh.

MR. FREIFELD: -- those inferences have to be looked in favor of the Plaintiff. There can be other explanations as to why their knowledge of this hazardous condition, prior knowledge of hazardous conditions, can be -- could go in front of a jury, and the jury could easily say, "Yeah, but..." and that's the reason why that knowledge in and of itself does not require that this motion be granted. In fact, it's -- as *Trueblood* stated, it's just the opposite.

THE COURT: All right. Well, I appreciate your help with the Court's questions.

All right. Here's what the Court is going to do: As I mentioned, I did have a chance to review this, and I want to think about it for a minute or two, maybe look at some of the cases that have been cited a little bit more closely than what I have done. And I'll do one of two things: I'm either going to notice this out again just for the Court to provide an opinion. I'll do it orally on the record, or, if I have the opportunity -- and this is a bad idea -- I'll just do a written opinion on the issues.

I'm sure you're all aware I'm only here every other week, so when we start talking about doing anything other than an oral decisions from the bench, if I don't get to it -- what's today? Tuesday? Monday, right? We're new. If I don't get it done before I leave Friday, then I'm not here at all next week, and then the following week -- so but the point of all that: It becomes a month very quickly, and then, you know, SCAO and different entities like to wag their finger at the Court that, "You're not being timely." So I find that difficult sometimes.

So I'm going to do it one of two ways: I don't know which way, but I'll certainly let the parties know, and if -- if I do have you back just to orally do a decision from the bench, you're all free to appear via Zoom. I don't know what the miscommunication was today. I didn't recall saying that folks had to appear in person. I

appreciate the effort Mr. James, but I'm -- especially motions of this nature, I -- I find that Zoom works pretty well if everybody has a good connection. And if I did say that at some point, and I just don't recall, then -- then I guess we did. I can't remember saying it in this case. I do sometimes when we have hearings and I'm going to be hearing testimony and judging credibility, and things sometimes are much easier with somebody sitting right next to you, but I won't make anybody drive here if I'm going to do this from the bench.

So before we then conclude our hearing, is there anything else that I may have missed or that we didn't take up today?

MR. FREIFELD: Not that I can think of.

MR. COOK: Nothing from us, your Honor.

MR. FREIFELD: Not that I can think of.

THE COURT: Okay.

MR. JAMES: Can I -- I'm just going to bring up, we plan to go to mediation, and --

THE COURT: When does that -- is it scheduled already?

MR. JAMES: We -- no. We were discussing that earlier. We had talked about using Tom Behm, and I don't know if I talked to Justin about this, but Tom, we -- I found out, is scheduling way out, so we either need to

kind of sneak in with him or come to some agreement on somebody else. We also have a -- I believe it's a settlement conference on the 11th of May, so I guess I'm just sort of --

THE COURT: Get it going.

MR. JAMES: -- letting the Court know that --

THE COURT: The Court, right?

MR. JAMES: -- you know, we are going to work to get a date, but if there's some conflict with that May 11 timing, we would let the Court know.

THE COURT: Okay.

MR. FREIFELD: And your Honor, I told Dan that I'm going to -- I know what Tom told him, but I have a friend of a friend who could probably get me in a lot sooner.

THE COURT: A mediator?

MR. FREIFELD: No, Mr. Behm.

THE COURT: Oh, with Mr. Behm?

MR. FREIFELD: Yes.

THE COURT: I see. Okay.

MR. FREIFELD: I have a friend of a friend who knows Mr. Behm, and we could probably get in there much quicker.

THE COURT: Okay. Well, I'll leave that to you folks, --

MR. FREIFELD: Sure.

THE COURT: -- and I would not stand in the way. I will do my best to try to get something out. Just keep in mind that being here every other week, I can almost guarantee it will not be this week, and that's going to put you out until April something, even if it's in two weeks, and that would probably be a stretch, so most likely, things hold the way I generally have been, we're talking four weeks, but I'll do my best to try to get it out before that, so -- all right?

MR. FREIFELD: Okay.

MR. JAMES: All right. Thank you, your Honor.

THE COURT: All right. Appreciate it.

Mr. Cook, you're free to sign off on your end, sir. Thank you.

MR. COOK: Thank you, your Honor.

(At 2:52 p.m., proceedings concluded)

I certify that this transcript, consisting of 46 pages, is a complete, true, and correct record of the proceedings and testimony taken in this case on Monday, March 27, 2023.

July 18, 2023

/S/Janet Lyndrup

Janet Lyndrup, CER 8323
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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTCALM

JAN BOWERMAN,
Plaintiff,

v

File No. 22-S-28824-NO
Hon. Ronald J Schafer

RED OAK MANAGEMENT CO., INC.,
And WESTVELD SERVICES, LLC
Defendants.
_____/

ORDER ON DEFENDANT RED OAK'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AND DEFENDANT WESTVELD SERVICES, LLC'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10)

At a session of said Court held in the
Courthouse in the City of Stanton, Michigan
on the 10 day of May, 2023

PRESENT: Honorable Ronald J Schafer, Circuit Judge

In this matter, Defendant Red Oak filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The Plaintiff filed a response to that motion, and Defendant Red Oak filed a subsequent reply. Additionally, Defendant Westveld filed a motion for summary disposition pursuant to MCR 2.116(C)(8) ad (C)(10). The Plaintiff also filed a response to that motion. Oral arguments were heard on both motions on March 27, 2023, and this Court took the matters under advisement to review additional case law.

Defendant Red Oak's motion for summary disposition argues that it did not violate MCL 554.139, which was the only claim against it in the Plaintiff's complaint; and therefore, it is entitled to summary disposition. It argues that the statute is clear that it had a duty to keep the premises and common areas fit for their intended use. It is also clear that the duty regarding reasonable repair only applies to the premises, not common areas.

Defendant Red Oak relies upon *Allison v AEW Capital Mgt. LLP* 481 Mich 419 (2008) to argue that the duties imposed on it by MCL 554.139 are much less stringent for common areas than it is for the premises and that while the parking lot is a common area that needs to be kept fit for its intended use, this does not mean that there is a duty to maintain the parking lot in an ideal condition. Red Oak further argues that the temporary trench in the parking lot did not hinder Plaintiff's ability to use a parking lot as a parking lot, nor did it prevent her from accessing her vehicle that was in the parking lot, not the use of the trash container that was accessible from the north or south.

Defendant Red Oak also argues that, to the extent Plaintiff asserts a common law claim for negligence, the trench in the parking lot as open and obvious so the Plaintiff would be precluded from recovery. The Plaintiff was aware of the trench, had taken notes about the trench, and the photos show that the concrete pad is distinguishable from the other areas of the parking lot, making the trench discoverable upon casual inspection. There is no question Plaintiff was aware of the trench, and in fact, had previously accessed the dumpster with no issue.

Plaintiff argues in response that Red Oak had inspected the concrete work completed by Defendant Westveld and knew that there were no warnings about the trench posted, such as caution tape or cones. Additionally, Plaintiff argues that her expert, Mr. Albert Kerelis, opines that the parking lot was underlit according to standards set forth by the Illuminating Engineering Society of North America.

Plaintiff clearly states that she is not pursuing a common law premise liability claim against Defendant Red Oak, only a violation of MCL 554.139. Plaintiff argues that the question in this case is whether or not the walkway was fit for its intended use on the day of the Plaintiff's

accident. As such, the open and obvious doctrine is inapplicable in this case for Defendant Red Oak.

Plaintiff also argues that the trench violated the City of Stanton Ordinance 192 because the City of Stanton adopted the BOCA 1990 edition, which has a section that states that when a building or structure is erected, altered, repaired, etc., it shall be conducted in a safe manner with suitable protection for the general public and that safeguards and construction equipment should be installed and maintained to ensure protection for the workers and public. Plaintiff argues that the failure to use cones or caution tape violated this standard and therefore, Stanton ordinance. She also argues that because Mr. Kerelis tested the area at 0.0 foot candles, which is less than the IES of North America standard of .5 foot candles in a parking lot, there is a genuine issue of material fact as to whether or not MCL 554.139 was violated as a violation of the local unit of government or applicable health and safety standards, which creates a separate covenant in the statute.

In reply, Defendant Red Oak reiterates that the parking lot was not required to be kept in perfect or ideal condition, only fit for use as a parking lot. It argues that the cases relied on by Plaintiff are distinguishable because they were situations where an entire parking lot was rendered inadequate, rather than a small isolated area of inconvenience, as was the case here.

Defendant Red Oak also argues that the Illuminating Engineering Society of North America standards were not adopted or incorporated by the state of Michigan or the city of Stanton as even the Plaintiff's expert conceded that Stanton utilizes lighting standards as a way to prevent light pollution, not inadequate lighting, and that the standards are for commercial or industrial zones, not residential. Defendant Red Oak further argues that there was no specific indication of what section of BOCA or city of Stanton ordinance was violated but deny there

were violations. It argues that BOCA 3006.0 applies only to buildings and structures, and a parking lot is neither.

Turning to Defendant Westveld's motion for summary disposition, it is argued that Defendant Westveld is entitled to summary disposition as a matter of law because there was no duty owed to the Plaintiff by Defendant Westveld. Relying on *Fultz v Union Commerce,* 470 Mich 460 (2004), Defendant Westveld argues that while every person engaged in performance of an undertaking has a duty to use due care and not unreasonably put others in danger, there is no duty to aid or protect another. Defendant Westveld encourages this Court to determine if a separate duty exists to the Plaintiff outside of the contractual obligations between Defendant Westveld and Defendant Red Oak.

Defendant Westveld argues that, alternatively, the claims should be dismissed as open and obvious. It argues that the trench was both open and obvious, and that the Plaintiff was well aware of the trench as she had seen it for multiple days and written about it in her contemporaneous notes on the goings on of the property. Defendant Westveld also argues that there were no special aspects present that would negate the open and obvious doctrine.

Defendant Westveld further indicates that while the open and obvious doctrine is typically available for owners of the premises, the court found in *Fianazzo v Fire Equipment Company,* 323 Mich App 620; 918 NW2d 200 (2018) that "One who, on behalf of the possessor of land, erects a structure or creates any other condition on the land is subject to the same liability and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge."

In response, Plaintiff argues that Defendant Westveld's motion regarding the duty of care is based on MCR 2.116(C)(8) and can only be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Plaintiff argues that every person has a duty to use due care to not unreasonably endanger another, and the factors that are considered to determine whether or not there was a duty of care is the relationship of the parties, the foreseeability of harm, the burden on the defendant, and the nature of the risk presented, *Hill v Sears, Roebuck & Co,* 492 Mich 651 (2012). Plaintiff argues there is a genuine issue of material fact as to whether or not Defendant Westveld owed Plaintiff a duty. Plaintiff relies on a number of cases that involve accidents occurring on sidewalks where the courts held that the defendants had a common law duty to exercise reasonable care in their undertakings and the performance of their work.

Plaintiff also argues that there is a genuine issue of material fact regarding the open and obvious doctrine such that summary disposition pursuant to MCR 2.116(C)(10) is inappropriate. Plaintiff argues that Defendant Westveld was not a possessor of the land, so it is not entitled to rely upon the open and obvious doctrine. Further, Plaintiff argues that the open and obvious doctrine does not extend to claims of ordinary negligence, but rather is reserved for premise liability claims. Plaintiff lastly indicates that in the event the open and obvious doctrine is found to be applicable to this case, there is a material question of fact as to whether or not it was open and obvious because it was extremely dark at the time of the accident.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the *complaint, Maiden v. Rozwood*, 461 Mich. 109, 120; 597 N.W.2d 817 (1999); *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 N.W. 2d 201 (1998); *Mino v. Clio School Dist*, 255 Mich. App. 60, 67; 661

N.W. 2d 586 (2003). In considering such a motion the trial court must also consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, supra at 120; *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362; 547 N.W. 2d 314 (1996). In doing so, the trial court must grant the benefit of all reasonable doubt to the nonmoving party. *Bourne v. Farmers Ins. Exchange*, 449 Mich. 193, 197; 534 NW2d 491 (1995).

A motion under MCL 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint and may be raised at any time. In considering a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded allegations should be accepted as true and construed most favorably to the nonmoving party, *Wade v Dep't of Corr*, 439 Mich 158 (1992). A mere statement of conclusions, unsupported by factual allegations is not sufficient to state a cause of action, *EET Ambulance Svc Corp v Rockford Ambulance, Inc.*, 204 Mich App 392 (1994)

Application of the Law

In this matter, this Court finds that there is no genuine issue of material fact that Defendant Red Oak did not violate MCL 554.139 such that summary disposition is appropriate.

MCL 554.139 (1) states as follows:

"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."

Plaintiff's arguments against summary disposition tend to combine the duties for premises with those duties for common areas. There is no question of fact or law that a parking lot or cement pad for placement of a dumpster are classified as common areas; the distinction being common areas are areas that are available for use by more than one person or tenant.

Because of this characterization, Defendant Red Oak only had to ensure the common areas are fit for the use intended by the parties. As set forth by *Allison v AEW Capital Mgt, LLP* 481 Mich 419 (2008)

Plaintiff makes arguments that seem to indicate this Court should consider the parking lot a walkway (See page 12, Plaintiff's Response to Red Oak's Motion for Summary Disposition), "Specifically, the purpose of the walkway at issue was to provide tenants, specifically plaintiff, reasonable access from the underlit garbage dumpster patio with the trench to plaintiff's apartment." Plaintiffs seems to ask this Court to determine the fitness for use based on that classification. However, the area in question was very clearly a parking lot and a cement pad to place a dumpster once cured, and the dumpster had even been removed from this location, which allowed for reasonable access to the dumpster, while still avoiding the trench at issue here. Indeed, Plaintiff had noted she had accessed the dumpster each day for several days without issue.

As stated in *Allison* "While a lessor may have some duty under MCL 554.139(1)(a). . ., it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute 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. Mere inconvenience of access. . .will not defeat the characterization of a lot as being fit for its intended use." While this Court can appreciate that the court in *Allison* was concerned with snow removal, the analysis still holds true in this case.

To the extent that the parking lot was considered part of the premises and subject to the higher duty under MCL 554.193(1)(a), there is no genuine issue of material fact that the city of Stanton *did not* adopt minimum foot candle standards for this residential area. While there is

mention of the measurement standards of the IES, Plaintiff's expert testified that there are no requirements for lighting in residential properties in Stanton to comply with the same. "They only gave that as a reference for measuring lighting. And, again, they were just giving for zoning ordinance. They just didn't want light to spill out onto adjacent properties." (Kerelis Transcript, 33:13-22)

Additionally, Plaintiff claims that the Defendant Red Oak violated MCL 554.139 because the BOCA section 3006.0 indicates that whenever a building or structure is erected, altered, repaired, removed, or demolished, the operation shall be conducted in safe manner and suitable protection for the general public and workers employed thereon shall be provided. (Kerelis Transcript, 40: 17-24). However, this was not a situation where a building or structure was involved.

As it relates to Defendant Westveld's motion for summary disposition, this Court does is also finding summary disposition to be appropriate at this time under MCR 2.119(C)(10)

A motion for summary disposition under MCR 2.116(C)(8) requires the Court to only grant summary disposition when a claim is so clearly unenforceable as a matter of law and no factual development could justify recovery. Additionally, the Court must accept all well-pleaded allegations as true and construed most favorably to the nonmoving party.

Defendant Westveld argues that it did not owe Plaintiff a duty separate from its contractual obligations to Defendant Red Oak, so summary disposition under MCR 2.116(C)(8) is appropriate as to the claim of negligence. However, this Court finds that there could be a common-law duty was owed to the plaintiff such that the claim against Defendant Westveld is not so clearly unenforceable as a matter of law that no factual development could justify recovery.

Defendant Westveld argues in the alternative that it is entitled to summary disposition under MCR 2.116(C)(10) because the trench was an open and obvious condition without special aspects that would preclude recovery. It argues that while it might be called something different, a claim based on the condition of a premises is a premises liability claim, *James v Alberts,* 464 Mich 12; 262 NW2d 158 (2001). In fact, the complaint indicates that Defendant Westveld breached his duty by creating a trench in front of the concrete slab, which constituted a tripping hazard.

When looking at this matter in relation to both the *James* case and *Fianazzo*, as relied on by Defendant Westveld, this Court finds Defendant Westveld is entitled to summary disposition under the open and obvious doctrine as this claim is based on the condition of the premises. Defendant Westveld, on behalf of Defendant Red Oak, created a condition on the land such that it would be subject to the same liability and enjoys the same freedom from liability, as though it were the possessor of the land.

As previously indicated, Plaintiff took notes on the existence of the trench and had even traversed to the trash dumpster daily. It was an open and obvious danger to her. All things considered, an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. An average user with ordinary intelligence would have also been able to discover the increased danger and risk presented by taking the trash out while it was dark outside, given her knowledge of the trench and its location.

Accordingly, after review of this matter, and the Court being fully advised;

IT IS ORDERED that Defendant Red Oak's motion for summary disposition is **GRANTED**

IT IS FURTHER ORDERED that Defendant Westveld's motion for summary disposition is **GRANTED.**

Date: May 10, 2023

Ronald J Schafer, Circuit Judge

STATE OF MICHIGAN

COURT OF APPEALS

JAN BOWERMAN,

Plaintiff-Appellant,

v

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

Defendants-Appellees,

and

BOB'S ASPHALT & PAVING, INC.,

Defendant.

UNPUBLISHED
September 12, 2024

No. 366338
Montcalm Circuit Court
LC No. 2022-028824-NO

Before: GADOLA, C.J., and K. F. KELLY and MARIANI, JJ.

PER CURIAM.

