RECEIVED by MSC 10/3/2025 11:29:40 AM

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

JAN BOWERMAN,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

MSC No. 167718

COA No. 366338

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

Filed under AO 2019-6

Plaintiff-Appellant's Reply Brief on Appeal

- Oral Argument Requested -

Christopher Patrick Desmond (P71493)
Thomas P. Carr (P87746)
Ven Johnson Law, PLC

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

Counsel for Plaintiff-Appellant

Date: October 3, 2025

RECEIVED by MSC 10/3/2025 11:29:40 AM

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ARGUMENT 1

I. Westveld breached its duty to use ordinary care in the work it performed at the apartment complex 1

A. Westveld's duty of care was rooted in negligence, not premises liability 1

B. Westveld's arguments addressing ordinary negligence are unavailing 4

1. Westveld's Legal Arguments 4

2. Westveld's Factual Arguments 5

CONCLUSION AND RELIEF REQUESTED 7

RECEIVED by MSC 10/3/2025 11:29:40 AM

INDEX OF AUTHORITIES

Cases

Buhalis v Trinity Continuing Care Servs,
296 Mich App 685; 822 NW2d 254 (2012) 3

Clark v Dalman,
379 Mich 251; 150 NW2d 755 (1967).....1, 2, 4, 5

Ferrett v General Motors Corp,
438 Mich 235; 475 NW2d 243 (1991).....5

Finazzo v Fire Equip Co,
323 Mich App 620; 918 NW2d 200 (2018) 1, 2, 4

Fraim v City Sewer of Flint,
474 Mich 1101 (2006) 3

Fultz v Union-Commerce Associates,
470 Mich 460; 683 NW2d 587 (2004).....3, 4

Garrett v Sam H Goodman Bldg Co,
474 Mich 948 (2005) 2, 3

Garrett v Sam H Goodman Bldg Co,
unpublished per curiam opinion of the Court of Appeals, issued March 17, 2005 (Docket No. 251793).....2

Kandil El-Sayed v F & E Oil, Inc,
512 Mich 95; 1 NW3d 44 (2023).....3, 5

Loweke v Ann Arbor Ceiling,
489 Mich 157; 809 NW2d 553 (2011).....4, 5

Lugo v Ameritech Corp,
464 Mich 512; 629 NW2d 384 (2001).....3

Osman v Summer Green Lawn Care Inc,
209 Mich App 703; 532 NW2d 186 (1995) 4

Statutes

MCL 691.1402a(3)(a) 6

Other Authorities

Prosser & Keeton, Torts (5th ed).....5

RECEIVED by MSC 10/3/2025 11:29:40 AM

RECEIVED by MSC 10/3/2025 11:29:40 AM

ARGUMENT

Westveld and Red Oak both argue that the Court of Appeals' opinion is correct. They're wrong. The court's opinion should be reversed. Nothing raised by either Defendant changes that. That said, some of Westveld's arguments merit a response. Plaintiff's arguments relative to Red Oak, however, stand on their own merit. This brief thus offers a response to Westveld alone.

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

A. Westveld's duty of care was rooted in negligence, not premises liability.

Westveld continues to argue that Plaintiff's negligence claim sounds in premises liability. And because the claim sounds in premises liability, Westveld contends it didn't owe Plaintiff a duty of care because it didn't possess or control the apartment complex. That argument is wrong and should be rejected.

Westveld spends a lot of time discussing *Finazzo v Fire Equip Co*, 323 Mich App 620; 918 NW2d 200 (2018). But *Finazzo* contains a thorough ordinary-negligence analysis. *Id.* at 634-638. It makes sense that Westveld largely avoids this part of the opinion, given sentences like "[c]ontractors 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. So if the *Finazzo* court held that the plaintiff's action "sounded solely in premises liability" like Westveld claims, it certainly didn't do a very good job of saying so. (Westveld Brief, p 14). But that's because the court *wasn't* saying so. Indeed, in discussing the plaintiff's negligence claim against the defendant contractor, the court—like Plaintiff does here—relied on *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967):

> In discussing the duty at issue ***in this case***, the *Clark* Court noted that ***a basic rule of common law***
>
> > imposes on every person engaged in the prosecution of any undertaking an obligation

RECEIVED by MSC 10/3/2025 11:29:40 AM

> to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. [*Finazzo*, 323 Mich App at 635, quoting *Clark*, 379 Mich at 261 (emphasis added).]