Plaintiff Jan Bowerman appeals by right the order of the Montcalm Circuit Court granting defendants Red Oak Management Co., Inc., (Red Oak) and Westveld Services, LLC, (Westveld) summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS

On the morning of October 30, 2021, about an hour before sunrise, plaintiff was taking out her trash at her apartment complex when she stepped into a hole, or a "trench" as the parties describe it, in the parking lot and fractured her ankle. The trench was created by defendant Westveld during the excavation of a recently poured concrete slab for the apartment's dumpster. Defendant Westveld was hired by defendant Red Oak to replace concrete in various areas around the apartment complex. Westveld poured the concrete for the dumpster platform on or around October 14, 2021. After Westveld was finished, the small trench was allegedly going to be filled by Bob's Asphalt & Paving. Westveld states in its brief that, "Normally, Bob's Asphalt would come within a day or two after Westveld completed its work to fill in the trenches. But on this

occasion, Bob's Asphalt did not do this until 10 days after Westveld was done with its work." To make sure tenants could access the dumpster, defendant Westveld moved it to a grassy area on the right side of the concrete slab. The narrow trench was ten feet long and four inches deep. The trench ran along the front of the concrete slab where the dumpster is typically located.

Plaintiff was 75 years old at the time of her fall and had lived at the Stanton Park Apartments, a residential building for seniors, for about eight years. Before she retired in 2018, plaintiff was actually a site manager for defendant Red Oak for 19 years, and was the site manager at the Stanton Park Apartments for about 10 of those years. Plaintiff kept detailed personal notes about the condition of the Stanton Park Apartments even after she retired. Plaintiff's note from October 14, 2021, states, "Dumpster was moved to grass area." Another note from October 14th goes on to say, "Sidewalks were being teared out [sic]. Started to rain. The company left cement and trash left laying on parking lot areas. No signs—caution tapes—no cones was put out [sic]. From the 14th of afternoon to 10-17-21 nothing was done on sidewalks." Plaintiff's note from October 18, 2021, states, "Sidewalk repairs started up again." Finally, her note labeled October 30, 2021, states, "I fell into trench took my trash out at 7:30 a.m. was dark. Called ambulance (my brother called)." Plaintiff testified as to how she fell as follows:

> I went out my apartment, turned to the left, went about 80 feet to that side door. And that side door, there's a handicapped sidewalk. I walked down to the end of the sidewalk. And then about – once you get past that sidewalk, it's about eight feet or ten feet, and I'm at the dumpster, and that's the route I always use to take out my trash.
>
> Well, that particular morning, I didn't wait [for daylight]. I looked out the side door, and I noticed that I could still 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 to the middle of the parking lot, it was all black. I couldn't see, so then I spotted the dumpster. They had moved it off the patio slab it was on. I – I seen that because it had like a reflector on it, and there was a little light coming from the trees from the streetlight. So I kept my eye on that dumpster, and I started walking toward it. And before – before I knew it, my foot went right to the edge. At that time, I didn't know what it was, but it went right to the edge of that trash, and I fell right down – right down in the hole."

Plaintiff further testified that she was aware of the trench's location and that she takes her trash out every day. Plaintiff explained that on the morning of the accident, she exited the side door of the apartment building and walked down the sidewalk to the parking lot. Once she was in the parking lot, she "went way out toward the middle of the parking lot" to "stay away from [the concrete slab]." So once plaintiff was in the middle of the parking lot, she "spotted the dumpster reflection light" and started walking towards it when she tripped and fell over the trench. Photos of the trench show that the sidewalk connects to the back-end of the concrete slab, providing tenants a pathway to the dumpster.

Plaintiff filed a complaint in the circuit court alleging violation of MCL 554.139 against Red Oak, negligence against Westveld, and negligence against Bob's Asphalt & Paving, Inc.

Bob's Asphalt & Paving, Inc. was dismissed as a defendant when the trial court granted its motion for summary disposition. The trial court's order does not explain its reasoning, but Bob's Asphalt argued in its motion that it did not create the trench and was unaware of its existence until it was asked to fill, and did fill the trench on November 10, 2021. Defendants Westveld and Red Oak each subsequently filed motions for summary disposition. The trial court found that Red Oak did not violate MCL 554.139 because the parking lot was fit for its intended use, and granted Red Oak summary disposition. The trial court also found that Westveld was entitled to summary disposition of plaintiff's negligence claim under MCR 2.116(C)(10) because the trench was an open and obvious condition without special aspects that would preclude recovery. Plaintiff now appeals.

II. DISCUSSION

Plaintiff argues the trial court erred in granting defendants summary disposition of plaintiff's claims. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Meemic Ins Co v Fortson*, 506 Mich 287, 296; 954 NW2d 115 (2020). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95, 109; 1 NW3d 44 (2023) (citation omitted). A (C)(10) motion "should be granted if the evidence submitted by the parties 'fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law.' " *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008) (citation omitted). A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id*. at 425, quoting *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Issues of statutory interpretation are also reviewed de novo. *Allison*, 481 Mich at 424. The goal of statutory interpretation is "to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Id*. at 427, quoting *G.C. Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). If the language in a statute is clear, "we presume that the Legislature intended the meaning expressed." *Id*.

B. MCL 554.139

While this appears to be a classic premises liability case, plaintiff has only asserted a statutory claim against defendant Red Oak, and plaintiff confirmed in the lower court proceedings that she is not making a claim of common law premises liability. Rather, plaintiff claims Red Oak violated its duty to her as a lessor of the property under MCL 554.139 when it failed to keep the parking lot fit for its intended use and violated local health and safety laws. MCL 554.139(1) provides:

> 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 [sic] wilful or irresponsible conduct or lack of conduct. [MCL 554.139].

This statute "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 (emphasis in original). Thus, if Red Oak had a duty under MCL 554.139(1)(a) or (b) to fill the trench, then plaintiff could proceed on her statutory claim even if a negligence claim would be barred by the "open and obvious danger doctrine." *Id*. However, "a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of the terms of the lease between the parties and any remedy under the statute would consist exclusively of a contract remedy." *Id*. at 425-426. Plaintiff's claim against Red Oak is therefore a contract claim under the law.

The first question is whether MCL 554.139(1) subsection (a), (b), or both, applies to the parking lot at issue here. The plain language of the statute dictates that the covenant of "fitness for the use intended by the parties" in (1)(a) applies to both "premises" and "common areas", while the covenant of "reasonable repair" in (1)(b) applies only to "premises." See *Allison*, 481 Mich at 431-432. Our Supreme Court has held that parking lots within a leased residential property that are shared by the tenants constitute "common areas" under MCL 554.139(1)(a), *id*. at 428, and thus the lessor's duty to repair under (1)(b) does not apply to parking lots, *id*. at 435.[1] Under (1)(a), a lessor has a contractual duty to keep the parking lot "fit for the intended use by the parties." *Id*. at 429. "[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*.

The next question is whether the covenant in (1)(a) encompasses the duty to keep the parking lot free from the defect at issue, i.e., the trench. Because only the covenant for fitness for intended use applies to common areas, "we can reasonably infer that the Legislature intended to place a less onerous burden on the lessor with regard to common areas. Keeping common areas fit for their intended use may well require a lessor to perform maintenance and repairs to those areas, but may conceivably require repairs less extensive than those required by the second covenant[,]" in subsection (1)(b). *Allison*, 481 Mich at 433. The intended use of a parking lot includes parking vehicles and walking on the lot. See *id*. at 429. "A parking lot is generally

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[11] Plaintiff's brief dedicates much space to analyzing MCL 554.139(1)(b) and alleging that the lighting in the parking lot violated applicable local health and safety laws. The trial court addressed (1)(b) in its order, but conditioned its analysis with, "To the extent that the parking lot was considered part of the premises and subject to the higher duty under [MCL 554.139]…," and then concluded that Red Oak had not violated any applicable health and safety law. However, we need not address subsection (1)(b) of the statute because Michigan law is clear that parking lots constitute "common areas" of an apartment complex, and are not part of the "premises" described in (1)(b).

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*. This obligation "would commonly be to ensure that the entrance to and exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles." *Id*. Here, the tenants also were likely to traverse the parking lot in order to take out their trash because the dumpster was located adjacent to the parking lot, and there is no evidence there was another dumpster available to tenants. Therefore, Red Oak had a duty to ensure the parking lot was fit for reasonable access to the dumpster as well. See *id*.

The testimony of plaintiff, and the photo exhibit showing the trench in the darkness, indicate plaintiff attempted to walk north of the trench to access the dumpster, but tripped over the corner of the trench. As the trial court noted, plaintiff 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. Plaintiff was not forced to encounter the trench to access the dumpster. 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).

C. NEGLIGENCE

Plaintiff argues the trial court erred in finding the trench was open and obvious, and that Westveld was entitled to summary disposition on that basis. Plaintiff contends that the trench was not open and obvious, Westveld was merely a contractor and could not avail itself of the open and obvious defense, and most importantly, the trial court analyzed plaintiff's claim under the duty element of negligence rather than the breach element, which is contrary to the Supreme Court's recent decision in *Kandil-Elsayed*.

In *Kandil-Elsayed*, the Supreme Court explicitly overruled *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), the case that established the open and obvious defense as an element of duty in premises liability cases. *Kandil-Elsayed*, 512 Mich at 153. Now, courts are to analyze the open and obvious nature of a defect under the breach of duty and comparative fault element of negligence. *Id*. In premises liability actions and common law negligence actions, the plaintiff must "prove four essential elements: duty, breach, causation, and harm." *Id*. at 110. In Michigan, it is well settled that "the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides." *Id*. at 112 (citation omitted). And in contrast, the question of breach is usually a jury question. *Id*. However, when the evidence of breach presents no genuine issue of material fact, breach can be decided by the court as a matter of law. *Id*. at 112 n 2. There can be no tort liability unless a defendant owed a duty to the plaintiff. *Hill v Sears, Roebuck and Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). And there can be no duty imposed if there is no relationship between the parties because the harm is not foreseeable. *Id*. at 661.

In *Lugo*, our Supreme Court held that a plaintiff who stepped in a pothole and fell while walking across defendant's parking lot could not recover in negligence because the pothole was open and obvious, and thus defendant had no duty to protect the plaintiff. *Lugo*, 464 Mich at 523. Plaintiffs could only recover for an open and obvious danger if there were special aspects of the condition that would make an open and obvious risk unreasonably dangerous. *Id*. at 517. As stated, in *Kandil-Elsayed*, the Supreme Court overruled *Lugo* and held that the open and obvious danger doctrine is now to be analyzed when asking whether a defendant breached its duty to the plaintiff. 512 Mich at 153. The test for whether a danger is open and obvious remains "whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 134 (citation omitted). "This is an objective standard, calling for an examination of 'the objective nature of the condition of the premises at issue.'" *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012), quoting *Lugo*, 464 Mich at 523-524.

Plaintiff asserts only a claim of negligence against defendant Westveld, and not a claim of premises liability. However, plaintiff's claim is based on an injury arising from a condition of the land, i.e., the trench in the parking lot. "A claim based on the condition of the premises is a premises liability claim." *Finazzo v Fire Equipment Co*, 323 Mich App 620, 627; 918 NW2d 200 (2018) (citation omitted). The trial court used this reasoning to conclude that plaintiff's claim was based in premises liability, and thus the open and obvious nature of the trench precluded liability. Therefore, we will analyze plaintiff's arguments in the context of both premises liability and general negligence.

1. PREMISES LIABILITY

It is well established that "premises liability is conditioned upon the presence of both possession and control over the land." *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). "This rule is based on the principle that a party "in possession is in a position of control, and normally best able to prevent any harm to others." *Finazzo*, 323 Mich App at 627. "Liability for negligence does not depend upon title; a person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control or possession, even though he is not the owner thereof." *Id*. (citation and emphasis omitted).

In this case, defendant Westveld was not in possession or control of the land at the time of plaintiff's fall. Defendant Red Oak possessed the apartment complex and contracted with Westveld to perform concrete work around the common areas. Westveld's owner testified that he started the job on or about October 14, 2021 and finished on or about October 21, 2021. This is consistent with plaintiff's notes that indicate the sidewalks were being torn out on October 14, 2021, and that they were being repaired on October 18, 2021. Plaintiff's fall occurred on October 30, 2021, nine days after defendant Westveld had vacated the premises. It is clear that Westveld had neither possession or control of the premises at the time of plaintiff's fall. The trial court erred in concluding Westveld created the condition on the land "such that it would be subject to the same liability" as though it were the possessor of land. However, this Court can affirm a decision on a motion for summary disposition for different reasons than those identified by the trial court. *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 449; 886 NW2d 445 (2015).

2. ORDINARY NEGLIGENCE

Plaintiff asserts a claim in ordinary negligence against defendant Westveld. "Contractors 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*, 323 Mich App at 634 (citation omitted). Generally, whether a particular defendant's conduct created an unreasonable risk of harm is a question of fact for the jury to decide. *Id*. But if the court finds that no reasonable person could conclude that the defendant created an unreasonable risk of harm, then the court can decide the question of duty as a matter of law. *Id*.

In *Finazzo*, plaintiff was working as a security guard at a company called ITC. 323 Mich App at 623. ITC contracted with Fire Equipment Company (FEC) to install a fire alarm system. *Id*. While FEC was installing the system, plaintiff tripped over a cable and injured himself. *Id*. Plaintiff then sued FEC for negligence. *Id*. The court concluded that because plaintiff was aware of the presence of the cables, and had safely stepped over them numerous times before falling, plaintiff could not establish a breach. *Id*. at 637. The court found that defendant contractor did not breach its general duty to perform its work so as to not unreasonably endanger the well-being of anyone lawfully on the worksite. *Id*.

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.

The trial court did not err in finding that the trench was avoidable and did not unreasonably endanger plaintiff. Plaintiff, despite her awareness of the trench, chose a path that led her into it on the morning of her accident, even though she had managed to avoid it on multiple previous occasions. Therefore, Westveld did not breach its general duty to perform its work so as to not *unreasonably* endanger the well-being of anyone on the premises. See *Finazzo*, 323 Mich App at 637. Because the evidence concerning Westveld's alleged breach presents no question of fact, the trial court did not err in granting Westveld's motion for summary disposition pursuant to MCR 2.116(C)(10). And because there is no genuine issue of material fact that Westveld breached a duty owed to plaintiff, her claim against Westveld fails whether examined as either a premises liability case or a negligence case.

Affirmed.

/s/ Michael F. Gadola
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

JAN BOWERMAN,

Plaintiff-Appellant,

v

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

Defendants-Appellees,

and

BOB'S ASPHALT & PAVING, INC.,

Defendant.

UNPUBLISHED
September 12, 2024

No. 366338
Montcalm Circuit Court
LC No. 2022-028824-NO

Before: GADOLA, P.J., and K. F. KELLY and MARIANI, JJ.

MARIANI, J. (*dissenting*).

I respectfully dissent, as I disagree that either defendant in this case has shown entitlement to summary disposition on plaintiff's respective claims against them. In my view, genuine issues of material fact exist as to whether Red Oak violated MCL 554.139(1)(a) and whether Westveld breached its duty to act with ordinary care so as not to create an unreasonable risk of harm. These claims thus belong with a jury to resolve, and I would reverse and remand so that they can proceed accordingly.

As our Supreme Court recently confirmed, "[a] court's role at the summary disposition stage is narrow." *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95, 109; 1 NW3d 44 (2023). It must be sure not to act as a factfinder, and must instead simply review the proffered evidence for genuine issues of material fact, which exist " 'when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.' " *Id*. at 109-110, quoting *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). This narrow role for the court is well settled, and I do not believe either defendant's bid for summary disposition can survive its proper application in this case.

Starting with defendant Red Oak, I see genuine issues of material fact as to whether it violated its obligation to plaintiff under MCL 554.139(1)(a). That subsection provides that, in every lease of a residential premises, the lessor covenants that "the premises and all common areas are fit for the use intended by the parties." MCL 554.139(1)(a). " 'Fit' is defined as 'adapted or suited; appropriate[.]' " *Allison*, 481 Mich at 429, quoting *Random House Webster's College Dictionary* (1997). "The statute does not require the lessor to maintain [a common area] in an ideal condition or in the most accessible condition possible . . . ." *Id*. at 430. The statute does, however, expressly require that its "provisions . . . shall be liberally construed." MCL 554.139(3).

The common area at issue in this case is the trash disposal area of Red Oak's apartment complex, which abuts the parking lot. Generally, in an apartment complex, trash disposal areas are used to provide tenants access to a place where they can dispose of their trash—in this case, a dumpster. Thus, as the majority concludes, Red Oak had a duty to ensure the common area at issue in this case was fit to provide the tenants of its apartment complex reasonable access to the dumpster. Furthermore, there is no dispute that the apartment complex in this case is specifically for senior citizens and those with disabilities. Given the apartment complex's limited class of tenants, the "use" of this trash disposal area that was "intended by the parties" to the leases for the complex—and the use for which that area needed to be "fit"—was necessarily use by elderly and/or disabled tenants, specifically. MCL 554.139(1)(a). Viewing the record in the light most favorable to plaintiff, I believe that reasonable minds could conclude that, at the time of plaintiff's injury, the trash disposal area was not fit for the use intended by these parties. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Photographs in the record document the layout and condition of the trash disposal area. There is a concrete slab on which the dumpster typically sits, and a sidewalk that runs from the apartment complex to one side of the slab. In this case, to accommodate the replacement of the concrete slab, the dumpster had been moved off to the side of the slab and onto a neighboring grassy area. The dumpster was placed on the side of the slab opposite from the one to which the sidewalk connected. The trench at issue in this case was ten feet long and approximately four to five inches deep, running the length of the front side of the concrete slab where the slab met the asphalt of the parking lot. The photographs show that, in order to access the dumpster from the building, tenants could follow the sidewalk to the concrete slab, and then reach the dumpster in one of two ways: either by walking across the slab and then onto and across the grassy area, or by walking into the parking lot and around the slab.

Accordingly, to reach the dumpster while avoiding the worksite and its recently poured concrete slab, tenants like plaintiff had to take a parabolic course around the concrete slab and the 10-foot trench that ran along its front side. It is undisputed that there were no visual aids installed to warn tenants of the trench's location, such as cones or caution tape. And the photographs also show that, in the dark—the time when plaintiff fell—the concrete slab was visible, but the trench itself was dark like the asphalt and difficult to see. This was further supported by the findings of plaintiff's expert, who opined that parking lots should have 0.5 foot candles of lighting in order to be considered safe for walking for tenants such as plaintiff and whose site investigation, which occurred in conditions similar to when plaintiff fell, yielded a reading of 0.0 foot candles at the location of her fall.