The *Finazzo* court thus held that the defendant owed the plaintiff an ordinary-negligence duty of care ("the duty at issue in this case"), and that duty of care stemmed from the "basic rule of common law" articulated in *Clark*. *Id.* That same "basic rule of common law" applies here and imposes an ordinary-negligence duty on Westveld. So not even *Finazzo* supports Westveld's position. The only reason the plaintiff didn't prevail there was because the defendant's conduct didn't unreasonably endanger the plaintiff, not because the defendant didn't owe the plaintiff a duty. *Id.* at 636-637.

Westveld ultimately cites numerous cases it says stand for the proposition that if a plaintiff is injured by a condition on land, the only available cause of action is a premises-liability claim—no matter who the defendant is or whether the defendant possesses and controls the premises. Multiple orders from this Court dispel that notion.

Take *Garrett v Sam H Goodman Bldg Co*, 474 Mich 948 (2005), for example. The plaintiff there was having work done on her home. As part of the construction process, the defendant contractor removed a concrete step that led to the side door of the plaintiff's home. The defendant never returned the step, and the plaintiff fell and injured herself when she later attempted to exit her house from the side door. *Garrett v Sam H Goodman Bldg Co*, unpublished per curiam opinion of the Court of Appeals, issued Mar. 17, 2005 (Docket No. 251793) (Ex 1).[1]

[1] This Court's order reversing the Court of Appeals does not describe the facts of the case, so Plaintiff relies on the facts set forth in the Court of Appeals' opinion.

RECEIVED by MSC 10/3/2025 11:29:40 AM

The *Garrett* plaintiff was thus injured from a condition on the land. But this Court held that the defendant could not avail itself of the open-and-obvious doctrine—a premises-liability defense—because the defendant was not the premises possessor. *Garrett*, 474 Mich at 948. Instead, the Court applied a *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), analysis to the plaintiff's negligence claim. The upshot is plain: If a defendant doesn't possess or control the land, their duty cannot lie in premises liability. But that does not foreclose liability grounded in ordinary negligence. See also *Fraim v City Sewer of Flint*, 474 Mich 1101 (2006) (affirming the Court of Appeals' ruling that the trial court properly denied summary disposition, but reversing the Court of Appeals' reliance on the open-and-obvious doctrine—finding instead that the doctrine was "inapplicable" because the "defendant did not possess or control the premises within which plaintiff was injured.").

At bottom, every case Westveld cites to support its argument that Plaintiff's negligence claim sounds exclusively in premises liability concerns a plaintiff suing a *premises possessor* for an injury sustained by a condition on the land. Many of these cases are emblematic of a common thread running through Michigan's premises-liability and negligence jurisprudence in the time between *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), and *Kandil El-Sayed v F & E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023). In that time frame, defendants attempted to turn every case into a premises-liability case so they could reap the benefits of the open-and-obvious doctrine. Plaintiffs, meanwhile, tried to make classic premises-liability cases—i.e., suing a premises possessor for a slip-and-fall—ordinary-negligence cases so they could avoid the doctrine's harsh consequences. Defendants ran to the doctrine, while plaintiffs ran from it.

Another case Westveld cites, *Buhalis v Trinity Continuing Care Servs*, is a classic example of the latter situation. 296 Mich App 685; 822 NW2d 254 (2012). It concerns a run-of-the-mill slip-and-fall on ice. Yet the plaintiff alleged that the premises possessor was liable for ordinary negligence. The court understandably rejected that argument, holding instead that the defendant's "liability arises solely from the defendant's

RECEIVED by MSC 10/3/2025 11:29:40 AM

duty *as an owner, possessor, or occupier of land*." *Id.* at 692 (emphasis added).