Evidence of record thus shows that tenants of Red Oak's apartment complex like plaintiff—who were necessarily senior citizens and/or individuals with disabilities—had to navigate around the trench in order to access the dumpster without crossing the worksite. And the evidence further shows that the visibility in that area after dark was low, and that there were no visual aids to demarcate the trench from the asphalt. Given these circumstances, I believe that, at minimum, reasonable minds could differ as to whether Red Oak discharged its obligation to ensure that the trash disposal area was fit for the use intended by the parties. *West*, 469 Mich at 183.

The majority posits that summary disposition was warranted because the trench was a "mere inconvenience," pointing to our Supreme Court's use of that phrase in *Allison* and to plaintiff's own knowledge of the trench and prior success in avoiding it. I struggle with this conclusion for a few reasons. To start, while the concept of "mere inconvenience" has cropped up in our caselaw regarding MCL 554.139(1)(a), its analytical role and value strike me as limited; that phrase is wholly absent from the statute and it does not (nor could it) supplant the words chosen by the legislature to define the scope of Red Oak's obligation thereunder. That obligation, the legislature made clear, is to ensure the area at issue is "fit for the use intended by the parties," and the scope of that obligation must be "liberally construed." MCL 554.139(1)(a), (3). If an area meets these 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. See *Allison*, 481 Mich at 430 (explaining that "[m]ere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a [parking] lot as being fit for its intended purposes"). But by the same token, if an area does not meet MCL 554.139's stated criteria, a defendant cannot escape liability and the statute's plain terms simply by characterizing the hazard as a mere inconvenience that the plaintiff could have conceivably avoided. See, e.g., *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 292; 933 NW2d 732 (2019) (finding that the fact that others were able to successfully walk on the icy sidewalk where the plaintiff fell did not overcome other evidence which indicated that the sidewalk was not fit for the use intended by the parties).

That a tenant may be able to a find a way to still use an area for a given purpose despite its hazards does not, in my view, mean that the lessor has discharged its duty to keep the area "fit"—that is, adapted or appropriate—for that use, particularly when fitness receives the liberal construction it must. See *Allison*, 481 Mich at 429; MCL 554.139(3). And while (for reasons discussed *infra*) a tenant's own fault for not better avoiding a hazard may bear on the ultimate extent of a lessor's liability, the lessor still owes to the tenant, and must meet, its statutory obligation as to that hazard; nothing in MCL 554.139 suggests otherwise. A contrary conclusion, I believe, would be to stray too far from MCL 554.139's plain terms, and into notions of the former open-and-obvious-danger doctrine that have long had no place in the statutory analysis. See, e.g., *Benton v Dart Properties, Inc*, 270 Mich App 437, 440-441; 715 NW2d 335 (2006).

Furthermore, I do not view the trench at issue in this case as a "mere inconvenience," let alone one as a matter of law. Nothing suggested that this 10-foot-long, four-to-five-inch-deep trench would be reasonably safe to just leave in place; it was an unfinished portion of a construction project that was in a location that (elderly and disabled) tenants would regularly need to access, and that representatives of both Red Oak and Westveld admitted was a potential trip hazard. While plaintiff may have successfully avoided the trench during prior trips to the dumpster, plaintiff testified that none of those previous instances occurred at night. And more fundamentally, as

discussed, the fact that the common area had been successfully traversed in the past is not itself dispositive of whether the area was fit for the use intended by the parties. See *Estate of Trueblood*, 327 Mich App at 292. At minimum, I believe the record presents genuine issues of material fact in this regard that are for a jury, and not the trial court or this Court, to resolve.

I would thus conclude that, viewing the record in the light most favorable to plaintiff, reasonable minds could differ as to whether the trash disposal area was fit for the use intended by the parties and, correspondingly, that Red Oak was not entitled to summary disposition on plaintiff's claim under MCL 554.139(1)(a).[1]

Turning to plaintiff's claim against Westveld, I agree with the majority that there is no genuine issue of material fact that Westveld was not in possession and control of the trash disposal area at the time of plaintiff's injury; accordingly, Westveld did not owe a duty to plaintiff under a theory of premises liability. Westveld did, however, owe a duty to plaintiff under a theory of ordinary negligence, as plaintiff alleged in her complaint. And I disagree that Westveld is entitled to summary disposition on that claim.

An ordinary negligence claim is made up of four elements: duty, breach, causation, and harm. *Kandil-Elsayed*, 512 Mich at 110. As the majority acknowledges, Westveld had a duty to perform its work with ordinary care so as not to create an unreasonable risk of harm. The majority also acknowledges that, "[g]enerally, unless the court can conclude that all reasonable persons would agree the defendant did not create an unreasonable risk of harm, whether a defendant's conduct in the particular case breached this general standard of care is a question of fact for the jury to decide." *Finazzo v Fire Equipment Co*, 323 Mich App 620, 634; 918 NW2d 200 (2018). As Westveld concedes, it did not seek summary disposition below on the basis that it did not breach this duty to plaintiff. And rightly so, in my view, as the record betrays genuine issues of material fact on that point.

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[1] Plaintiff also claimed that, because the lighting in the parking lot violated local health and safety laws, Red Oak violated its obligation under MCL 554.139(1)(b) "to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located." The majority concludes that it need not address this claim because the area of the apartment complex at issue is a "common area" and not part of the "premises," which renders subsection (1)(b) wholly inapplicable to this case. I disagree with this proposition. As this Court has explained, subsection (1)(b) comprises two distinct covenants: "a landlord's covenant to comply with local health and safety laws is distinct from its covenant to make reasonable repairs." *Estate of Trueblood*, 327 Mich App at 295. And while the covenant to make reasonable repairs is limited only to the "premises" and not the "common areas," the covenant to comply with health and safety laws applies to both. *Id*. at 293-295. Nonetheless, I do not see error in the trial court's award of summary disposition to Red Oak as to this portion of plaintiff's claim, as plaintiff has failed as a matter of law to show noncompliance with any applicable health or safety laws. That said, as discussed *supra*, plaintiff put forth evidence regarding the inadequacy of the lighting in the parking lot that is relevant to her claim under MCL 554.139(1)(a), regardless of the success of her claim under MCL 554.139(1)(b).

Westveld was responsible for creating the trench at issue and for placing the dumpster on the grassy area neighboring the concrete slab. Testimony from Westveld's owner and operator established that the company ordinarily puts out caution tape and cones to warn of conditions like the trench but failed to do so for this trench. He also testified that the company filled in other trenches around the parking lot with sand or asphalt milling but failed to do so for this trench. And he admitted that this trench was a potential trip hazard. Viewing the record in the light most favorable to plaintiff, I believe that, at minimum, reasonable minds could differ about whether Westveld created an unreasonable risk of harm under these circumstances. *West*, 469 Mich at 183.

As with Red Oak, the majority concludes Westveld was entitled to summary disposition based on plaintiff's own actions and awareness of the trench, explaining that, for many of the same reasons that the trial court found the trench to be open and obvious, Westveld did not breach its general duty of ordinary care. Plaintiff's actions may speak to her degree of comparative fault, but I fail to see how they show Westveld did not, as a matter of law, breach its duty of care. Under Michigan's comparative-fault framework, "when a plaintiff is at fault, it does *not* bar recovery, but rather reduces the amount of damages they can recover by their percentage of fault." *Kandil-Elsayed*, 512 Mich at 133 (emphasis in original). And the extent of plaintiff's own liability for her injuries are to be allocated by the trier of fact. *Id*. at 136; see also *Gabrielson v Woods Condo Ass'n Inc*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket Nos. 364809 and 36481); slip op at 13 (explaining that, after *Kandil-Elsayed*, the "plaintiff's knowledge of the hazardous condition is now only relevant to [the] plaintiff's comparative fault" and "is not dispositive on the question whether the defendant breached the duty owed to the plaintiff").

Relying on *Finazzo*, 323 Mich App 620, the majority reasons that plaintiff's actions demonstrate that Westveld did not create an unreasonable risk of harm. I find *Finazzo* distinguishable. There, the plaintiff tripped over a visible cable while the defendant was installing a fire alarm system. *Id*. at 623. Unlike this case, it was undisputed that the defendant warned the plaintiff about the cable and that the room where the plaintiff tripped was fully illuminated. *Id*. at 636-637. The 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. Record evidence indicates that, despite the admittedly hazardous nature of the trench, Westveld failed to follow its ordinary protocol of putting up cones and caution tape and failed to fill in the trench as it did for other trenches in the parking lot. Viewing Westveld's conduct in the light most favorable to plaintiff, reasonable minds could conclude that it created an unreasonable risk of harm. Reasonable minds might also conclude that plaintiff bears comparative fault for her injuries and her recovery should be reduced accordingly. But given the record at hand, the questions of Westveld's breach and plaintiff's comparative fault belong with the jury, as factfinder, to resolve, and not with the trial court or this Court to decide as a matter of law.

Accordingly, I would reverse the trial court's award of summary disposition as to both Red Oak and Westveld and remand for further proceedings.

/s/ Philip P. Mariani

Order

Michigan Supreme Court
Lansing, Michigan

June 6, 2025

167718

JAN BOWERMAN,
Plaintiff-Appellant,

v

SC: 167718
COA: 366338
Montcalm CC: 2022-028824-NO

RED OAK MANAGEMENT CO., INC., and
WESTVELD SERVICES, LLC,
Defendants-Appellees,

and

BOB'S ASPHALT & PAVING, INC.,
Defendant.

_____/

On order of the Court, the application for leave to appeal the September 12, 2024 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(I)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), 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). The total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellant, and 20 minutes for the appellees, to be divided at their discretion. MCR 7.314(B)(2).

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case who are not exempt from the motion requirement under MCR 7.312(H) may move the Court for permission to file briefs amicus curiae.

HOOD, J., did not participate.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 6, 2025

Clerk

a0603

STATE OF MICHIGAN

COURT OF APPEALS

SHARON DEBANO,

Plaintiff-Appellant,

v

MCCARTHY & SMITH, INC.,

Defendant,

and

FLOORING EDGE and LANSING CARPENTER,

Defendants-Appellees.

UNPUBLISHED
June 22, 2023

No. 362766
St. Clair Circuit Court
LC No. 20-000694-NO

Before: SWARTZLE, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

Flooring Edge and Lansing Carpenter were contracted to do some construction work on the hallway floors of Keewahdin Elementary School. Plaintiff was a teacher at Keewahdin, and she slipped and fell on glue that had been spread on the hallway floor to repair it. The trial court granted Flooring Edge and Lansing Carpenter summary disposition. We affirm.

Plaintiff was walking in the hallway when her foot abruptly became stuck on wet glue that was placed on the hallway floor by Flooring Edge and Lansing Carpenter. As a result, plaintiff fell and severely injured her right arm and wrist. Plaintiff alleged that Flooring Edge and Lansing Carpenter were liable for her injuries because of their ordinary negligence.

During her deposition, plaintiff testified that she received an email from Keewahdin that informed her that construction was going to be occurring on the hallway floors. Plaintiff stated that she did not see the glue on the floor, and the hallway was not sectioned off with any warning. In contrast, Shayne Carpenter, an employee who was working on the flooring, testified during his deposition that the glue was a dark grey when it was wet and applied to the floor, and it was easy to see in contrast to the floor. Further, Shayne removed the caution tape around the glue because

the Fire Marshal needed to come through the hallway, but he stated that the caution tape was still on the wall leading into the hallway.

Lansing Carpenter moved for summary disposition under MCR 2.116(C)(10), concurred with by Flooring Edge, and argued that plaintiff's claim sounded in premises liability, not ordinary negligence, because plaintiff alleged that the hazardous conditions of the hallway caused her fall. Accordingly, Lansing Carpenter argued that he did not have possession and control of the premises to be liable, and that in the alternative the hazard was open and obvious. In conjunction with the motion, Lansing Carpenter attached a photo of the hallway that demonstrated that there were signs of construction work in the vicinity of the glue, including warning tape and stacks of tiles, and that the glue was a noticeably darker color than the floor.

The trial court agreed that plaintiff's claim sounded in premises liability because it occurred as a condition of the land, and plaintiff had admitted that neither Lansing Carpenter nor Flooring Edge had possession of the premises. The trial court then granted Lansing Carpenter and Flooring Edge summary disposition.

Plaintiff now appeals.

"We review de novo a trial court's decision to grant or deny a motion for summary disposition." *Sherman v City of St Joseph*, 332 Mich App 626, 632; 957 NW2d 838 (2020) (cleaned up). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Sherman*, 332 Mich App at 632.

Plaintiff's claim is based on an injury she received from a condition of the property—namely the wet glue that was on the floor. "A claim based on the condition of the premises is a premises liability claim." *Finazzo v Fire Equip Co*, 323 Mich App 620, 626; 918 NW2d 200 (2018) (citation omitted). "Because plaintiff's injury arose from an allegedly dangerous condition on the land, [her] action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*. (cleaned up). For a party to be subject to premises liability, that party must possess and control the property at issue but not necessarily be its owner. *Id*. at 627.

This Court explained in *Finazzo* that "contractors performing changes to the property by methods that were under defendants' control, were also best able to prevent any harm to others." *Id*. at 629-630 (cleaned up). "So, it is appropriate to impose premises liability on defendants with respect to the work they controlled relating to changing the premises." *Id*. at 630 (cleaned up).

Plaintiff repeatedly concedes, however, that neither Flooring Edge nor Lansing Carpenter were premises possessors in this case. Instead, even on appeal, plaintiff argues that Port Huron Public Schools owned the property where plaintiff fell, and it was the premises possessor instead. By conceding that neither Flooring Edge nor Lansing Carpenter were a possessor of the premises, plaintiff has failed to create a genuine issue of material fact that would subject Flooring Edge or Lansing Carpenter to premises liability.

Nevertheless, the hazard in this case was also open and obvious. The open and obvious doctrine generally shields premises possessors from liability where the harm is caused by a condition on the land that was open and obvious. *Id*. at 626. "A condition of the land is open and obvious when it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. (cleaned up). In this case, the glue was open and obvious because it was a different color, when wet, than the surrounding floor. There were also signs of construction work in the vicinity of the glue, including warning tape and stacks of tiles. Additionally, plaintiff testified that she knew that construction work was going on. Thus, even if Flooring Edge and Lansing Carpenter are considered premises possessors for the purposes of being subject to premises liability, the hazard was open and obvious such that it shields them from that premises liability in this case.

Assuming for argument's sake that plaintiff's claim sounded in ordinary negligence, plaintiff still did not establish a prima facie case for Flooring Edge or Lansing Carpenter's liability. "Contractors 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." *Id*. at 634. "To establish a prima facie case of negligence, plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Id*. at 635 (citation omitted).

As this Court explained, the "general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors of inspectors, or anyone else lawfully on the site of the project, is well settled." *Id*. (cleaned up). In this case, plaintiff was warned of a known and observable hazard that would be temporarily on the floor. Thus, for many of the same reasons that the glue on the floor was an open and obvious hazard, neither Flooring Edge nor Lansing Carpenter breached a general duty to perform work "so as not to *unreasonably endanger* the well-being of…anyone else lawfully on the site of the project." *Id*. at 637 (cleaned up).

Therefore, the trial court did not err when it granted Flooring Edge and Lansing Carpenter summary disposition under MCR 2.116(C)(10).

Affirmed. Flooring Edge and Lansing Carpenter, as the prevailing parties, may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Anica Letica

STATE OF MICHIGAN

COURT OF APPEALS

DEBRA ANN FOWLKES,

Plaintiff-Appellant,

v

THE ABBEYS OF WESTLAND CONDOMINIUM ASSOCIATION and SHAKESPEARE SERVICES, INC., doing business as SHAKESPEARE'S LAWN & SNOW,

Defendants-Appellees.

UNPUBLISHED
May 13, 2025
9:54 AM

No. 366609
Wayne Circuit Court
LC No. 22-003681-NO

Before: M. J. KELLY, P.J., and SWARTZLE and ACKERMAN, JJ.

PER CURIAM.

Plaintiff appeals the trial court's orders granting summary disposition to defendant Shakespeare Services, Inc., doing business as Shakespeare's Lawn & Snow, and to defendant The Abbeys of Westland Condominium Association, dismissing her claims of breach of contract, negligence, and premises liability. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS

This case arises from plaintiff's slip and fall on a mound of snow and ice in the common area of a condominium complex operated by the Association.

Plaintiff owned a condominium in a complex operated by the Association. While walking her dog, she encountered a mound of snow and ice on the sidewalk. As she attempted to avoid the hazard, she slipped and fell, sustaining injuries to her right leg that required surgery and caused permanent damage. The Association had contracted with Shakespeare for snow removal services, and it was Shakespeare that plowed the mound of snow and ice onto the sidewalk.

Plaintiff filed suit against the Association and Shakespeare, alleging claims of breach of contract, negligent performance of a contract, and premises liability. The trial court dismissed plaintiff's claims against the Association, holding that, as a co-owner of the condominium

development, plaintiff could not assert a premises liability claim because the Association owed her no duty. The court also found that the Association fulfilled its obligations under the master deed by hiring Shakespeare for snow removal, and that any alleged negligent performance was attributable to Shakespeare, not the Association.

Regarding Shakespeare, the trial court dismissed plaintiff's negligent performance of a contract claim, finding that Shakespeare owed no duty separate and distinct from its contract with the Association. To the extent plaintiff's complaint could be construed as asserting a premises liability claim against Shakespeare, the court held that Shakespeare lacked possession and control over the property and therefore owed no duty as a land possessor.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision to grant summary disposition. *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015). Summary disposition under MCR 2.116(C)(10) is appropriate where, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

Interpretation of condominium bylaws and master deeds is governed by principles of contract interpretation. *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015). We review the interpretation of contracts de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). In interpreting a contract, this Court gives the words their plain and ordinary meaning. *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005). The contract must be read and construed as a whole, harmonizing and giving effect to all its parts whenever possible. *Smith v Smith*, 292 Mich App 699, 702; 823 NW2d 114 (2011).

Whether a legal duty exists is a question of law, reviewed de novo. *Finazzo v Fire Equip Co*, 323 Mich App 620, 625; 918 NW2d 200 (2018).

III. CLAIMS AGAINST THE ASSOCIATION

Plaintiff's appellate brief presents 11 separate questions, many of which overlap with each other or are otherwise redundant. Moreover, some counts in plaintiff's complaint were untitled, causing confusion in the trial court regarding the legal theories being pursued. We construe plaintiff's Count I as a premises liability claim. We conclude that the trial court erred in dismissing plaintiff's premises liability and breach of contract claims but properly dismissed her negligent performance of a contract claim.

A. PREMISES LIABILITY

We begin with plaintiff's premises liability claim against the Association. The key question is whether the Association owed plaintiff a duty of care given that plaintiff was a co-owner of the premises using the condominium's common areas at the time of her injury. We conclude that it did, and that genuine issues of material fact preclude summary disposition.

"All negligence actions, including those based on premises liability, require a plaintiff to prove four essential elements: duty, breach, causation, and harm." *Kandil-Elsayed v F & E Oil,*

Inc, 512 Mich 95, 110; 1 NW3d 44 (2023). As to Count I, plaintiff's central argument on appeal is that the trial court erred by relying on *Francescutti v Fox Chase Condo Ass'n*, 312 Mich App 640, 641; 886 NW2d 891 (2015), which has since been overruled by *Janini v London Townhouses Condo Ass'n*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket No. 164158).

In *Francescutti*, the plaintiff, a co-owner of a condominium unit in the defendant's development, alleged a negligence claim after he fell on an icy, snow-covered sidewalk and injured his hand and wrist. *Id*. at 641. The trial court treated the claim as one of premises liability and dismissed it because the danger was open and obvious.[1] *Id*. at 642. On appeal, this Court affirmed. *Id*. at 641. However, our decision was based on a different premise: we held that the defendant owed no duty to the plaintiff under a premises liability theory because plaintiff was neither a licensee nor an invitee. *Id*. at 643. We focused on the definitions of those terms: "A licensee is a person who is privileged to enter the *land of another* by virtue of the possessor's consent, while an invitee is a person who enters upon *the land of another* upon an invitation." *Id*. at 643 (cleaned up). Because the plaintiff was a co-owner of the common areas, he had not entered "the land of another," and therefore was neither a licensee nor an invitee. *Id*. Accordingly, the defendant owed no duty under a premises liability theory. *Id*.

In *Janini*, the Michigan Supreme Court overturned *Francescutti*. The Court explained that we erred by focusing on the phrase "land of another" when defining licensee and invitee.

> The proper inquiry when considering the duty owed in a premises-liability action is who has possession and control over the land where a person was injured, not merely who owns the land. We hold that, when the master deed and bylaws governing a condominium complex provide that the condominium association is responsible for maintaining the common areas and the condominium's co-owners lack possession and control over those common areas, a condominium co-owner using the condominium complex's common areas and elements is an invitee. In such circumstances, a condominium association owes a condominium co-owner a common-law duty to exercise reasonable care to protect them from dangerous conditions in the common area. [*Janini*, ___ Mich at ___; slip op at 2.]

The master deed here meets the conditions established in *Janini*. Article III of the master deed defines the "Association" as "the non-profit corporation organized under Michigan law of which all Co-owners shall be members, which corporation shall administer, operate, manage and maintain the Condominium." The common elements include open spaces, roads, and sidewalks. Article IV, Section 3 provides for the "maintenance, decoration, repair and replacement of the common elements," including the sidewalks:

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[1] At the time, our common law provided that "[i]n general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land," but "this duty does not generally encompass removal of open and obvious dangers." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001), overruled by *Kandil-Elsayed*, 512 Mich at 143.

> **Sidewalks**. The Association shall be responsible for the maintenance, repair, replacement and snow removal with respect to all sidewalks; provided, however, that the costs of maintenance, repair, replacement and snow removal with respect to sidewalks that differ in their specifications from Developer's standard specifications for sidewalks shall be borne by the Co-owner of the Unit to which it is respectively appurtenant.

According to the master deed, the Association assumed responsibility for maintaining the common elements, including the sidewalks. Plaintiff's acceptance of the master deed surrendered her control of the common areas to the Association. *Id*. at ___; slip op at 13. Thus, plaintiff was an invitee able to pursue a premises liability claim against the Association. *Id*. at ___; slip op at 13.

As an invitee, the Association owed plaintiff "a duty to exercise reasonable care to protect [her] from an unreasonable risk of harm caused by a dangerous condition on the land." *Kandil-Elsayed*, 512 Mich at 149 (cleaned up; alteration in original). With respect to a condition caused by ice and snow, a premises possessor's duty "will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of the injury to the invitee." *Id*. at 150 (cleaned up). While the hazard here was arguably open and obvious, the obviousness of a condition is not a per se bar to recovery by eliminating the possessor's duty of reasonable care, *id*. at 104, but instead "is relevant to the defendant's breach and the plaintiff's comparative fault." *Id*. at 144. When determining whether a condition is open and obvious, the trial court should consider "whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 144 (citation omitted). The trial court must also recognize that a land possessor must anticipate harm that could arise from an open and obvious condition. *Id*. at 104.

Plaintiff alleged that the Association not only failed to take reasonable measures to address the hazard of an accumulation of snow and ice, but also affirmatively created a hazard by piling snow and ice on the sidewalk. Plaintiff and another resident of the development who lived near the hazard testified that the Association's snow removal contractor created a mound of snow and ice when plowing the street. While plaintiff was walking her dog, she encountered the mound blocking the sidewalk and fell while attempting to walk around it. The Association argues, and the trial court found, that plaintiff's claims should be dismissed because she fell on the grass, and the Association owed no duty to remove snow from the grass. The Association is correct that the master deed did not impose a duty to remove snow from grassy areas. In addition, plaintiff was aware of the mound. However, plaintiff testified that she attempted to avoid the mound blocking the sidewalk when she fell. There are genuine issues of material fact regarding where plaintiff fell and whether the fall was caused by the mound of snow. Plaintiff testified that she fell on her very first step to avoid the mound, though she was unsure whether she stepped on the sidewalk or grass; she testified that she stepped on snow-covered ice.

Viewing the evidence in a light most favorable to plaintiff, there are genuine issues of material fact as to whether the Association's handling of the snow was reasonable, whether the Association should have anticipated harm from the condition, and whether plaintiff was comparatively at fault in attempting to walk around the mound rather than choosing another path.

Accordingly, the trial court erred by granting summary disposition as to plaintiff's premises liability claim against the Association.[2]

B. BREACH OF CONTRACT

Plaintiff next challenges the dismissal of her breach of contract claim against the Association. At issue is whether the Association satisfied its contractual obligation to remove snow from the sidewalks under the master deed by contracting with Shakespeare. We conclude that it did not, and that summary disposition was improper.

Plaintiff alleged that the Association breached its contractual duty to remove snow from the sidewalks pursuant to Article IV, Section 3 of the master deed, which provides that the Association "shall be responsible for the maintenance, repair, replacement, and snow removal with respect to all sidewalks." Plaintiff further alleged that, as a direct and proximate result of this breach, she sustained injuries to her right leg, some of which were permanent. The trial court dismissed plaintiff's breach of contract claim, reasoning that the Association fulfilled its duty by contracting with Shakespeare to perform snow removal services. Because the Association delegated its responsibility to Shakespeare, the trial court concluded that the Association could not be liable for plaintiff's injuries.

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Construction, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2015). Condominium ownership in Michigan is governed by the Condominium Act, MCL 559.101 *et seq*. A condominium co-owner is "a person . . . who owns a condominium unit within [a] condominium project." MCL 559.106(1). "The administration of a condominium project shall be governed by bylaws recorded as part of the master deed, or as provided in the master deed." MCL 559.153.

As noted earlier, Article IV, Section 3 of the master deed expressly assigned to the Association responsibility for the "maintenance, repair, replacement and snow removal with respect to all sidewalks." As a party to an agreement, the Association had an enforceable contractual duty to perform as agreed. *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 212-213; 737 NW2d 670 (2007). Furthermore, "[t]he Condominium Act . . . recognizes that the condominium association is a separate legal entity that is capable of being sued." *Janini*, ___ Mich at ___; slip op at 6. Plaintiff and another resident testified that a mound of snow blocked the sidewalk where plaintiff fell while walking her dog. This evidence, viewed in the light most favorable to plaintiff, supports a finding that the Association failed to fulfill its contractual duty to maintain and clear the sidewalks.

[2] Having granted relief to plaintiff as to Count I, we need not address plaintiff's additional arguments concerning MCL 554.139, the Michigan Building Code, or the International Property Maintenance Code beyond observing that some risk of confusion is attendant to the sort of kitchen-sink pleading employed in this case.

The Association avers that it satisfied its obligations by delegating snow removal to Shakespeare. It relies on *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 510; 579 NW2d 411 (1998), for the proposition that an "obligor may delegate a contractual duty" that does not require personal performance. According to the Association, because the master deed did not require it to personally perform snow removal, it was free to delegate that responsibility to Shakespeare.

UAW-GM relied on Restatement (Second) of Contracts, § 318, p 19, to reach its conclusion. However, the Restatement goes on to clarify that "[u]nless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor." Here, there is no evidence that plaintiff agreed to relieve the Association of its obligations under the master deed. Moreover, the contract between the Association and Shakespeare does not contain language indicating that Shakespeare assumed the Association's duties to condominium owners; it merely sets conditions triggering snow removal services based on snowfall and temperature. Thus, the Association's delegation of snow removal duties to Shakespeare did not discharge its obligations under the master deed. The trial court erred by concluding that the Association's duty was satisfied merely by hiring Shakespeare.

The Association also contends that it cannot be held liable for Shakespeare's alleged negligence. However, plaintiff's claim against the Association sounds in breach of contract, not negligence. Plaintiff alleges that her injuries resulted from the Association's failure to fulfill its contractual duty to maintain the sidewalks, not from Shakespeare's negligent performance. See *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 333; 852 NW2d 180 (2014), vacated in part on other grounds 497 Mich 927 (2014).

Because the Association had an enforceable contractual duty to remove snow from the sidewalks, and because plaintiff, as a party to the master deed, had the right to enforce that obligation, the trial court erred by granting summary disposition on plaintiff's breach of contract claim. Genuine issues of material fact exist regarding whether the Association breached its duty and whether that breach caused plaintiff's injuries.

C. NEGLIGENT PERFORMANCE OF A CONTRACT

We next turn to plaintiff's claim for negligent performance of a contract against the Association. The primary question is whether the Association owed plaintiff a duty that was independent of its contractual obligations. On this claim, we agree with the trial court that dismissal was appropriate.

Plaintiff claims that the Association had a duty independent of the master deed, and that the trial court erred in dismissing her negligent performance of a contract claim. Torts and contracts are "two types of civil wrongs." *In re Bradley Estate*, 494 Mich 367, 383; 835 NW2d 545 (2013). A contract claim arises from a breach of a contractual promise, while a tort claim arises from a breach of a duty imposed by law, independent of the contract. *Id*. at 382-383 n 34.

"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." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). A defendant cannot be held liable in tort without a duty owed to the plaintiff independent of any contractual obligations. *Id*. "While the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care . . . , the existence of a contract also does not extinguish duties of care otherwise existing . . . ." *Id*. at 170 (cleaned up).

Plaintiff contends that the Association's possession and control of the premises imposed a duty of reasonable care. As discussed above, the Association did owe plaintiff, an invitee, a duty "to exercise reasonable care to protect [the invitee] from an unreasonable risk of harm caused by a dangerous condition on the land." *Kandil-Elsayed*, 512 Mich at 143 (cleaned up). However, that duty sounds in premises liability, not ordinary negligence or negligent performance of a contract.

Because "this Court will look beyond a plaintiff's choice of labels to the true nature of the plaintiff's claim," *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998), plaintiff's negligent performance claim is properly construed as duplicative of her premises liability claim (Count I). Although the trial court dismissed plaintiff's negligent performance claim on the grounds that no independent duty existed and that the Association fulfilled its duty by contracting with Shakespeare, the trial court reached the correct result, albeit for the wrong reason. "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Because any duty the Association owed to plaintiff that was independent of the contract arises under premises liability—and not as a separate claim for negligent performance of a contract—we affirm the dismissal of this claim.

IV. CLAIMS AGAINST SHAKESPEARE

Finally, plaintiff contends that the trial court erred by dismissing her negligent performance of a contract claim against Shakespeare. Because Shakespeare owed plaintiff a duty of ordinary care in performing its contractual obligations, and because material factual disputes exist, we reverse.

"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." *Loweke*, 489 Mich at 162. A defendant cannot be held liable in tort absent a duty owed to the plaintiff that is independent of any contractual obligations. *Id*. "While the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort, the existence of a contract also does not extinguish duties of care otherwise existing . . . ." *Id*. at 170 (cleaned up).

"[A] party to a contract breaches a duty separate and distinct from the contract when it creates a new hazard that it should have anticipated would pose a dangerous condition to third persons." *Boylan v Fifty Eight Ltd Liability Co*, 289 Mich App 709, 721; 808 NW2d 277 (2010). For example, in *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 704; 532 NW2d

186 (1995), overruled on other grounds by *Smith v Globe Life Ins*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), the plaintiff sued a snow removal contractor after slipping and falling in a Kmart parking lot. The plaintiff alleged that the contractor negligently moved snow to an area where it melted and refroze, creating an icy hazard. *Id*. The trial court granted the contractor's motion for summary disposition, finding that only the premises owner could be liable. *Id*. at 707. This Court reversed, holding that the snow removal contractor owed "a common-law duty to perform with ordinary care the things agreed to be done" and recognized a duty of care to third parties foreseeably injured by its negligent performance. *Id*. at 708.

Applying that reasoning here, Shakespeare agreed to perform snow removal services at the condominium complex. Plaintiff and another resident testified that the mound of snow at issue resulted from Shakespeare's plowing activities. As in *Osman*, Shakespeare had a common-law duty to perform its contractual obligations with ordinary care and could be held liable to third parties foreseeably injured by its negligent performance.

The trial court erred by characterizing plaintiff's claim against Shakespeare as sounding in premises liability rather than negligence. Shakespeare's duty arose not from possession or control of the premises, but from its performance of contractual obligations in a manner that allegedly created a foreseeable risk of harm to others. Because plaintiff presented evidence creating a genuine issue of material fact regarding Shakespeare's negligent performance, the trial court erred by granting summary disposition.[3]

V. CONCLUSION

We affirm the trial court's dismissal of plaintiff's negligent performance of a contract claim against the Association. We reverse the dismissal of plaintiff's premises liability and breach of contract claims against the Association and plaintiff's negligent performance of a contract claim against Shakespeare. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Brock A. Swartzle
/s/ Matthew S. Ackerman

[3] As with Count I, plaintiff's untitled Count IV against Shakespeare caused confusion regarding the legal theory being pursued. The trial court construed it as potentially raising a premises liability claim. However, Count IV is properly construed as a negligent performance of a contractual duty claim. Because we reverse the trial court's grant of summary disposition on this count, we need not address plaintiff's remaining arguments.

STATE OF MICHIGAN

COURT OF APPEALS

SUSAN HERRERA,

Plaintiff-Appellant,

v

SUN TROY VILLA, LLC,

Defendant-Appellee.

UNPUBLISHED
October 19, 2023

No. 361852
Oakland Circuit Court
LC No. 2021-191601-NO

Before: CAMERON, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

This case arises from injuries plaintiff suffered as a result of tripping on a raised concrete slab that was part of a sidewalk on premises owned by defendant. At the time of her fall, plaintiff resided on a leased lot in Sun Troy Villa, a manufactured-home community located in Troy that defendant owns and operates. On February 19, 2021, around 4:30 p.m., plaintiff was walking on the sidewalk outside her home on Sun Troy Villa's premises when she tripped and fell on uneven pavement, fracturing her knee and arm.

Photographs plaintiff submitted show a sidewalk in the Sun Troy Villa community located between a roadway and the manufactured homes running parallel to, and along the distance of, the roadway. The sidewalk appears in poor condition, with cracks and gaps typical of worn pavement. The photographs of the sidewalk section where plaintiff allegedly tripped and fell, which was near her residence, depict a large height differential between two adjacent concrete slabs spanning the width of the sidewalk, and large cracks on the elevated slab.

In her complaint, plaintiff alleged that defendant breached its duties to her by failing to maintain the sidewalk in a safe condition, to inspect the premises, to provide warning, and to otherwise exercise reasonable care to protect her from the dangerous condition. Additionally, plaintiff alleged that defendant breached its implied contractual duties under MCL 554.139(1) by

failing to keep the premises "fit for its intended use and in proper repair" and by "violating safety codes, including local statutes and ordinances."

In her answers to interrogatories, plaintiff stated that, at the time of her accident, she "was watching where [she] was stepping," and "tripped and fell because of the defect in the sidewalk." She also 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." Plaintiff also stated that her neighbor had previously complained about the 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.

After only limited discovery, defendant moved for summary disposition under MCR 2.116(C)(8) and (10), asserting that further discovery stood no chance of creating an issue of fact regarding its liability for plaintiff's fall, and that her complaint should be dismissed in its entirety. Defendant argued that plaintiff's common-law premises-liability claim must fail because there was no question of fact that the discontinuity with a large height differential between the concrete slabs was readily observable upon casual inspection and, thus, the sidewalk's hazardous condition was open and obvious. Defendant also argued that plaintiff had no viable claim under MCL 554.139(1)(b) for breach of its duty to "keep the premises in reasonable repair" because that duty did not apply to common areas, such as the sidewalk where plaintiff allegedly tripped and fell, warranting summary disposition for failure to state a claim. With regard to its duty under MCL 554.139(1)(a) to see that "all common areas are fit for the use intended by the parties," defendant argued that there was no breach because it was undisputed that the sidewalk, despite its unevenness, was still fit for its intended purpose, as evidenced by the photographs indicating that the hazard was easily traversable; a pedestrian using the sidewalk could simply step over the height differential, as plaintiff admitted having done numerous times. Defendant did not address any claim alleging that it breached its duty by violating local safety ordinances.

In opposing defendant's motion, plaintiff focused on her statutory claim. She argued that defendant had breached its duty under MCL 554.139(1)(a) because the defective condition at issue rendered the sidewalk unsafe for walking. To support her claim, plaintiff presented an affidavit from an engineer, who described the subject sidewalk as "deteriorated, cracked," with "adjacent sections" having "a difference in height of over two-inches." He opined that the sidewalk's condition was a "known trip and fall hazard," "hazardous and unsafe to pedestrians using the sidewalk," and in violation of pertinent municipal ordinances. Plaintiff argued that, on the basis of the available evidence, whether defendant violated its statutory obligations presented an issue of fact. Plaintiff further complained, however, that defendant's motion was premature because it was brought before any witnesses had been deposed.

After a hearing on defendant's motion, the trial court summarily dismissed plaintiff's complaint, holding that (1) the condition of the sidewalk was open and obvious and (2) defendant "did not violate a duty" under MCL 554.139(1)(a) because defendant was not required to maintain its sidewalks in "perfect" condition. This appeal followed.

II. STANDARDS OF REVIEW

"A trial court's decision to grant a motion for summary disposition is reviewed de novo." *Bowman v Walker*, 340 Mich App 420, 425; 986 NW2d 419 (2022).

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint; we accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmovant. A motion for summary disposition under MCR 2.116(C)(8) is properly granted when, considering only the pleadings, the alleged claims are clearly unenforceable as a matter of law and no factual development could justify recovery.
>
> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. When reviewing an order granting summary disposition under MCR 2.116(C)(10), the reviewing court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 623-624; 971 NW2d 716 (2021) (quotation marks and citations omitted).]

III. PREMISES-LIABILITY CLAIM

Plaintiff first argues that the trial court erred in dismissing her premises-liability claim. We agree only because there has been an intervening change in this state's jurisprudence concerning this issue, and accordingly remand the issue to the trial court.

In dismissing plaintiff's premises-liability claim, the trial court concluded that it was required to do so because the defect alleged in this case was open and obvious. In so doing, the trial court applied the then-correct analysis applicable to premises-liability claims first announced in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), overruled by *Kandil-Elsayed v F & E Oil, Inc*, ___ Mich ___; ___ NW2d ___ (2023) (Docket No. 162907). *Lugo* held in relevant part that a possessor of land does not owe a duty to protect invitees from open and obvious defects. *Lugo*, 464 Mich at 516. In *Kandil-Elsayed*, our Supreme Court overruled *Lugo* and held that "the open and obvious nature of a danger" is only "relevant to the defendant's breach and the plaintiff's comparative fault." *Kandil-Elsayed* ___ Mich at ___; slip op at 39-40. *Kandil-Elsayed* further clarified that "the three traditional status-based categories" for determining the duty a possessor of land owes to a person on the land—licensee, invitee, and trespasser—remained unchanged. *Id*. at ___; slip op at 39.

In light of *Kandil-Elsayed*, there is little for this Court to decide. The trial court here found that the danger posed by the defect in defendant's sidewalk was open and obvious and accordingly dismissed plaintiff's claim because, under *Lugo*, defendant did not owe plaintiff a duty to protect against open and obvious defects. As explained, *Kandil-Elsayed* overruled the relevant portion of *Lugo* and shifted consideration of the open-and-obvious nature of a danger "from duty to

breach . . . ." *Id.* at ___; slip op at 40. As the law now stands, defendant unquestionably owed plaintiff—a person on defendant's land—a duty, and the contours of that duty depended only on plaintiff's status on the land. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000); *Kandil-Elsayed* ___ Mich at ___; slip op at 39. Accordingly, the trial court erred to the extent it concluded that defendant did not owe plaintiff a duty and, on that basis, dismissed plaintiff's premises-liability claim. That portion of the court's ruling is reversed, and the matter is remanded for further proceedings.

IV. MCL 554.139(1)

Plaintiff next argues that the trial court erred in summarily dismissing her claims of breach of statutory duties under MCL 554.139(1)(a) and (b). We agree in part.

"In addition to the general common-law duties that a possessor of land owes to invitees, MCL 554.139 imposes further covenants and duties on landlords who lease or license their property to residential tenants." *Jeffrey-Mois*, 336 Mich App at 636. MCL 554.139 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.

"The statutory protection of MCL 554.139(1) 'arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease.' " *Jeffrey-Mois*, 336 Mich App at 636, quoting *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

A. MCL 554.139(1)(a)

Plaintiff argues that the trial court erred in granting summary disposition of her statutory claim under MCL 554.139(1)(a) because reasonable minds could differ regarding whether the sidewalk was fit for pedestrian travel. We disagree.

Under MCL 554.139(1)(a), a lessor covenants that "all common areas are fit for the use intended by the parties." As explained by this Court in *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 289; 933 NW2d 732 (2019):

> In *Allison*, 481 Mich at 427-431, our Supreme Court addressed the analytical framework to be used when determining liability under MCL 554.139(1)(a). First, the court is to determine whether the area in question is a "common area." Then, the court is to identify the intended use of the common area.

> Lastly, the court must determine if there could be "reasonable differences of opinion regarding" whether the conditions made the common area unfit for its intended use.

Unless the evidence shows that "there could be no reasonable differences of opinion" regarding the fitness of a common area for the use intended by the parties, the question is for the trier of fact. *Allison*, 481 Mich at 430.

Here, the parties do not dispute that the subject sidewalk, which traversed along a roadway in defendant's manufactured-home community where plaintiff resided, was a common area within the meaning of MCL 554.139(1)(a). And it cannot seriously be disputed that the intended use of the sidewalk was walking on it. See *Trueblood Estate*, 327 Mich App at 290; *Benton v Dart Properties, Inc*, 270 Mich App 437, 444; 715 NW2d 335 (2006).

The remaining, and dispositive, question in determining whether defendant could be liable under MCL 554.139(1)(a) is whether the defect at issue made the sidewalk unfit for walking on it. As explained by our Supreme Court, "The statute does not require a lessor to maintain a [common area] 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" its intended use. *Allison*, 481 Mich at 430. While "[k]eeping common areas fit for their intended use may well require a lessor to perform maintenance and repairs to those areas," *id.* at 433, "[t]he statute does not require any level of fitness beyond what is necessary to allow tenants to use the [common area] as the parties intended," *id*. at 431. With this understanding of MCL 554.139(1)(a), we conclude that there is no question of fact that the sidewalk at issue in this case was fit for its intended use.

Plaintiff established, and it is not disputed, that the subject sidewalk was not in ideal condition. Aside from the photographs depicting a more than two-inch height differential between adjacent concrete slabs, plaintiff stated that, in addition to her own accident, other individuals had tripped on the same sidewalk within the last two years. Plaintiff'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."

However, establishing a breach of duty under MCL 554.139(1)(a) requires evidence of more than the presence of a hazardous condition and someone falling. See *Trueblood*, 327 Mich App at 291-292 (explaining that "a plaintiff must present more evidence than simply the presence of ice or snow and someone falling" to establish that a common area was not fit for its intended use). Plaintiff must show that the sidewalk was unsuitable for its intended purpose. The appropriate focus, therefore, is on the accessibility of the sidewalk for pedestrian travel.

The height differential between the adjacent concrete slabs at issue exceeds two inches and extends the sidewalk's entire width, thereby forcing tenants using the sidewalk to confront the hazardous condition. However, users need not walk on the discontinuity itself because the hazard was plainly visible and easily avoidable, and thus a pedestrian could simply step over the uneven slabs and continue walking. Indeed, plaintiff repeatedly negotiated the hazard in the past, as evidenced by her admission that she had "walked over the same sidewalk on approximately a dozen occasions" before her accident, which shows that the discontinuity did not preclude her from

using the sidewalk but rather presented a mere inconvenience of access. Accord *Allison*, 481 Mich at 430 (in the context of a snow-covered parking lot, explaining that "[m]ere inconvenience of access . . . will not defeat the characterization of a lot as being fit for its intended purposes"). Because the uneven sidewalk was still traversable despite the complained-of condition, it was akin to the patches of ice on the sidewalk in *Jeffrey-Moise*, 336 Mich App at 637-638, which presented, at most, a mere inconvenience that did not render the sidewalk unfit for walking. Compare *Trueblood*, 327 Mich App at 292 (explaining that a sidewalk "*completely* covered in ice" is not fit for its intended use because if anyone "walked on the sidewalk, he [or she] was inevitably going to confront the ice"); *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 132; 782 NW2d 800 (2010) (holding that there was a question of fact whether "a hidden danger"—"black ice on a darkly lit, unsalted stairway"—"rendered the stairway unfit for its intended use"). Thus, the evidence presented failed to establish that the sidewalk's defective condition rendered it unfit for its intended purpose within the meaning of MCL 554.139(1)(a).[1] Accordingly, we hold that the trial court did not err in granting summary disposition to defendant on plaintiff's claim that defendant breached its statutory duty under MCL 554.139(1)(a) to keep the common areas fit for the use intended by the parties.

B. MCL 554.139(1)(b)

Plaintiff next argues that the trial court prematurely dismissed her claim that defendant breached its implied covenant to comply with local safety laws pursuant to MCL 554.139(1)(b). We agree.

MCL 554.139(1)(b) provides that every lessor covenants "[t]o 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 . . . ." There is no question that defendant did not have a statutory duty under § (1)(b) to keep its sidewalk in reasonable repair because that duty does not apply to common areas, including sidewalks. *Allison*, 481 Mich at 432-435. Plaintiff does not argue otherwise. Instead, plaintiff argues that defendant breached the second covenant under MCL 554.139(1)(b) by failing to

[1] Plaintiff points out that, under MCL 691.1402a(3)(a), which governs actions against municipalities involving defective public sidewalks, a vertical discontinuity of two or more inches rebuts the presumption that the municipality has "maintained the sidewalk in reasonable repair." Plaintiff argues that this requirement "reflects the common understanding that small differentials are acceptable, while a differential exceeding two inches is not," to show that reasonable jurors could conclude that the discontinuity of more than two inches in this case rendered it unfit for walking. We find plaintiff's reliance on MCL 691.1402a(3)(a) inapt. Besides containing no similar presumption, MCL 554.139(1)(a) focuses on whether the sidewalk's defective condition rendered it unfit for its intended use. MCL 554.139(1)(b), on the other hand, concerns a landlord's duty "[t]o keep the premises in reasonable repair," which is more akin MCL 691.1402a. But our Supreme Court held in *Allison* that the reasonable-repair covenant in MCL 554.139(1)(b) does not apply to common areas like sidewalks. *Allison*, 481 Mich at 432-435.

comply with pertinent provisions of the city of Troy's ordinances governing sidewalk maintenance.

Defendant argues that plaintiff failed to raise this issue before the trial court and so it is not preserved for appellate review. As this Court has explained:

> Michigan generally follows the "raise or waive rule" of appellate review. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. [*Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, 337 Mich App 529, 539-540; 976 NW2d 674 (2021), rev'd in part on other grounds, vacated in part on other grounds, ___ Mich ___ (2023) (Docket No. 163320) (quotation marks and citation omitted).]

" 'This Court will not review a case on a theory different from that on which it was tried.' " *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003), quoting *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110; 593 NW2d 595 (1999). Thus, if an issue was not raised in the pleadings, or argued below, appellate review is forfeited. See *Soaring Pine*, 337 Mich App at 539-540.

Plaintiff's complaint alleged that defendant "failed to keep the premises and all common areas therein fit for its intended use and in proper repair pursuant to MCLA 554.139(a)(b) [sic]," thereby directly implicating the first covenant under MCL 554.139(1)(b) (to keep the premises in reasonable repair). With respect to the second covenant under MCL 554.139(1)(b)—obligating a lessor to comply with applicable local safety and health laws—plaintiff did not set forth a specific count asserting that claim. However, she did generally allege that defendant breached its duties to plaintiff by "violating safety codes, including local statutes and ordinances." Although plaintiff did not specifically reference defendant's statutory duty under MCL 554.239(1)(b), the allegation would nonetheless have reasonably informed defendant of the need to defend the claim that it breached its duty under MCL 554.139(1)(b) to comply with local safety ordinances in regard to its sidewalk. See MCR 2.111(B)(1) (a complaint need only contain "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend"); *Smith v Stolberg*, 231 Mich App 256, 259-260; 586 NW2d 103 (1998). It is "well established that the gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim." *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (quotation marks, citation, and

alteration omitted). Accordingly, plaintiff adequately raised a claim pertaining to local ordinances under MCL 554.139(b) in her pleadings.[2]

Plaintiff further raised the issue of defendant's violation of local ordinances and MCL 554.139 during discovery. She stated in her responses to interrogatories that "Defendant violated MCL 554.139 (a)(b) [sic]," but that she "had not yet retained an expert to investigate what other code or ordinances Defendant may have violated." Further, in response to defendant's motion for summary disposition, plaintiff again raised the issue of defendant's noncompliance with local safety laws, particularly the Troy City Code, and, notably, presented an affidavit from an expert who opined that the sidewalk's condition violated two specific code provisions. However, plaintiff did not argue that defendant's noncompliance with the code constituted a breach of defendant's statutory duty under MCL 554.139(1)(b) while defending defendant's motion, but rather cited such noncompliance as support for her position that the sidewalk was not fit for its intended use under MCL 554.139(1)(a). But that failure is somewhat understandable because defendant did not move for summary disposition of any claim that it failed to comply with local safety ordinances in violation of MCL 554.139(1)(b); rather, it moved for summary disposition on (1) plaintiff's common-law premises-liability claim, (2) her claim that defendant breached the covenant in MCL 554.139(1)(a), and (3) her claim that defendant breached the reasonable-repair covenant in MCL 554.139(1)(b).

Regardless, we conclude that plaintiff adequately raised the issue whether defendant violated applicable local safety laws before the trial court. Although plaintiff did not further develop her argument that defendant's failure to comply with local safety laws breached its statutory duty under MCL 554.139(1)(b) in response to defendant's motion, she at least implied such a claim throughout her pleadings by asserting that defendant violated such laws. And, again, defendant did not move to dismiss any claim on that ground.

Despite concluding that defendant sufficiently pleaded a claim under MCL 554.139(1)(b) that defendant breached its implied covenant to comply with local safety ordinances, we decline to address whether that claim survives summary disposition because the trial court failed to do so in the first instance. We therefore remand the issue to the trial court in order to allow it the opportunity to address the issue through the proper course, including developing any relevant additional facts or arguments.

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[2] To the extent the parties may dispute whether plaintiff sufficiently pleaded that defendant breached its duty under MCL 554.139(1)(b) to comply with applicable local safety ordinances, plaintiff presented factual support for that claim. As this Court has explained, "If a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 209; 920 NW2d 148 (2018) (quotation marks and citation omitted). See also MCR 2.116(I)(5).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

STATE OF MICHIGAN

COURT OF APPEALS

MEGHAN THIEL and NICHOLAS SCOBEL,

Plaintiffs-Appellants,

v

PINES AT CLOVERLANE, LLC, also known as PINES OF CLOVERLANE, LLC, and THE HAYMAN COMPANY,

Defendants-Appellees.

UNPUBLISHED
June 27, 2024

No. 366096
Washtenaw Circuit Court
LC No. 21-000948-NO

Before: O'BRIEN, P.J., and M. J. KELLY and FEENEY, JJ.

PER CURIAM.

In this premises liability action arising from injuries Meghan Thiel sustained after falling on a sidewalk in her apartment complex, plaintiffs appeal as of right the trial court's order granting summary disposition to defendants ("Pines" and "Hayman" when individually referenced),[1] pursuant to MCR 2.116(C)(10). We affirm.

In plaintiffs' amended complaint, they alleged, in relevant part, that Thiel slipped and fell on ice that had accumulated on the sidewalk coming from the rear door of their apartment building because Pines's gutters were not properly functioning and the grading of the sidewalk funneled water from melting snow toward the door. Plaintiffs alleged defendants were liable for Thiel's injuries because they violated MCL 554.139(1)(a) by allowing an unnatural accumulation of ice to form on the sidewalk, which made the sidewalk unfit for its intended use.[2] Defendants alleged

[1] Pines is the apartment complex where Thiel and Nicholas Scobel lived in 2019. Hayman is a maintenance company that provided workers for Pines.

[2] Plaintiffs also raised a premises liability claim and a loss of consortium claim that was derivative of the other two claims. However, plaintiffs did not challenge the trial court's grant of summary disposition regarding either of these claims. Because neither claim is relevant to this appeal, they will not be discussed further unless relevant to the issues raised on appeal.

the sidewalk was fit for its intended use, and that plaintiffs failed to demonstrate there were genuine issues of material fact regarding the fitness of the sidewalk.

Subsequently, defendants filed a motion for summary disposition alleging, in relevant part, that plaintiffs' claims against defendants should be dismissed because plaintiffs failed to create a genuine issue of material fact concerning whether defendants had actual or constructive notice of the alleged patch of ice on the sidewalk, or of any problem with the gutters, prior to Thiel's fall. Defendants argued that plaintiffs' claim under MCL 554.139(1)(a) failed because the sidewalk was fit for walking, there was no evidence of an issue with the gutters, and the covenant to keep the premises in reasonable repair under MCL 554.139(1)(b) does not apply to common areas. Defendants argued that the paramedics' ability to walk on the sidewalk and push Thiel on it while she was on a stretcher demonstrated that the sidewalk, while not perfectly free of ice, was fit for its intended use.

In their response to defendants' motion for summary disposition, plaintiffs argued that genuine issues of material fact existed that would allow a rational finder of fact to determine that the slab outside of the rear apartment door was completely covered in ice. If a finder of fact determined the slab was covered in ice, then it was not fit for its intended use pursuant to MCL 554.139(1)(a) because it was not fit to be traversed, and defendants would not be entitled to summary disposition on this claim. Plaintiffs further argued that MCL 554.139(1)(a) does not require the defendant to have knowledge of the unfit condition to be liable for a breach of MCL 554.139(1)(a). However, genuine issues of material fact existed regarding whether defendants had constructive notice that ice was on the slab. A rational trier of fact could have concluded that defendants knew, or should have known, that water pooled on the slab because the slab was sloped backward toward the door and there were visible signs of water damage to the exit door and the wood surrounding the door. Finally, plaintiffs argued that the open and obvious doctrine is not applicable to their statutory claim because defendants materially breached the specific statutory duty for residential property owners to keep their premises fit for their intended use.

In reply, defendants argued that Hayman was entitled to summary disposition on the claim under MCL 554.139(1)(a) because Hayman was not the lessor of the property. Defendants argued that the picture of the level on the slab showed the slab was almost perfectly flat, undermining the plaintiffs' claim that it was tilted toward the door. Even if the slab was not perfectly flat, any tilt was invisible to the naked eye, and thus, defendants did not have notice of a tilt. Furthermore, no one in this case testified that water was prone to collect and freeze on the slab. Accordingly, defendants concluded that the evidence in the case demonstrated that the ice on the slab was nothing more than a mere inconvenience, and the sidewalk was fit for its intended use. Defendants also argued that the weathering of the door area did not give defendants constructive notice of a defect with the slab because weathering was normal. Finally, defendants argued there was no genuine issue of material fact regarding whether the sidewalk was fit for its intended use because plaintiffs referred to the ice as being a patch on the sidewalk that did not cover the whole sidewalk, and ice on a slab of sidewalk is insufficient to make the entire sidewalk unfit for its intended use.

The trial court apparently adopted defendants' arguments and made the following specific conclusions: (1) MCL 554.139(1) does not apply to sidewalks in common areas of apartment complexes; (2) defendants did not have actual or constructive notice of the icy condition; (3) the sidewalk was fit for its intended use; and (4) even if the Court of Appeals determines there was a

genuine issue of material fact regarding whether defendants had notice,[3] the condition was open and obvious, without special aspects.

On appeal, plaintiffs argue the trial court erred when it determined MCL 554.139(1) does not apply to walkways in common areas. We conclude that MCL 554.139(1)(a) applies to sidewalks in common areas of apartment complexes.

MCL 554.139(1) states the following:

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

Issues of statutory interpretation that underlie a trial court's ruling on a summary disposition motion are reviewed de novo. *Candler v Farm Bureau Mut Ins Co of Michigan*, 321 Mich App 772, 777; 910 NW2d 666 (2017) (citation omitted). "We also review questions of law de novo." *South Dearborn Environmental Improvement Assoc, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360 n 11; 917 NW2d 603 (2018).

MCL 554.139(1)(a) "requires the lessor to maintain a common area in a condition that renders it fit for its intended use." *Gabrielson v The Woods Condominium Assoc, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2024) (Docket No. 364813); slip op at 15 (citation omitted). A sidewalk within an apartment complex is a common area under MCL 554.139(1)(a). *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 428; 751 NW2d 8 (2008) (citation omitted). Accordingly, MCL 554.139(1)(a) applies to sidewalks in common areas of apartment complexes.

Notably, while the trial court announced that MCL "554.1391 [sic] does not apply to sidewalks in common areas of apartment complexes," it also held that the sidewalk "was under the law fit for its intended use." At face value, these two holdings are incongruent because, if MCL 554.139(1)(a) does not apply to sidewalks in common areas, then it would not matter if the sidewalk was fit for its intended use. The key to this disconnect may be that the trial court neglected to include subpart (b) when it announced MCL 554.139(1) does not apply to sidewalks in common areas. This would be consistent with the trial court's announcement that it adopted

[3] The trial court directly referenced this Court and the possibility that we would find a question of fact regarding the sidewalk being fit for its intended use; the trial court also stated that "If the Court of Appeals—believe me, if you can go up and convince two out of three whatever panel you get to say Conners, give me a trial date, I'm happy to try the case for you."

defendants' arguments, one of which was that MCL 554.139(1)(b) did not apply to sidewalks in common areas. This constructive notice would also explain why the trial court concluded that the sidewalk was fit for its intended use. However, even if the trial court erroneously held that MCL 554.139(1)(a) does not apply to sidewalks in common areas, reversal is not warranted because, as discussed later, plaintiffs failed to create a genuine issue of material fact regarding whether the sidewalk was fit for its intended use. Accordingly, defendants were entitled to summary disposition of this claim.

Additionally, plaintiffs contend the trial court erred by concluding that the open and obvious doctrine applies to plaintiffs' claim under MCL 554.139(1)(a). We agree that the trial court erred in concluding that the open and obvious doctrine was applicable to claims under MCL 554.139(1)(a).

"[T]he open and obvious danger doctrine is not available to deny liability for a statutory violation under MCL 554.139(1)." *Gabrielson*, ___ Mich App at ___; slip op at 15 (citation omitted). Therefore, the trial court erred when it announced that the open and obvious doctrine would apply to plaintiffs' claim under MCL 554.139(1)(a) if this Court determined there was a genuine issue of material fact regarding whether the sidewalk was fit for its intended use. However, the trial court's erroneous conclusion about the applicability of the open and obvious doctrine to claims under MCL 554.139(1)(a) has no bearing on this case because the trial court granted defendants summary disposition on the basis that plaintiffs failed to create a genuine issue of material fact regarding the fitness of the sidewalk. Indeed, defendants did not argue that they were entitled to summary disposition on plaintiffs' claim under MCL 554.139(1)(a) because the condition was open and obvious. Defendants only raised the open and obvious doctrine in relation to plaintiffs' *premises liability* claim. Accordingly, whether the open and obvious doctrine could apply to plaintiffs' claim under MCL 554.139(1)(a) is irrelevant to whether defendants were entitled to summary disposition. Therefore, reversal is unnecessary, despite the trial court's erroneous conclusion about the applicability of the open and obvious doctrine.

Finally, plaintiffs argue the trial court erred by granting defendants' motion for summary disposition with respect to their claim under MCL 554.139(1)(a) because there was a genuine issue of material fact regarding whether the slab was fit for its intended use. We conclude the trial court did not err by granting defendants' motion for summary disposition with respect to plaintiffs' claim under MCL 554.139(1)(a) because plaintiffs failed to create a genuine issue of material fact regarding whether the sidewalk was fit for its intended use.

"A trial court's ruling on a motion for summary disposition is reviewed de novo." *Meyers v Rieck*, 509 Mich 460, 468; 983 NW2d 747 (2022) (citation omitted). A party is entitled to summary disposition pursuant to MCR 2.116(C)(10) when the evidence does not present a genuine issue of material fact. *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 470; 957 NW2d 377 (2020). "A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue upon which reasonable minds might differ." *MacDonald v Ottawa Co*, 335 Mich App 618, 622; 967 NW2d 919 (2021) (quotation marks and citation omitted). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Jewett*, 332 Mich App at 470 (quotation marks and citation omitted).

I. NOTICE

Because there is no published caselaw holding that a lessor must have notice of unfit conditions to be liable under MCL 554.139(1)(a), and the statute itself does not contain a notice requirement, we will not engage in judicial legislation by adding language to the statute and requiring notice under MCL 554.139(1)(a).

II. FITNESS

MCL 554.139(1)(a) "requires the lessor to maintain a common area in a condition that renders it fit for its intended use." *Gabrielson*, ___ Mich App at ___; slip op at 15 (citation omitted). "The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease." *Id*. (citation omitted). Here, plaintiffs had a residential lease with Pines. Therefore, MCL 554.139(1) was applicable to plaintiffs' contract with Pines. "MCL 554.139(1)(a) does not require lessors to maintain a common area in an ideal condition or even in the most accessible condition possible. Rather, the statute requires the lessor to maintain a common area in a condition that renders it fit for its intended use." *Id*. (citation omitted). "Fit is defined as adapted or suited; appropriate." *Allison, 481 Mich* at 429 (quotation marks and citation omitted).

As previously established, apartment complex sidewalks are considered common areas under MCL 554.139(1)(a). *Allison*, 481 Mich at 428. The intended use of sidewalks in apartment complexes includes walking on them. *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 290; 933 NW2d 732 (2019). "[I]ce does not inherently render a common area unfit for its intended use if the ice is a mere inconvenience." *Id*. (quotation marks and citation omitted). Sidewalks completely covered in ice are unfit for their intended use because they do not present a "mere inconvenience of access" given that "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 (citation omitted). In *Trueblood*, a panel of this Court held that there was a genuine issue of material fact regarding whether the sidewalk was completely covered with ice where the plaintiff testified that the sidewalk was covered with snow and was slippery, another witness testified that there was snow covering the sidewalk and that it was slippery, a third witness testified that the weather conditions leading up to the plaintiff's fall would have coated the entire area in ice, and the pictures taken immediately after the plaintiff's fall demonstrated the entire surrounding area was coated with snow and ice. *Id*. at 290.

This case is distinguishable from *Trueblood* because here, unlike *Trueblood*, no witness testified that the sidewalk was *covered* in snow or ice. Thiel did not recall whether the *patch* of ice she slipped on covered the entire sidewalk. Further, Thiel testified that none of the neighbors who came to help her after the fall had slipped, and only one of the paramedics slipped, without falling, although they pushed the stretcher Thiel was lying on out to the ambulance. Scobel also slipped, but he did not fall. Scobel testified that there was a "significant amount of ice" on the slab and on the half of the small sidewalk closest to the apartment building, but he never alleged the ice covered those areas.

Additionally, unlike *Trueblood*, no witness testified that the weather conditions leading up to Thiel's fall would have coated the entire area in ice. The weather logs indicate that 8.5 inches

of snow fell in the area near plaintiffs' apartment on November 11, 2019. Then, the day prior to Thiel's fall, the temperature was above freezing for seven hours. Subsequently, the night before Thiel's fall and during the time of her fall, the temperature was below freezing. Viewing these facts in the light most favorable to plaintiffs, a rational trier of fact could conclude that snow remaining from the storm on November 11, 2019, melted on the afternoon of November 15, 2019, and then froze into ice later that evening and stayed frozen until Thiel's fall on the morning of November 16, 2019.

However, even assuming the weather created ice on the sidewalk, that is insufficient to create a genuine issue of material fact regarding whether the sidewalk was unfit for its intended use. Plaintiffs have the burden of proving a genuine issue of material fact exists regarding whether the sidewalk was fit for its intended use. *Id*. Plaintiffs have failed to do so. As discussed earlier, no one testified that the sidewalk was completely covered with ice. In fact, Scobel only described the ice as being on the first half of the small sidewalk. Additionally, the fact that everyone but Thiel was able to successfully navigate the sidewalk without falling suggests it was fit for its intended use, and the ice present only created a mere inconvenience. Without pictures or other evidence demonstrating the ice was so pervasive on the sidewalk that it made the sidewalk unfit for its intended use, we conclude that plaintiffs have failed to demonstrate a genuine issue of material fact exists regarding the fitness of the sidewalk.

In their appellate brief, plaintiffs isolate the slab from the sidewalk in an attempt to argue that, if the slab was completely covered in ice, that is sufficient to overcome summary disposition on their claim under MCL 554.139(1)(a) because that would render the slab unfit for its intended use—granting access to the rest of the sidewalk. By doing so, plaintiffs are moving the target. In plaintiffs' first amended complaint, they alleged that the "walkway" (sidewalk) was unfit for its intended use. Defendants moved for summary disposition on the basis that plaintiffs failed to create a genuine issue of material fact regarding whether the walkway was fit for its intended use, and it was on this basis that the trial court granted defendants summary disposition. The sidewalk is what was at issue in the complaint and motion for summary disposition, and plaintiffs cannot now change their argument to gain an advantage. See *Summer v Southfield Bd of Ed*, 324 Mich App 81, 106; 919 NW2d 641 (2018) ("A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.") (citation omitted).

Furthermore, we are unpersuaded that the slab could logically be viewed separately from the rest of the small sidewalk because the slab is connected to the sidewalk, made of the same material, and intended for the same purpose—providing a walkway from the apartment building to the parking lot. However, even if the slab could be viewed separately, or the sidewalk could be considered unfit if the first slab of the sidewalk was entirely covered in ice, the same problem remains: no one testified that the slab was completely covered in ice. Absent the slab being covered in ice, users could step around the ice and successfully navigate it, thereby showing the ice was a mere inconvenience, not a condition that made the slab unfit for its intended use. This is exactly what Scobel did when he rushed outside to aid Thiel after her fall. Although he slipped on the slab or sidewalk, he did not fall. Therefore, for the same reasons stated earlier, even if plaintiffs could successfully limit their argument to the slab, they would still fail to create a genuine issue of material fact regarding its fitness.

Finally, we agree with defendants that summary disposition for Hayman was appropriate on this claim because MCL 554.139(1)(a) applies to lessors, and Hayman was not the lessor of plaintiffs' apartment, Pines was. See *Gabrielson*, ___ Mich App at ___; slip op at 15 (holding that, under MCL 554.139(1)(a), *lessors* are required to maintain common areas in conditions that render them fit for their intended use).

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ Kathleen A. Feeney

STATE OF MICHIGAN

COURT OF APPEALS

PAMELA BRANCH,

Plaintiff-Appellant,

v

D & S PROPERTY MANAGEMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
December 26, 2019

No. 345882
Macomb Circuit Court
LC No. 2017-001162-NO

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Plaintiff brought suit against defendant alleging several claims including a claim of common-law premises liability and violations of MCL 554.139. The circuit court granted summary disposition in favor of defendant and dismissed plaintiff's premises liability claim and plaintiff's statutory claims under MCR 2.116(C)(10). Plaintiff now appeals as of right. We affirm in part, and reverse and remand in part for further proceedings consistent with this opinion.

This premises liability action arises out of injuries sustained by plaintiff from two slip and falls that occurred at Pine Crest Apartments, an apartment complex owned by defendant. On the date of plaintiff's injuries, she was a resident at Pine Crest Apartments. Plaintiff left her apartment through the rear entryway to the building at approximately 6:00 a.m. and returned at approximately 9:00 a.m. Upon plaintiff's return, she was unable to see the sidewalk leading to the rear entryway to the building because it was covered in snow but knew where it was from prior experience. As plaintiff used the sidewalk to approach the rear entryway of the apartment building, she slipped and fell onto her back, twisting her ankle. After plaintiff fell, she stood up, entered the apartment building through the rear entryway, and called the management office at Pine Crest Apartments. Plaintiff reported that she had fallen and requested that management arrange for the snow to be cleared from the sidewalks. Despite plaintiff's request, management did not clear the snow from the sidewalks and did not use salt to abate the conditions.

Plaintiff remained in her apartment until approximately 9:00 p.m. on that same day. As plaintiff was preparing to leave for a second time, she looked outside and noticed that the snow

had not been cleared from the sidewalks. Plaintiff also noted that it was dark at that time, and the light above the stairs outside the rear entryway was broken. As plaintiff was descending the stairs to the rear entryway, she slipped and fell, injuring her back. Before plaintiff fell, she attempted to grab the handrail next to the stairs for support but was unable to do so because it was covered in ice. The ice accumulated as a result of a defective gutter above the rear entryway stairs that was leaking water. An expert meteorologist assessed the weather conditions on the date of plaintiff's injuries and opined that the ice plaintiff encountered had existed for 31 hours before her first slip and fall and for 42 hours before her second slip and fall. As a result of the two slip and falls, plaintiff sustained injuries, underwent multiple back surgeries, and incurred medical expenses.

On appeal, plaintiff argues that the circuit court erred in granting defendant's motion for summary disposition because there was a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a). Plaintiff also contends that the areas in which plaintiff fell were effectively unavoidable at the time of plaintiff's injuries. We agree that there is a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a) and disagree that there is a question of fact as to whether the areas in which plaintiff fell were effectively unavoidable at the time of plaintiff's injuries.

I. MCL 554.139(1)(a)

Defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), and the circuit court considered evidence outside the pleadings. Therefore, this Court considers the motion as having been decided under MCR 2.116(C)(10). *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 776; 910 NW2d 666 (2017). A trial court's decision on a motion for summary disposition is reviewed de novo. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). A motion for summary disposition under MCR 2.116(C)(10) challenges the "factual adequacy of a complaint on the basis of the entire record, including affidavits, depositions, admissions, or other documentary evidence." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper when the evidence, "viewed in the light most favorable to the nonmoving party, show[s] that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey*, 500 Mich at 5. "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." *Gorman*, 302 Mich App at 116 (citation omitted). " 'This Court is liberal in finding genuine issues of material fact.' " *Lewis v Farmers Ins Exch*, 315 Mich App 202, 209; 888 NW2d 916 (2016), quoting *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).[1]

[1] In her brief on appeal plaintiff relies in part on an outdated and overruled summary disposition standard, arguing that under MCR 2.116(C)(10) the trial court cannot summarily dismiss a case if a record "could be developed that would leave open an issue upon which reasonable minds

Plaintiff argues that there is a genuine issue of material fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a). We agree.

MCL 554.139(1)(a) provides that in every lease or license of residential premises, the lessor or licensor covenants that the premises and all common areas are fit for their intended use by the parties. 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 v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The Michigan Supreme Court has addressed the analytical framework that is to be used when determining liability under MCL 554.139(1)(a). See *id*. at 428-431. First, the court is to determine whether the area in question is a common area. *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 289; ___ NW2d ___ (2019). Next, the court is to identify the intended use of the common area. *Id*. "Lastly, the court must determine if there could be reasonable differences of opinion regarding whether the conditions made the common area unfit for its intended use." *Id*. (quotation marks omitted). MCL 554.139(1)(a) does not require a lessor to maintain a premises 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 its intended use. *Allison*, 481 Mich at 430. Mere inconvenience of access will not render a premises unfit for its intended use. *Id*.

In this case, plaintiff slipped and fell in two separate locations. Plaintiff first slipped on the sidewalk leading from her apartment building to the parking lot. Plaintiff then slipped while descending the stairs to the rear entranceway of her apartment building. This Court has held that sidewalks located within an apartment complex constitute common areas. *Benton v Dart Props, Inc*, 270 Mich App 437, 442; 715 NW2d 335 (2006). Furthermore, this Court has held that stairways located within an apartment complex constitute common areas. *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010). Accordingly, both locations in which plaintiff slipped and fell are common areas within the meaning of MCL 554.139(1)(a).

The intended use of a sidewalk is for pedestrians to walk on it. *Benton*, 270 Mich App at 444. Moreover, the intended use of a stairway is to provide pedestrian access to different levels of a building or structure. *Hadden*, 287 Mich App at 130. Accordingly, it must be ascertained whether there could be reasonable differences of opinion as to whether the sidewalk and stairs to the rear entranceway of plaintiff's apartment building were fit for their intended uses on the date of plaintiff's injuries. See *id*.

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could differ." Twenty years ago the Supreme Court explicitly rejected this approach. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). We recognized the correct standard under the 1985 Court Rules more than a decade ago in *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). Nevertheless, this Court continues to receive briefs advocating our application of this outdated, overruled, and obviously inapplicable standard. We urge appellate counsel to update their brief banks or their legal research methods to avoid citing to summary judgment standards that were set aside by the 1985 Court Rules.

A. SIDEWALK LEADING TO PLAINTIFF'S APARTMENT BUILDING

A genuine issue of material fact exists as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use. In *Estate of Trueblood*,[2] this Court summarized the current state of Michigan law as it relates to the effect of ice accumulation on the intended use of a sidewalk in the context of MCL 554.139. "In *Benton*, this Court held that 'a sidewalk covered in ice is not fit' for its intended use." *Estate of Trueblood*, 327 Mich App at 290, quoting *Benton*, 270 Mich App at 444. "But in *Allison*, our Supreme Court explained that ice does not inherently render a common area unfit for its intended use if the ice is a '[m]ere inconvenience.' " *Id*., quoting *Allison*, 481 Mich at 430. In reconciling the holdings in *Benton* and *Allison*, this Court distinguished between sidewalks that are completely covered in ice and sidewalks that are partially covered in ice. *Id*. at 291. In doing so, this Court held that a sidewalk completely covered in ice is not fit for its intended use because it presents more than a mere inconvenience of access, but rather, forces anyone using the sidewalk to walk on ice. *Id*. Conversely, a sidewalk that is only partially covered in ice does not inherently render it unfit for its intended use because the ice is a mere inconvenience. *Id*. at 291-292. Thus, in considering a motion for summary disposition as to whether a sidewalk is fit for its intended use, the dispositive issue is whether there is a question of fact that a sidewalk is completely covered in ice, and therefore, presents more than a mere inconvenience. See *id*.

There is a question of fact as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use. Plaintiff's expert stated in his affidavit that ice would have existed on untreated surfaces at the location of Pine Crest Apartments on the date that plaintiff slipped and fell. Plaintiff's expert also opined that the ice that plaintiff encountered had existed for 31 hours before her first slip and fall, and for 42 hours before her second slip and fall. Moreover, plaintiff stated in her deposition that the snow had not been cleared from the sidewalks and there was a layer of ice under the snow at the time of her first slip and fall. Notably, plaintiff indicated that the entire sidewalk was covered in snow and ice by stating that she could not see the sidewalk under the snow as she was walking toward her apartment building, but knew where the sidewalk was from prior experience. Because the snow and ice had not been cleared, and because plaintiff could not see the sidewalk under the snow as she was walking to her apartment building, the evidence presented creates a question of fact as to whether the sidewalk was completely covered in snow and ice, thereby rendering the ice more than a mere inconvenience.

Defendant avers that there is no question of fact as to whether the sidewalk was fit for its intended use because plaintiff stated in her deposition that she used the sidewalk to her apartment building two times without falling on the date of her injuries. This evidence tends to suggest that the sidewalk was fit for its intended use and was not completely covered in ice because plaintiff was able to walk on it twice without slipping. However, this evidence also suggests that plaintiff walked on the sidewalk more carefully at some times than at others, or that plaintiff was simply

[2] Estate of Trueblood had not been issued prior to the trial court's decision on defendant's motion.

able to keep her balance some of the time. While this evidence is contrary to plaintiff's deposition testimony, it does not invalidate plaintiff's deposition testimony that the sidewalk was completely covered in snow and ice such that there is no question of fact regarding this issue. Thus, given the conflicting evidence on this matter, a genuine issue of material fact exists as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use.

B. STAIRS TO THE REAR ENTRANCEWAY OF PLAINTIFF'S APARTMENT BUILDING

A genuine issue of material fact exists as to whether the stairs to the rear entranceway to plaintiff's apartment building were fit for their intended use. The presence of ice in a common area does not inherently render that common area unfit for its intended use provided that the ice presents a mere inconvenience of access. *Allison*, 481 Mich at 430. The principles set forth in *Allison* apply to all common areas, including stairways. *Hadden*, 287 Mich App at 130. Thus, "MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants 'reasonable access' to different building levels." *Id*. (citation omitted).

In *Hadden*, this Court considered whether there was a genuine issue of material fact as to whether the stairway leading to the plaintiff's apartment unit was fit for its intended use by providing tenants with reasonable access to the premises. *Id*. The plaintiff presented evidence that she lived on the second floor of an apartment building owned by the defendant. *Id*. The plaintiff also presented evidence that there was fresh snow and black ice on the stairway, the stairway was unlit, the gutters above the stairway were overflowing with water, and there was no salt on the stairway at the time of her fall. *Id*. at 131. Additionally, the plaintiff presented evidence that she was able to use the stairway without incident on the day before her injury, but called the defendant to complain about the presence of snow and ice on the stairway. *Id*. at 130-131. Based upon this evidence, this Court concluded:

> Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use. [*Id*. at 132.]

Ultimately, this Court held that the evidence presented by the plaintiff was sufficient to establish a genuine issue of material fact as to whether the stairway was fit for its intended use on the date of the plaintiff's injuries. *Id*.

The facts presented by plaintiff in this case bear several similarities to the facts in *Hadden*. Thus, a genuine issue of material fact exists as to whether the rear entranceway to Pine Crest Apartments was fit for its intended use of providing tenants with reasonable access to the premises. Much like the plaintiff in *Hadden*, plaintiff presented evidence that she was aware of the wintry weather conditions and requested that management arrange for the snow to be cleared from the walkways before her second slip and fall. Additionally, plaintiff presented evidence that the stairs and the handrail leading to the rear entranceway were covered in ice, the light above the rear entranceway was broken, and the gutter above the rear entranceway was leaking

water at that time, causing ice to accumulate on the handrail and the stairs. Plaintiff also presented evidence that, on the date of her injuries, she used the stairs to the rear entranceway without issue approximately 12 hours prior to her slip and fall. However, unlike the plaintiff in *Hadden*, plaintiff did not slip on black ice in this case. Thus, plaintiff was not injured by a hidden danger like the plaintiff in *Hadden*.

Michigan law dictates that the stairs to the rear entranceway were not required to be in an ideal condition, nor were they required to be in the most accessible condition possible. *Allison*, 481 Mich at 430. However, reasonable minds could conclude that the presence of snow and ice on the darkly lit, unsalted stairway—possibly caused by overflowing water from overhead gutters—posed a danger that denied tenants reasonable access to different levels of the Pine Crest Apartment building and rendered the stairway unfit for its intended use.

It is true that plaintiff was aware of the presence of the ice at the time of her second slip and fall. Additionally, the open and obvious doctrine provides that a landlord does not owe a tenant a duty to safeguard from open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). An open and obvious danger is known to a tenant or is so obvious that a tenant might reasonably be expected to discover it. *Id*. However, whether plaintiff knew or should have known of the condition of the stairs leading to the rear entranceway does not affect the analysis at hand. Indeed, the open and obvious doctrine is not available to deny liability for a statutory violation under MCL 554.139(1). *Benton*, 270 Mich App at 441. Thus, plaintiff's knowledge of the ice on the stairs at the time of her second slip and fall does not negate the existence of a genuine issue of material fact as to whether the rear entranceway stairs to Pine Crest Apartments were fit for their intended use. In sum, the circuit court erred in determining that there was no genuine issue of material fact as to whether the stairs to the rear entranceway to Pine Crest Apartments were fit for their intended use.

II. PREMISES LIABILITY

Plaintiff argues that there is a question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard that was effectively unavoidable. We disagree.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton*, 270 Mich App at 440. "The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land." *Id*. "A person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee, and a tenant is an invitee of the landlord." *Id*.

A landlord "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo*, 464 Mich at 516. "Absent special aspects, this duty does not extend to open and obvious dangers." *Estate of Trueblood*, 327 Mich App at 285. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). "Generally, the hazard presented by snow and ice is open and obvious, and the

landowner has no duty to warn of or remove the hazard." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 694; 822 NW2d 254 (2012). Michigan courts "impute[] knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). As a matter of law, "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

The hazard presented by the snow and ice that plaintiff encountered on the date of her injuries was open and obvious. On the date of plaintiff's injuries, plaintiff observed that there was snow on the sidewalk from a prior snowfall and it had been snowing throughout the morning. At the time of plaintiff's first slip and fall, there was approximately 2 feet of snow on the ground. Before plaintiff's second slip and fall, she observed that the snow had not been cleared from the sidewalks and salt had not been used to abate the conditions. Furthermore, plaintiff's expert opined that the ice that plaintiff encountered had existed for 31 hours before her first fall, and for 42 hours before her second fall. As a result of plaintiff's prior observations and the duration that the snow and ice were present, a reasonable person in plaintiff's position would have gleaned from the circumstances, as well as common knowledge of weather hazards that occur in Michigan during the winter months, that the sidewalk and rear entryway stairs were slippery. See *Slaughter*, 281 Mich App at 479. Thus, the circuit court did not err in determining that there is no question of fact that the hazard presented by the snow and ice that plaintiff encountered on the date of her injuries was open and obvious.

Although there is no question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard, liability may still arise if the hazard was effectively unavoidable. *Hoffner*, 492 Mich at 463. "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. at 469.

There is no question of fact as to whether the hazard in this case was effectively unavoidable. At the time of plaintiff's slip and falls, she had the option to enter and exit her apartment building through the front door, but chose to enter and exit through the back door because it was convenient to do so. Thus, plaintiff was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building.

"[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998). It is true that plaintiff presented evidence that snow and ice may have also been present at the front door entryway to plaintiff's apartment building. For instance, plaintiff's expert opined that ice existed on untreated surfaces at the location of Pine Crest Apartments on the date of plaintiff's slip and falls. Additionally, plaintiff opined that management did not clear the snow from the sidewalks and did not use salt to abate the conditions. However, plaintiff failed to present specific evidence that the front door entryway presented a hazard similar to the back door entryway. Plaintiff testified that she did not remember whether the front entryway was well-lit

and she was not sure whether the railing leading to the front door entryway was icy. Thus, there is no question of fact as to whether plaintiff was required or compelled to encounter a hazard before entering or exiting her apartment building because the evidence presented by plaintiff only provides speculation that the front door entryway was hazardous and plaintiff could have used an alternate route to enter and exit her apartment building.

Based upon the record, and viewing the evidence in the light most favorable to plaintiff, we conclude that there is a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a), and there is no question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard that was effectively unavoidable.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Christopher M. Murray
/s/ David H. Sawyer

STATE OF MICHIGAN

COURT OF APPEALS

PAMELA BRANCH,

Plaintiff-Appellant,

v

D & S PROPERTY MANAGEMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
December 26, 2019

No. 345882
Macomb Circuit Court
LC No. 2017-001162-NO

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

Plaintiff Pamela Branch slipped and fell twice on the same day. The first fall occurred on a common-area sidewalk, and the second on the steps of her unit. The day was cold, snowy, and icy. Her testimony and that of an expert witness substantiated that the outdoor surfaces of her apartment premises (sidewalks and steps) were coated in ice and snow. Branch used her back door in and out of her apartment because it was closest to her targets (her parked car and her mother's nearby unit).

Branch sued the apartment complex, defendant D & S Property Management, under MCL 554.139(1)(a). This statute imposes a duty on landlords to maintain common areas in a condition "fit for the use intended by the parties." The majority holds that Branch's statutory claim survives summary disposition and I agree, albeit for different reasons. I respectfully dissent as to the dismissal of Branch's premises liability claim.

I. BRANCH'S STATUTORY CLAIM

Defendant contends that because Branch was able to walk on the sidewalk twice without falling, the sidewalk was fit for its intended use. The majority concludes that a question of fact exists regarding the sidewalk's fitness, reasoning that on the fall-free occasions Branch may have walked with extra care or avoided the most slippery spots. These observations are logical but irrelevant. Defendant's argument that the sidewalk was fit because there had been no previous accidents (involving Branch or anyone else) should be rejected because it conflicts with a longstanding legal principle: evidence of the absence of accidents involves unreliable negative

evidence and generally is not probative of a party's negligence. *Grubaugh v City of St Johns*, 82 Mich App 282, 287; 266 NW2d 791 (1978). Just as another tenant's slip and fall on the sidewalk would not have definitely proved defendant's negligence, "it would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Larned v Vanderlinde*, 165 Mich 464, 468; 131 NW 165 (1911).[1]

Defendant also suggests that Branch's decision to use the back door rather than the front door defeats her statutory claim. But defendant presented no evidence regarding the sidewalk conditions in the front of the apartment. MCR 2.116(G)(4) assigns to the *moving* party the task of identifying "the issues as to which the moving party believes there is no genuine issue as to any material fact." If evidence actually exists that the front-door route was safe, it does not appear in the record. Therefore, Branch had no duty to address this question.

II. "MERE INCONVENIENCE"

Citing *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275; 933 NW2d 732 (2019), the majority engages in an analysis of defendant's contention that the ice and snow covering the common areas created a "mere inconvenience," thereby absolving defendant of liability. Correctly, the majority rejects this argument. To the extent *Trueblood* requires a "mere inconvenience" analysis in cases brought under MCL 554.139(1)(a), *Trueblood* misstates the law.

The *Trueblood* Court found that a question of fact existed regarding whether the sidewalk at issue "was completely covered in ice, making the ice more than a mere inconvenience." *Trueblood*, 327 Mich App at 290. "[A] sidewalk completely covered in ice," the Court explained, "is not fit for 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). The majority deems this case analogous.

To the extent that *Trueblood* requires a court to consider whether a sidewalk condition is merely "inconvenient" and therefore not actionable, I respectfully disagree with *Trueblood*. The "mere inconvenience" language derives from *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 430; 751 NW2d 8 (2008). The primary issues presented in *Allison* were whether a parking lot constituted a "common area" under MCL 554.139(1)(a), and whether a lessor had a duty under the statute "with regard to the accumulation of snow and ice in a parking lot." *Allison*, 481 Mich at 430.

A parking lot is a common area, the Supreme Court acknowledged, but analyzed the duty to keep a parking lot "fit for the use intended by the parties" under MCL 554.139(1)(a) based strictly on the "intended use" of a parking lot. *Allison*, 481 Mich at 428-429. The Court

[1] One obvious reason for this rule is that another tenant may have slipped and fallen, but not suffered injury or elected not to report the fall.

explained that the "intended use" of a parking lot is "parking" and "storing" vehicles. *Id*. at 429. Therefore, the Court reasoned,

> 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. A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used. [*Allison*, 481 Mich App at 429.]

The evidence of parking lot unfitness presented in *Allison* consisted of one to two inches of snow, with ice underneath in the areas where the snow had been "displaced." *Id*. at 423. In the Supreme Court's view, this evidence did not suffice to restrict ingress or egress to the parking lot. In other words, a small amount of snow and ice did not deny tenants "reasonable access" to their vehicles. In this context—parking lots harboring a relatively benign amount of snow—the Court added:

> The statute 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. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes. [*Id*. at 430.]

Notably, the "mere inconvenience" concept was limited in *Allison* to a parking lot. Because a sidewalk serves an entirely different "intended use" than a parking lot, the duty to maintain a sidewalk differs meaningfully from that required for a parking lot. *Allison* explicitly recognized this distinction: "A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be *to ensure that the entrance to, and the exit from, the lot is clear*[.]" *Allison*, 481 Mich at 429 (emphasis added). The means of parking lot entry and exit are sidewalks.

Tenants also use sidewalks to enter and exit from their homes. Stairs and banisters function in the same way. As this Court stated in *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010), the standard of care is the preservation of *reasonable* access to and from the premises.

Parties to a lease understand and intend that sidewalks and steps serve purposes different from parking lots. Lessors have a duty to keep the premises "fit" for those intended uses: walking on them. Parking lots are vehicle storage locations, but sidewalks are places for *people* to walk. While a tenant might be inconvenienced at having to maneuver around snow and ice in a parking lot, the presence of that condition does not automatically render the lot "unfit" for parking a vehicle. But the presence of snow and ice on a sidewalk (of which the lessor has reasonable notice, as here) *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. A sidewalk is all about

"access." Therefore, "[m]ere inconvenience of access," when applied to a sidewalk, is an oxymoron.

It goes without saying that a plaintiff who chooses to walk on an icy sidewalk rather than to take an obviously safer path may be found comparatively negligent. But this legal truism does not alter the landlord's duty to maintain the sidewalk or the banister. Both parties must exercise reasonable care. The "mere inconvenience" formulation applied in *Truebolood* to a statutory claim should not be available as a complete defense to a suit involving common areas intended for access to and from one's home.

III. NEGLIGENCE CLAIM

The majority holds that Branch's premises liability claim is foreclosed based on a related doctrine: the snowy and icy sidewalk and banister were "effectively avoidable." The majority asserts that Branch "was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building." This portion of the majority's analysis finds its genesis in *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012). I have previously examined the doctrinal weaknesses of *Hoffner*, and will not restate that particular analysis here. See *Deas v Hartman & Tyner, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2019 (Docket No. 340068) (GLEICHER, J., concurring). The facts of this case provide additional grounds for a careful reexamination of *Hoffner*.

Before addressing those grounds, I respectfully suggest that the majority has misapplied the "effectively unavoidable" doctrine by holding that Branch "had the option to enter and exit her apartment building through the front door," and therefore "was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building." This is undoubtedly true, but critical facts are missing: a description of the conditions outside her front door. No evidence supports that that the front-door route offered safer passage than the path from the rear door. Rather, the evidence presented to the trial court substantiates that *every* surface in the apartment complex was covered in ice and snow, and that taking the front door would have required Branch to spend *more* time traversing the dangerous terrain. Plaintiff testified that there was snow "everywhere," and her expert submitted an affidavit, averring, in relevant part:

> 7. The meteorological facts indicate that the ice Plaintiff encountered would have existed on untreated surfaces at the location of this incident in Warren, Michigan both at 10:00 A.M. and 8:50 P.M. on 2 February 2015.
>
> 8. The meteorological facts indicate that this ice was caused by melting of residual snow and ice on 31 January 2015, which then froze into ice no later than 3:00 A.M. on 1 February 2015. This was then covered by a ten inch snowfall that began on the 1st and ended by 8:00 A.M. on the 2nd. The snow would not have changed the physical characteristics of the ice in any manner whatsoever.
>
> 9. Thus, the meteorological facts indicate clearly and unambiguously that the ice Plaintiff encountered had existed for thirty-one hours before her first fall, and for forty-two hours before her second fall.

I would hold that defendant has utterly failed to support its claim that the dangerous condition was "effectively unavoidable."

More importantly, the "effectively unavoidable" doctrine contradicts bedrock tort principles, and should be jettisoned for that reason.

Under *Hoffner*, an open-and-obvious danger precludes a premises liability claim unless the danger is "effectively unavoidable," a term interpreted in *Hoffner* to mean "an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." *Hoffner*, 492 Mich at 456.[2] As framed by *Hoffner*, the issue is one of "choice." *Id*. at 469. The Court elaborated, "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required or compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. (emphasis in original).

At its core, this analysis is nothing more than a surreptitious resurrection of a long-dead tort precept: assumption of the risk. The now-discredited and abandoned assumption of the risk doctrine began as a defense available only in "cases involving the master-servant relationship," but its reach gradually expanded to include "every conceivable kind of negligence action." *Felgner v Anderson*, 375 Mich 23, 39-40; 133 NW2d 136 (1965). As the Supreme Court pointed out in *Felgner*, 375 Mich at 42, the defense was applied "as a virtual synonym of contributory negligence[.]" "[T]he gist of the defense is that the plaintiff took his chances." *Waltanen v Wiitala*, 361 Mich 504, 508; 105 NW2d 400 (1960).

In *Felgner*, 375 Mich at 46, the Supreme Court officially eliminated the defense in most applications, characterizing its history in our state as "an indefensible misuse of a legal doctrine whose foundations in justice, even when applied properly, are tenuous at best."[3] The Court

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[2] The "effectively unavoidable" framework is not a recognized tort doctrine outside of Michigan. A Westlaw search reveals that no other state has adopted this theory as part of its "open and obvious" jurisprudence.

[3] In support of this proposition, the Supreme Court quoted from an article by Fleming James, Jr., *Assumption of Risk*, 61 Yale L J 141, 168-169 (1952), worthy of reprinting here:

> "The doctrine of assumption of risk, however it is analyzed and defined, is in most of its aspects a defendant's doctrine which restricts liability and so cuts down the compensation of accident victims. It is a heritage of the extreme individualism of the early industrial revolution. But quite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence. The one exception is to be found, perhaps, in those cases where there is an actual agreement. Moreover, the expression has come to stand for two or three distinct notions which are not at all the same, though they often overlap in the sense that they are applicable to the same situation.

declared that assumption of the risk "should not again be used in this State as a substitute for, or as a supplement to, or as a corollary of, contributory negligence . . . . The traditional concepts of contributory negligence are more than ample to present that affirmative defense to established negligent acts." *Id.* at 56.

Here, an orthodox application of *Hoffner* would not focus on the availability of the front steps, but instead would announce that because Branch had a choice to just stay home, the snow and ice on the sidewalk were "effectively avoidable." According to *Hoffner*, tenants must elect to be prisoners in their homes rather than risk falling; if they choose to walk, they alone must pay the price for the landlord's negligence. I suggest a return to the real world of tort. A duty of care is owed to those who may foreseeably suffer injury due to the negligence of a landowner. If the danger created by the landowner's negligence is open and obvious, a jury should decide whether a plaintiff was negligent in having confronted it. And a jury must weigh that negligence against that of the landowner who failed to ameliorate the danger. A tenant who chooses to go out into the snow and ice so she can exercise or take care of her elderly mother may have made a negligent choice. But that is for a jury to decide. "A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care." *Klopp v Wackenhut Corp*, 824 P2d 293, 297 (1992, NM Sup Ct). The relevant inquiry evaluates and compares the conduct of the parties against the standards of care. Whether a danger was "effectively unavoidable" may play a role in that analysis, but should not dictate the outcome.

/s/ Elizabeth L. Gleicher

> Except for express assumption of risk, therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion. For the most part the policy of individualism it represents in outmoded in accident laws; where it is not, that policy can find full scope and far better expression in other language. There is only one thing that can be said for assumption of risk. In the confusion it introduces, it sometimes—ironically and quite capriciously—leads to a relaxation of an overstrict rule in some other field. The aura of disfavor that has come to surround it may occasionally turn out to be the kiss of death to some other bad rule with which it has become associated. We have seen how this may happen with the burden of pleading and proving an exceptional limitation on the scope of defendant's duty. There may be other instances. But at best this sort of thing is a poor excuse indeed for continuing the confusion of an unfortunate form of words." [*Felgner*, 375 Mich at 46 n 7.]

STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MILLER and MARY ANN MILLER,

Plaintiffs-Appellants/Cross-Appellees,

v

J.P. MORGAN CHASE BANK, N.A., METRO CONSULTING ASSOCIATES, LLC, and THE ARCHITECTS PARTNERSHIP, LTD.,

Defendants,

and

SCOTT WESNEY CONSTRUCTION, LLC,

Defendant-Appellee/Cross-Appellant,

and

JONES LANG LASALLE AMERICAS, INC.,

Defendant-Appellee.

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No. 368053
Oakland Circuit Court
LC No. 2022-194368-NO

Before: GADOLA, C.J., and RICK and YATES, JJ.

PER CURIAM.

Plaintiff, Thomas Miller, and his wife, Mary Ann Miller,[1] filed this action against several defendants after plaintiff fell and suffered injuries on property occupied by defendant, J.P. Morgan Chase Bank, N.A. ("Chase"). Plaintiff resolved his claims against Chase and one other defendant while the action was pending, but plaintiff litigated the case to conclusion against three defendants,

[1] Mary Ann Miller's involvement in this case is limited to her claim for loss of consortium, so we will refer to Thomas Miller as "plaintiff."

including Scott Wesney Construction, LLC ("Wesney"), and Jones Lang LaSalle Americas, Inc. ("Jones"). Both of those defendants, which worked on construction of an entrance to a Chase bank branch, obtained summary disposition under MCR 2.116(C)(10). Plaintiff appeals of right the trial court's order granting that relief, and Wesney has filed a cross-appeal. We affirm the trial court's award of summary disposition to Wesney and Jones, so we need not address the cross-appeal.

I. FACTUAL BACKGROUND

In 2017 and 2018, Chase hired several companies, including Wesney and Jones, to design and construct a new entrance to its branch office in Waterford. The new entrance along the east side included a ramp that was compliant with the Americans With Disabilities Act (ADA), 42 USC 12101 *et seq*. A new sloped sidewalk was constructed on the west side that did not comply with the ADA, but replaced a level sidewalk. Jones served as the construction manager for the project, and Wesney performed construction work on the project.

On March 22, 2021, plaintiff went to the bank at about 3:00 p.m. to handle some business, and he admitted at his deposition that the weather was "gorgeous" that day. He parked his vehicle facing the bank's entrance, and he walked along the driver's side of his vehicle to enter the bank. Plaintiff stepped up onto a curb to reach the sloped sidewalk on the west side to walk into the bank. When he walked over the curb to enter the bank, he admitted that he did not trip because he could see the height difference between the parking lot and the curb for the sloped sidewalk.

Plaintiff conducted business inside the bank for about five minutes and then walked back to his vehicle using the same path that he took to enter the bank. Although plaintiff watched where he was going, he was not looking down at his feet. As he stepped down from the sidewalk to the parking lot with his right foot, he thought he saw a step. When plaintiff moved his right foot off the sidewalk, his leg gave out and he fell down onto the parking lot. He agreed there was no debris or other substance in the parking lot that caused his fall. Plaintiff was assisted by a passerby after he suffered severe injuries as a result of the fall.

There was no yellow paint along the curb or sidewalk edge where plaintiff fell. The curb and a two-foot-wide area of the parking lot abutting the sloped sidewalk were made of the same material at the time of plaintiff's fall. Plaintiff believed that the height of the curb was not standard, but the curb ranged from about seven inches to three or four inches. The sloped sidewalk and curb, as well as the approximate location where plaintiff fell, are depicted in this photograph:

Plaintiff believed that if the sidewalk curb had been painted, he would have paid more attention to it when he left the bank and approached his vehicle. Specifically, he thought that the paint would have alerted him to the height discrepancy of the sidewalk as it slanted down. Plaintiff agreed that he did not fall when he went over the curb to enter the bank because he could readily see the height discrepancy from that angle as he stepped up onto the curb.

In plaintiff's third amended complaint, he pleaded a premises-liability claim against Chase as the occupant of the property. Plaintiff presented an ordinary negligence claim against the other four defendants for their involvement in the design and construction of the changes to the entrance of the bank branch. Plaintiff generally alleged that the sidewalk where he fell was neither designed nor constructed in a reasonably safe manner. In particular, there was no marking or paint applied to the curb, even though the previous sidewalk curb had been painted yellow. He alleged that the applicable building codes were not followed, and the completed construction included a hazardous and dangerous condition that caused his fall. During the course of the proceedings, Chase and an engineering firm, Metro Consulting Associates, LLC, resolved plaintiff's claims against them and were dismissed from the action. The other three defendants, including Jones and Wesney, obtained summary disposition.[2]

[2] The third defendant, The Architects Partnership, Ltd., obtained relief under MCR 2.116(C)(7) on the theory that plaintiff's claim against it was barred by the statute of limitations. That theory was not advanced by Wesney and Jones, and plaintiff has not appealed the summary disposition award in favor of The Architects Partnership, Ltd., here, so we need not address the statute of limitations.

The trial court granted summary disposition under MCR 2.116(C)(10) to Jones and Wesney in a written opinion and order issued on September 22, 2023. Specifically, the trial court reasoned that the negligence claim against Jones was more accurately characterized as a premises-liability claim, and Jones plainly was not the owner or possessor of the land on which plaintiff fell, so Jones was entitled to summary disposition under MCR 2.116(C)(10). Turning to Wesney, the trial court explained that plaintiff "failed to present facts to demonstrate the step posed an unreasonable risk of harm because [Wesney] did not mark the step with a contrasting color," so Wesney was entitled to summary disposition under MCR 2.116(C)(10). Plaintiff thereafter appealed those rulings.

II. LEGAL ANALYSIS

On appeal, plaintiff contests the trial court's decisions to award summary disposition under MCR 2.116(C)(10) to Jones and Wesney. We review de novo the trial court's rulings on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "A motion under MCR 2.116(C)(10) . . . tests the *factual sufficiency* of a claim." *Id.* at 160. When addressing such a motion, "a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* The motion "may only be granted when there is no genuine issue of material fact." *Id.* "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds might differ.' " *Id.* With these standards in mind, we will analyze the summary disposition award to each of the defendants in turn.

A. THE NEGLIGENCE CLAIM AGAINST JONES

The trial court based its ruling granting summary disposition to Jones on the determination that plaintiff's negligence claim against Jones "is a classic premises liability claim," rather than an ordinary negligence claim. "Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land." *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 625; 971 NW2d 716 (2021). "Whether the gravamen of an action sounds in negligence or in premises liability is determined by considering the plaintiff's complaint as a whole, regardless of the labels attached to the allegations by the plaintiff." *Id.* "When it is alleged that the plaintiff's injuries arose from a dangerous condition on the land, the claim is one of premises liability rather than one of ordinary negligence." *Id.* If the claim sounds in premises liability, rather than ordinary negligence, a defendant that "is not an owner, possessor, or occupier of the premises . . . cannot be held liable on a premises-liability theory." *Bowman v Walker*, 340 Mich App 420, 426; 986 NW2d 419 (2022). Because Jones cannot possibly be characterized as an owner, possessor, or occupier of the premises where plaintiff fell and injured himself, the trial court properly awarded summary disposition to Jones under MCR 2.116(C)(10) if plaintiff's claim against Jones sounded in premises liability.

Here, as in *Wilson v BRK, Inc*, 328 Mich App 505, 512; 938 NW2d 761 (2019), plaintiff's "lawsuit ultimately concerns an injury arising from an allegedly dangerous condition on the land, i.e., a step that must be navigated . . . in order to enter and exit" the premises. Plaintiff had to step up from the parking lot onto the curb and sidewalk to enter the Chase bank, and then he had to step down from the sidewalk and curb onto the parking lot surface to return to his vehicle. The step up and the subsequent step down involved encountering what plaintiff described in his complaint as a dangerous condition on the premises, which turned his claim against Jones into one that sounded

in premises liability, rather than ordinary negligence. See *id*. at 512-513. And because Jones was "not an owner, possessor, or occupier of the premises, [Jones] cannot be held liable on a premises-liability theory." *Bowman*, 340 Mich App at 426.

Plaintiff insists he may separately state a claim involving a theory independent of premises liability based on the conduct of Jones. See *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 14-15; 930 NW2d 393 (2018). In making that argument, plaintiff concedes—as he must—that he must have proof of additional conduct by Jones beyond the fulfillment of its contractual obligations that was the proximate cause of plaintiff's injuries. In other words, plaintiff cannot rely simply on the existence of the hazardous condition. Although Jones was involved in the construction project, Jones completed that work in 2018. Plaintiff fell in the parking lot in 2021, nearly three years after Jones completed its work. Because Jones had no continuing involvement with the Chase premises after the final inspection occurred on April 6, 2018, and plaintiff has no evidence that his fall was traceable to anything involving Jones other than the allegedly dangerous condition on the premises, the trial court appropriately treated plaintiff's claim against Jones as sounding in premises liability and correctly awarded summary disposition to Jones under MCR 2.116(C)(10).

B. THE NEGLIGENCE CLAIM AGAINST WESNEY

The trial court granted summary disposition under MCR 2.116(C)(10) to Wesney based on the observation that plaintiff "failed to present facts to demonstrate the step [from the parking lot to the curb and sidewalk] posed an unreasonable risk of harm because [Wesney] did not mark the step with a contrasting color." As a threshold matter, plaintiff claims the trial court erred because it resolved the motion on that basis even though Wesney did not raise that issue in its motion for summary disposition. One of the grounds cited by Wesney in its motion was that, even if plaintiff could prove that Wesney owed a duty to him, plaintiff was the proximate cause of his injuries and Wesney did not do anything that created an unreasonable risk of harm to anybody. That argument formed the basis for the trial court's decision. Accordingly, we reject plaintiff's claim that the trial court resolved the case on a theory that Wesney did not present.

Turning to the merits of the trial court's ruling, we acknowledge that plaintiff alleged that Wesney was liable for design and construction defects by not following applicable building codes, and that Wesney's construction work created a hazardous and dangerous condition, including the failure to mark the edges of the sidewalk so customers could see where the sidewalk ended at the parking lot. But for two reasons, plaintiff cannot prevail on his negligence claim against Wesney. All negligence claims "require a plaintiff to prove four essential elements: duty, breach, causation, and harm." *Kandil-Elsayed v F & E Oil Co*, 512 Mich 95, 110; 1 NW3d 44 (2023). Hence, unless plaintiff can meet all four of those requirements, his negligence claim must fail. Because plaintiff cannot establish either duty or causation, his negligence claim against Wesney is fatally flawed.

Duty " 'is essentially a question whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person.' " *Kandil-Elsayed*, 512 Mich at 110 (citation omitted). "[W]hether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides." *Id*. (quotation marks and citation omitted). Here, plaintiff contends that Wesney owed a duty to provide some form of warning that there was a step down from the sidewalk to the parking lot because nothing made the step apparent. In *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), our Supreme Court discussed

cases involving steps and noted that "the general rule emerged that steps and differing floor levels were not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Id*. at 614. Our Supreme Court explained that, "because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety." *Id*. at 616. So under "ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps 'foolproof.' " *Id*. at 616-617. But if "there is something unusual about the steps, because of their 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains." *Id*. at 617.

In the companion case to *Bertrand*, *Maurer v Oakland Co Parks & Recreation Dep't*, 449 Mich at 618-621, our Supreme Court decided that there was no duty owed to the plaintiff because she testified that she did not see a step as she left a restroom. In language readily applicable to the instant case, our Supreme Court commented that, because "[t]he plaintiff's only asserted basis for finding that the step was dangerous was that she did not see it[,] the plaintiff has failed to establish anything unusual about the step that would" give rise to a duty. *Id*. at 621. As our Supreme Court put it, "[b]ecause the plaintiff has not presented any facts that the step posed an *unreasonable* risk of harm, the trial court properly granted summary disposition." *Id*. Faithfully applying that logic, we conclude that Wesney was entitled to summary disposition under MCR 2.116(C)(10) because it owed no duty to plaintiff.

Beyond that, even assuming for the sake of argument that Wesney owed plaintiff a duty to identify the drop-off from the sidewalk and curb to the parking lot, Wesney would still be entitled to summary disposition under MCR 2.116(C)(10) because plaintiff has not created a genuine issue of material fact with respect to the separate element of causation. Plaintiff navigated the step with no difficulty on his way into the bank. He stayed in the bank for only about five minutes. Plaintiff then walked out of the bank and fell at the very same place where he had just been on his way into the bank. Despite plaintiff's claim that he would have paid more attention if Wesney had painted the step, plaintiff acquired notice of the step when he walked into the bank. Simply looking where he was going when he left the bank would have prevented him from losing his footing because he admitted that he walked toward the parking lot without looking down. Thus, the trial court did not err in awarding summary disposition to Wesney under MCR 2.116(C)(10).

Affirmed.

/s/ Michael F. Gadola
/s/ Michelle M. Rick
/s/ Christopher P. Yates