But that's not our situation here. Westveld's liability doesn't stem from possession of land. It stems from its "common-law duty to perform [its] work with ordinary care so as not to unreasonably endanger" people like Plaintiff. *Finazzo*, 323 Mich App at 634. Westveld is wrong to conclude otherwise. This is a negligence claim, not a premises-liability claim.

B. Westveld's arguments addressing ordinary negligence are unavailing.

1. Westveld's Legal Arguments

Westveld's arguments addressing the substance of Plaintiff's negligence claim fare no better. Start with its most glaring mistake: it's misunderstanding of *Clark*, *Fultz*, *Osman v Summer Green Lawn Care Inc*,[2] and *Loweke v Ann Arbor Ceiling*.[3]

Westveld seems to draw from these cases an unspoken premise: evidence of a contract defining the contours of a contractor's duty of care is necessary for a plaintiff to state a negligence claim against a contractor. This Court squarely rejected that view in *Loweke*. Indeed, much of Westveld's analysis on this front is undermined by even a cursory read of *Loweke*.

Loweke makes clear that what a contract does or doesn't say—in other words, how the parties define the scope of their work—is irrelevant. The Court noted that "[d]etermining 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." *Id.* at 169. Instead, the relevant question is whether "a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to

---

[2] 209 Mich App 703; 532 NW2d 186 (1995).

[3] 489 Mich 157; 809 NW2d 553 (2011).

RECEIVED by MSC 10/3/2025 11:29:40 AM

another." *Id.* And that duty 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." *Id.* at 169-170 (cleaned up). The Court then used *Clark* as an example of a situation in which a common-law duty arises irrespective of a contract: "In *Clark*, the duty 'imposed by law' was 'the general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully on the site of the project[.]'" *Id.* at 170, quoting *Ferrett v General Motors Corp*, 438 Mich 235, 245-246; 475 NW2d 243 (1991).

So, to summarize: "Entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there exists a preexisting obligation or duty to avoid harm when one acts." *Id.* (alternations removed), quoting Prosser & Keeton, Torts (5th ed), § 92, pp 656-657. This is the principal point Westveld misconstrues. A contract is irrelevant. It doesn't matter that "Westveld completed the scope of its work under its contractual duty for services," (Westveld Brief, p 27); or that "there was no contractual relationship between Plaintiff and Westveld," (Westveld Brief, p 28). Nor does it matter that "there is no evidence that the contract obligated Westveld to fill the trench, install guards, or warning signs around the trench." (Westveld Brief, p 31). What matters is that Westveld had a common-law duty to use due care in its undertaking—a duty that it breached.

2. Westveld's Factual Arguments

A few words on Westveld's fact-based breach arguments. Plaintiff's principal brief sets forth facts that support a finding that Westveld breached its common-law duty to use due care. And whether a defendant breached its duty of care, as this Court well knows, is typically a question of fact. *Kandil-Elsayed*, 512 Mich at 112. So there's at least fact questions to be resolved by a jury on this front. Westveld argues otherwise, however, and it makes several fact-based arguments to do so. Each is unpersuasive.

First, the picture Westveld includes in its statement of facts that purports to show tape surrounding the trench was taken after Plaintiff's

RECEIVED by MSC 10/3/2025 11:29:40 AM

injury. (App'x, p 057a). Eric Koch, Red Oak's construction specialist, testified that there was no tape surrounding the trench on October 21, 2021, the day Westveld finished the project. (App'x, p 095a). Plaintiff's own testimony and personal notes confirm Koch's recollection. (App'x, p 151a).

Second, Westveld remarks that the trench was "only around 3 inches deep." (Westveld Brief, p 20). To Westveld, this is "an ordinary elevation change" that doesn't create "an unreasonable risk of harm." (Westveld Brief, p 20).

Set aside for a moment the fact that this apartment complex only houses elderly and disabled tenants. And set aside the testimony that the trench was closer to four-to-five inches deep. (App'x, p 095a). This trench abutted a sidewalk. Our Legislature has determined that a sidewalk with just two inches of vertical discontinuity is in unreasonable repair. MCL 691.1402a(3)(a). The Legislature has thus demonstrated concern for elevation changes even less than that seen here. The necessary implication of Westveld's view, it seems, is that every legislator who voted in favor of MCL 691.1402a(3)(a) was unreasonable as a matter of law. They were not. Westveld's only-three-inches argument doesn't make much sense.

Third, the notion that the concrete slab was a different color than the trench is immaterial. Take a look again at the picture on page 12 of Plaintiff's principal brief. To say that the dark-gray concrete slab would put anyone on notice of a darkness-covered trench is a stretch. It wouldn't take much heavy lifting to convince a jury that it was unreasonable for Westveld to rely on tenants like Plaintiff (1) recognizing the slight color discrepancy, (2) making the connection that the discrepancy warns of the trench, and then (3) avoiding the trench based solely on the color discrepancy—especially given that there were numerous trenches throughout the property. Westveld is free to argue to a jury that each resident should have kept a mental inventory of every trench on the property and their corresponding warning-sign landmarks. But that argument shouldn't win the day in this Court.

RECEIVED by MSC 10/3/2025 11:29:40 AM

* * *

None of Westveld's arguments are compelling. Not legally nor factually. Judge Mariani's dissent below got this case right. The Court should reverse the Court of Appeals' decision granting Westveld and Red Oak summary disposition.

CONCLUSION AND RELIEF REQUESTED

The Court should reverse the Court of Appeals' decision affirming the trial court's grant of summary disposition to Defendants Westveld and Red Oak.

Respectfully submitted,

Ven Johnson Law, PLC

/s/ *Christopher P. Desmond*

Christopher P. Desmond (P71493)
Thomas P. Carr (P87746)
535 Griswold Street, Ste 2600
Detroit, MI 48226
313-324-8300
CDesmond@VenJohnsonLaw.com
TCarr@VenJohnsonLaw.com

Counsel for Plaintiff-Appellant

Date: October 3, 2025

RECEIVED by MSC 10/3/2025 11:29:40 AM

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 2,098 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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

RECEIVED by MSC 10/3/2025 11:29:40 AM

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

JAN BOWERMAN,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

MSC No. 167718

COA No. 366338

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

Filed under AO 2019-6

Plaintiff-Appellant's Index of Exhibits to Reply Brief

- Oral Argument Requested -

Christopher Patrick Desmond (P71493)
Thomas P. Carr (P87746)
Ven Johnson Law, PLC

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

Counsel for Plaintiff-Appellant

Date: October 3, 2025

RECEIVED by MSC 10/3/2025 11:29:40 AM

TABLE OF CONTENTS

- **Exhibit 1** - *Garrett v Sam H Goodman Bldg Co*, unpublished per curiam opinion of the Court of Appeals, issued March 17, 2005 (Docket No. 251793)

RECEIVED by MSC 10/3/2025 11:29:40 AM

STATE OF MICHIGAN

COURT OF APPEALS

NANCY GARRETT,

Plaintiff-Appellant,

v

SAM H. GOODMAN BUILDING COMPANY, INC., and DONALD BRYANT, d/b/a D & B CEMENT,

Defendants-Appellees.

UNPUBLISHED
March 17, 2005

No. 251793
Wayne Circuit Court
LC No. 02-226727-NI

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Bryant pursuant to MCR 2.116(C)(10) and dismissing plaintiff's claims against all defendants. We affirm, but for reasons other than those stated by the trial court.

Plaintiff was having work done on her home. While construction of the home was underway, trucks needed to drive across plaintiff's driveway to access other homes under construction. During this time period, plaintiff had a moveable concrete step on the side of her home. Defendant was hired for the construction of a concrete driveway, walkway and other structures within plaintiff's home. The moveable concrete step had been moved so that the gravel could be stripped from the area and concrete forms could be put in place. The side door of plaintiff's home could not be used from the time the grading was done until after the concrete was poured. Defendant Goodman's employee admitted that the concrete step had been removed and never returned to the side door. After the pouring of the concrete, plaintiff assumed that the step had been returned and so she exited her house from the side door and without the step, she fell and sustained numerous injuries.

On appeal, plaintiff argues that the trial court incorrectly determined that the open and obvious danger doctrine applies to claims of negligence that do not sound in premises or product liability and to claims of breach of contract. Plaintiff argues that there is a question of fact regarding defendants' duties. We disagree. Whether defendants owed a duty to plaintiff is a question of law. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). This Court reviews questions of law de novo. Similarly, "this Court applies a de novo standard when reviewing motions for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim." *Dressel v Ameribank*, 468 Mich 557, 561; 664

RECEIVED by MSC 10/3/2025 11:29:40 AM

NW2d 151 (2003). In evaluating a motion under MCR 2.116(C)(10), "a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

Our Supreme Court has held that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort, as well as a breach of contract." *Fultz, supra* at 465. With regard to plaintiff's negligence claims:

> [i]t is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 n 10; 485 NW2d 676 (1992). The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. 'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.' *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). [*Fultz, supra* at 463.]

Addressing the defendant's duty in *Fultz*, our Supreme Court stated, "[t]he threshold question for negligence claims brought against a contractor on the basis of a maintenance[1] contract between a premises owner and that contractor is whether the contractor breached a duty *separate and distinct from those duties assumed under the contract*." *Id*. at 461-462 (emphasis added). "[A] tort action will not lie when based solely on the nonperformance of a contractual duty." *Id*. at 466.

Therefore, before this Court can determine whether defendant Goodman or defendant Bryant owed plaintiff a duty that is separate and distinct from their contractual duties, it must first determine what contractual duties are owed to plaintiff. Specifically, this Court must determine whether defendant Goodman had a duty to replace the step beneath plaintiff's side door once the walkway was completed. The trial court, however, never directly addressed plaintiff's breach of contract claim against defendant Goodman, but rather, dismissed all of plaintiff's claims on the basis that the missing step was open and obvious.

"The main goal of contract interpretation generally is to enforce the parties' intent." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). "Ambiguities in a contract generally raise questions of fact for the jury; however, if a contract must be construed according to its terms alone, it is the court's duty to interpret the language." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003). In this case, plaintiff never offered

---

[1] Although the Supreme Court's ruling in *Fultz* dealt with the negligent performance of a maintenance contract, there is nothing in the opinion to suggest that its reasoning would not apply with equal force to a construction contract, as in the present case.

RECEIVED by MSC 10/3/2025 11:29:40 AM

a written contract into evidence or alleged any specific oral representations by defendant Goodman that the step would be replaced, so even viewing the evidence in a light most favorable to plaintiff, we have no basis on which we could infer that replacing the step was part of plaintiff's reasonable expectations or defendant Goodman's duties under the contract. In addition, this Court held in *McDowell v Detroit*, 264 Mich App 337; 690 NW2d 513 (2004) that where a claim sounds in tort, irrespective of the wording of the complaint, this Court may use the same analysis utilized in reviewing a summary disposition motion for a tort action. *Id.* at 355-356. Like the court in *McDowell*, *supra*, after careful review of the plaintiff's contract claims, we are convinced that they are merely a recapitulation of plaintiff's tort claims. Thus, because plaintiff has failed to demonstrate any evidence that would allow this Court to infer a contract regarding the return of the moveable step and because plaintiff's contract claim sounds in tort rather than in contract law, we affirm the trial court's grant of summary disposition.

Returning to plaintiff's negligence claims, although, as a general rule, those persons or parties foreseeably injured by the negligent performance of a contractual duty are owed a duty of care, *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002), neither defendant Goodman nor defendant Bryant owed plaintiff a duty of care that was separate and distinct from their duties under the contract. Plaintiff only alleges that defendant Goodman and defendant Bryant had a duty to "provide a product and conditions which were useable and safe and [were] negligent in not having done so." This duty arose solely because of the contract between plaintiff and defendant Goodman. Because no independent duty exists, plaintiff cannot maintain her tort actions based on the contract. *Fultz*, *supra* at 467. It was, therefore, unnecessary for the trial court to apply the open and obvious danger doctrine to defeat defendant Goodman's and defendant Bryant's duties.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello