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

JAN BOWERMAN,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

and

BOB'S ASPHALT & PAVING, INC.,

Defendant.

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

DEFENDANT-APPELLEE WESTVELD SERVICES, LLC'S SUPPLEMENTAL ANSWER BRIEF

Oral Argument Requested

PROOF OF SERVICE

Respectfully Submitted,

/s/ L. Charlynn Turner
L. CHARLYNN TURNER (P80746)
SECREST WARDLE
Attorneys for Defendant-Appellee
Westveld Services, LLC
2600 Troy Center Dr #100
Troy, MI 48084
(248) 851-9500

Dated: September 19, 2025

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STATEMENT OF QUESTION PRESENTED

As directed by this Court's June 6, 2025 MOAA Order, the question presented with respect to defendant Westveld Services, LLC is whether there is a genuine issue of material fact that exists regarding whether Westveld Services, LLC breached a duty owed to the plaintiff.

The trial court answered: "No."

The Court of Appeals majority answered: "No."

Defendant-Appellee Westveld Services, LLC answers: "No."

Plaintiff-Appellant answers: "Yes."

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COUNTER-STATEMENT OF FACTS

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

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

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

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

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

Again, it is worth repeating that Plaintiff-Appellant was admittedly aware of the trench, as she described taking a specific path around the concrete pad several times prior to her trip and fall in order to avoid the trench.[11] Plaintiff-Appellant

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

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explained that she took her trash out every day, but normally did it during daytime hours, and that she was aware of where the trench was located.[12]

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

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

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[12] **Id.**, pp 62-63, **Appx.**, p 82.
[13] **Id.**, pp 37, 51, **Appx.**, pp 80-81.
[14] **Id.**, p 51, **Appx.**, p 81.
[15] **Westveld's Ex. 5-E**, Deposition Testimony of Eric Koch, **Appx.**, p 88.
[16] **Id.**, pp 24-45, **Appx.**, p 87.
[17] **Westveld's Ex. 5-C**, Deposition Testimony of Randy Westveld, pp 41-42, **Appx.**, pp 67-68.
[18] **Westveld's Ex. 5-E**, Deposition Testimony of Eric Koch, p 26, **Appx.**, p 88.
[19] **Id.**, pp 32-33, **Appx.**, p 89.

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the original plan was for Bob's Asphalt to come out quickly after Westveld completed its work, but Bob's Asphalt was inexplicably delayed. [20]

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



[20] **Id.**, pp 32-33, **Appx.**, p 91.
[21] **Westveld's Ex. 5-B**, Deposition Testimony of Randy Westveld, pp 20, 22, 36, **Appx.**, pp 62-63, 66.
[22] **Westveld's Ex. 5-D**, Deposition Testimony of Jan Bowerman, **Appx.**, p 78.
[23] **Id**. at **Appx.**, p 66.
[24] **Id.** at pp 16-17, 26-27, 30-31, 36, **Appx.**, pp 61, 64, 65-66.

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

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

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

Based on the above factual record, Westveld moved for summary disposition, arguing that there was no relationship between it and the Plaintiff that could give

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rise to a tort duty. Alternatively, Westveld argued that, to the extent Plaintiff was really trying to assert a premises liability claim against it, there was no duty because the condition was open and obvious. At the hearing on Westveld's motion, Westveld advanced an additional argument that, as a premises liability claim, liability could not be imposed because Westveld had no possession or control over the premises when Plaintiff-Appellant's injury occurred.[25]

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

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

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Following the trial court's ruling, Plaintiff-Appellant then appealed the trial court's decision, as of right, to the Court of Appeals. Following briefing and oral argument, the Court of Appeals issued a 2-1 unpublished opinion affirming the trial court's decision. The majority acknowledged that Plaintiff-Appellant's claim arises from a condition on the land, i.e., the trench in the parking lot, but nevertheless decided to address Plaintiff-Appellant's arguments on appeal in the context of both premises liability and ordinary negligence, providing multiple alternative grounds for affirmance.

With respect to the claim being analyzed under a premises liability theory, the majority concluded that it is clear Westveld lacked possession and control over the premises at the time of Plaintiff-Appellant's injury, and therefore, Plaintiff-Appellant's claim failed at the outset because possession and control is a precursor to a duty being implicated. Notwithstanding the lack of possession and control, the majority concluded that, based on the record, it was beyond dispute that Westveld did not breach its duty owed to Plaintiff under either a premises liability theory or ordinary negligence.[30]

In particular, with respect to Plaintiff's claim of ordinary negligence, the majority alternatively held, as a separate grounds for affirmance, that there was no evidence of Westveld's breach that generated a question of fact because based on the factual record there was no evidence that Westveld breached its general duty to

[30] **Westveld's Ex. 2**, Court of Appeals Majority Opinion, **Appx.**, pp 13-19.

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perform its contractual work so as to not create an unreasonable risk of harm – which is the standard of care that must be shown to be breached.[31]

In dissent, Judge Mariani agreed with the majority that Westveld lacked possession and control over the premises, and, therefore, that it is not subject to liability under a premises liability theory. But Judge Mariani disagreed with the majority that an ordinary negligence claim could not move forward. In reaching this conclusion, Judge Mariani improperly concluded that "Westveld's conduct demonstrates [an] unreasonable risk of harm, or at least a genuine factual dispute in that regard."[32]

Now, Plaintiff-Appellant seeks leave to appeal with this Court. Specifically, Plaintiff-Appellant asks this Court to reverse the trial court's ruling by adopting the reasoning of Judge Mariani in dissent. On June 6, 2025, this Court issued a mini oral argument on the application (MOAA) order directing the parties to address the specific question of whether a genuine issue of material fact exists under MCR 2.116(C)(10) as to whether "defendant Westveld Services, LLC, breached a duty that it owed to plaintiff."

However, for all the reasons discussed in Westveld's original answer brief and in more detail below in its supplemental answer brief, Plaintiff-Appellant is not entitled to her requested relief. Consequently, Westveld respectfully asks this Court to ***deny*** Plaintiff-Appellant's application for leave to appeal.

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[31] **Id.** at **Appx.**, p 19.
[32] **Westveld's Ex. 3**, COA Dissenting Opinion, **Appx.**, pp 21-25.

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STANDARD OF REVIEW

A trial court's decision either granting or denying a motion for summary disposition is reviewed *de novo* as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). More specifically, a motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Maiden*, 461 Mich at 120.[33] Under a MCR 2.116(C)(10) motion, the moving party has the initial burden of establishing that no genuine issue of material fact warranting a trial exists, and that the law entitles the movant to judgment in his or her favor when applied to those undisputed facts. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996).

In a motion brought under MCR 2.116(C)(10), the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Educ*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the movant satisfies this initial requirement, the burden shifts to the non-moving party to introduce affidavits, depositions, admissions, or other documentary evidence via establishing that a genuine issue of material fact necessitates a jury resolution. *Id.*; *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999). Courts have described a (C)(10)

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

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hearing as "the 'put up or shut up' stage of the proceeding…." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). So, if the non-moving party fails to proffer substantive admissible documentary evidence in response to the motion, the motion is properly granted. *Smith*, 460 Mich at 455.

ARGUMENT

No genuine issue of material fact exists regarding whether Westveld breached its duty owed to Plaintiff-Appellant regardless of whether it is viewed under either a premises liability theory or ordinary negligence theory.

I. It is beyond dispute that there is no evidence of breach on the part of Westveld under a premises liability theory.

a. As an initial matter, Plaintiff's claim is rooted exclusively under a premises liability theory.

This Court in *Kandil-Elsayed* clarified that "where the evidence presented to a court concerning breach generates no question of fact, the issue can be decided by [a] judge *as a matter of law*. See MCR 2.116(C)(10)." *Kandil Elsayed*, 512 Mich at 112 n 2 (emphasis added). "In a premises liability [or ordinary negligence] action, a plaintiff must prove the [following] 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." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013) (quotation marks and citation omitted).

Of course, at the same time, this Court also clarified that it is only "[i]f the plaintiff establishes that the land possessor owed plaintiff a duty, [that] the next step

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in the inquiry is whether there was a breach of that duty." *Kandil-Elsayed*, 512 Mich at 148. Stated differently, in assessing a premises liability claim, an examining court must first conclude that the landowner or possessor owed plaintiff a duty, a question of law, before ever moving onto the inquiry of the element of breach. And specifically with regard to a court's assessment of the breach element, this Court in *Kandil-Elsayed* held that its "decision d[id] not alter the standard of reasonable care owed to an invitee, meaning that it's not necessary for land possessors to . . . immediately rectify hazards on their property to avoid liability." *Id.*

Additionally, "[a]s part of the breach inquiry, the fact-finder may consider, among other things, whether the condition was open and obvious and whether, despite its open and obvious nature, the land possessor should have anticipated harm to the invitee." *Id.* at 148-149. In other words, whether the condition was open and obvious remains a relevant consideration even for an examining court as this Court properly recognized in *Kandil-Elsayed*. See *Kandil-Elsayed*, 512 Mich at 112 n 2 (explaining "[t]he default rule that duty is settled by the judge and breach is settled by the jury does not always play out in practice. Where the evidence presented to a court concerning duty generates a question of fact, that question can be submitted to the jury for resolution. Correlatively, where the evidence presented to a court concerning breach generates no questions of fact, the issue can be decided by the judge as a matter of law. See MCR 2.116(C)(10).").

For this Court to hold otherwise would improperly usurp and implicitly overrule the governing Michigan Court Rules, which control as a matter of practice

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and procedure, MCR 1.103, and would lead to an absurd result considering it is the Michigan Supreme Court that creates the rules of practice and procedure governing courts in this state in the first place. See Mich Const Art 6, § 5; MCR 1.104. Accordingly, "if there are no genuine issues of material fact" regarding the element of breach, "a court may properly grant summary disposition under MCR 2.116(C)(10)." *Kandil-Elsayed*, 512 Mich at 148 n 28.

Here, as an initial matter, there is no genuine issue of material fact as relates to the element of breach under a premises liability theory because first and foremost Westveld did not owe Plaintiff-Appellant a legal duty when her alleged injury occurred. There cannot be evidence of a breach where a non-existent duty exists. As discussed in detail in Westveld's original answer brief filed with this Court on December 4, 2024, Plaintiff-Appellant's claim is rooted *exclusively* in premises liability because her injury is alleged to have occurred *because of a condition on the land*, a "trench" located in the parking lot of the Stanton Park apartment complex.

It is well-settled that "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Where an alleged claim of injury is based on a condition of the premises and not the activity itself, it is a premises liability claim. *Finazzo v Fire Equip Co*, 323 Mich App 620, 626; 918 NW2d 200 (2018); see also *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001) (explaining that the plaintiff's alleged claim of injury – whether it

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arose from a condition on the land or activity itself – dictates whether the case is rooted in a premises liability theory).

Here, despite Plaintiff-Appellant's label of "Negligence" within her complaint, the substance of her complaint is rooted exclusively in premises liability law. This Court "is not bound by a party's choice of labels because this would effectively elevate form over substance." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 715, 742 NW2d 399 (2007). In other words, this Court looks beyond procedural labels used in the pleadings and reads the complaint as a whole to determine the exact nature of the claim. See *Altobelli v Hartmann*, 499 Mich 284, 299, 884 NW2d 537 (2016). "A party cannot avoid the dismissal of a cause of action through artful pleading." *Zelasko v Charter Twp of Bloomfield*, 347 Mich App 141, 159; 14 NW3d 441 (2023).

This is exactly what Plaintiff improperly attempted to do – artfully plead the complaint in an attempt to avoid dismissal of the cause of action against Westveld. But the undisputed fact remains that the Plaintiff's alleged injury occurred because of a condition on the land – not by any overt or affirmative action by any defendant. Indeed, by her very own words, Plaintiff alleges that her injury occurred when "she fell into the trench sustaining . . . injuries . . . ."[34] Therefore, the trench constituted a condition on the land – not an activity undertaken by Westveld. In fact, Plaintiff does not allege to have sustained her alleged injuries in any other manner within her complaint besides the trench – a condition on the land.

[34] **Westveld's Ex. 4**, Plaintiff's Complaint, **Appx.**, p 29.

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To illustrate the legal distinction between an alleged injury caused by a condition of the land as opposed to the activity or conduct of an individual, *Finazzo Buhalis* are instructive. In *Finazzo*, the plaintiff was an employee working at his place of employment while the defendants were present working on a construction project. *Finazzo*, 323 Mich App at 622-623. More specifically, the defendants were sub-contractors on site for the purpose of installing a fire protection system. *Id.* Sometime during the installation, the plaintiff tripped and fell on a large electrical cable lying on the floor where the work was being performed. *Id.*

In his complaint, the plaintiff asserted that the defendants created the dangerous condition of the large cable lying on the floor and that their breach of duty caused him injury. *Id.* at 623. Further the plaintiff argued that the defendants did not possess or control the premises where the work was being performed and that his ordinary negligence claim – the act of laying the cable on the floor and leaving the room – survived even if the premises liability claim failed. *Id.* at 624.

The *Finazzo* Court expressly rejected the plaintiff's argument. Specifically, the *Finazzo* Court explained the distinction between a claim based in premises liability from an ordinary negligence claim, ultimately holding that the plaintiff's action sounded solely in premises liability rather than ordinary negligence. *Id.* at 626. The Court reasoned that the plaintiff's action sounded in premises liability because the plaintiff's injury arose from a *condition* of the property, i.e., the cable lying on the tile floor pending its installation. *Id.* The Court further noted that even though the plaintiff had alleged that the condition was created by the defendants, his argument

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was inconsequential because the plaintiff pled that the injury *was received* from a condition of the premises. *Id*. *Finazzo* is factually analogous and controlling on the present case.

Although *Buhalis* is not factually analogous, it is instructive as the general principles of premises liability law relied upon are governing. In *Buhalis*, the plaintiff visited the defendant's business premises where she allegedly sustained injury after slipping and falling on ice. *Buhalis*, 296 Mich App at 692. The plaintiff admitted that she was aware that ice and snow could accumulate and that the defendant had posted a caution sign, but she maintained that she did not see any ice before she slipped. *Id*. at 690-691. The *Buhalis* Court held that the plaintiff's action sounded in premises liability because she clearly pleaded that she was injured when she slipped and fell on the ice. *Id*. at 692. Further, the Court explained that even though the plaintiff asserted that the defendant's employees created the dangerous condition at issue, her allegation does not transform into one for ordinary negligence. *Id*.

Applying *Finazzo, Buhalis,* and the other governing caselaw cited above, it is clear that Plaintiff-Appellant's claim is rooted exclusively in premises liability. As such, the trial court and the Court of Appeals majority properly held that Plaintiff's claim, as a whole, is substantively rooted in premises liability law because her alleged claim of injury is based *on a condition of the premises*, the "trench" on the land, not the activity itself. *Finazzo*, 323 Mich App at 626*; Alberts*, 464 Mich at 18-19. Plaintiff-Appellant has not alleged that it was the *affirmative* conduct or activity that Westveld was engaged in that caused her injury. Nor could she when the undisputed record

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evidence establishes that no Westveld employee or representative was even present on the premises when Plaintiff-Appellant's injury occurred.

Moreover, that Westveld created the condition does not automatically transform the Plaintiff's claim into one proceeding forward under an ordinary negligence theory. "[A]lleging that defendant created the condition 'does not transform the claim into one for ordinary negligence.'" *Jahnke v Allen*, 308 Mich App 472, 475; 865 NW2d 49 (2014), citing *Buhalis*, 296 Mich App at 692 (overruled on other grounds).

Further, Plaintiff-Appellant's reliance on *Laier* is misplaced because *Laier* is inapposite to the present case. In *Laier*, the decedent was crushed by a bucket of a front-end load tractor while assisting the defendant repair a tractor on the defendant's premises. *Laier v Kitchen*, 266 Mich App 482, 485-486; 702 NW2d 199 (2005). The plaintiff alleged that the defendant "owed a duty to [the decedent] to use due care and caution in the operation and control of the tractor and bucket." *Id.* at 493. In holding that an ordinary negligence claim can be a separate independent basis for liability from premises liability, the *Laier* Court clarified that this may be possible when a plaintiff alleges that a defendant's *conduct* is a basis of liability. *Id.* In *Laier*, the Court explained that the plaintiff alleged liability based on the defendant's failure to exercise care in the repair of the front-end loader and his operation of the equipment before the bucket fell and fatally injured the plaintiff, and so, the defendant's *conduct when the injury occurred* was at issue. *Id.* at 493.

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Here, Plaintiff has made no such claim. For example, she has not asserted that Westveld failed to exercise care in its concrete work while she was present and allegedly injured such that Westveld's conduct would be at issue when the injury occurred. Instead, Plaintiff alleges that she was injured because of the mere existence and creation of the trench and that Westveld owed her a duty to fill the trench, guard against it, or warn her of the trench. However, Plaintiff's assertion lacks legal merit. The mere creation of a condition does not form an ordinary negligence claim. *Jahnke*, 308 Mich App at 475. Instead, as pled by Plaintiff, her claim is rooted exclusively in premises liability. See, e.g., *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010) ("Although an injured person may pursue a claim in ordinary negligence for the *overt acts* of a premises owner on his or her premises, *Laier* [], the plaintiff in this case is alleging injury by a condition of the land, and as such, his claim sounds exclusively in premises liability.") (emphasis added).

As such, the trial court and the Court of Appeals majority properly concluded that Plaintiff-Appellant's "negligence" claim sounds solely in premises liability in holding summary disposition in favor of Westveld was appropriate.

b. <u>It is undisputed that Westveld lacked possession and control over the premises to implicate a duty under a premises liability theory</u>.

And as a premises liability claim, it is undisputed that Westveld did not possess or control the premises when Plaintiff's injury occurred. It is further undisputed that Plaintiff's alleged injury occurred ***9 days after Westveld completed the scope of its work and left the premises***. As such, Plaintiff-Appellant's claim

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fails at the outset. Possession and control of the premises at the time of the incident is a *precursor* to liability being imposed under a premises liability theory.

Whether a duty is owed is assessed at the time of the plaintiff's alleged injury – not after the fact with the benefit of hindsight. *Alberts*, 464 Mich at 20. Premises liability is conditioned upon the presence of both possession *and* control over the land. *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 566; 563 NW2d 241 (1997); see also *Finazzo*, 323 Mich App at 627 ("Generally . . . for a party to be subject to premises liability in favor of persons coming on the land, the party must possess *and* control the property at issue but not necessarily be its owner."). The reasoning is simple – the person in possession *and* control of the premises is best able to prevent harm to others, and normally best able to prevent any harm to others. *Orel*, 454 Mich at 566; *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980).

The *Merritt* Court clarified that under a premises liability theory, a "possessor" is defined as:

> (a) a person who is in occupation of the land with intent to control it, or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b). [*Merritt*, 407 Mich at 552; internal quotation marks omitted.]

Additionally, "possession" in this context has been defined as "[t]he right under which one may exercise control over something to the *exclusion of all others*" and "control" has been defined as the exercise of "restraint or direction over; dominate,

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regulate, or command . . . manage, direct, or oversee." *Derbabian v S&C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002) (internal quotation marks omitted).

Here, it is beyond dispute that Westveld neither owned, possessed, nor occupied the premises when Plaintiff-Appellant sustained her alleged injury on October 30, 2021. Plaintiff-Appellant admitted below and on appeal that Westveld did not own, possess, or control the premises. Therefore, Westveld is not subject to liability. See *Buhalis*, 296 Mich App at 692; *Orel*, 454 Mich at 566; *Finazzo*, 323 Mich App at 627. "[A] defendant is not liable to a plaintiff unless the defendant owed a legal duty to the plaintiff." *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 162; 809 NW2d 553 (2011).

Contrary to Plaintiff-Appellant's argument that Westveld's position would create "the perfect tort: be a contractor, negligently create a hazardous condition on another's land, and then back your bags and leave," she blatantly overlooks critical undisputed facts and governing law that dictate the legal outcome in this case. As discussed above, Plaintiff-Appellant has not alleged that her injury occurred due to the overt or affirmative act of Westveld or any of its representatives. Moreover, Plaintiff-Appellant ignores the fact that Westveld completed the scope of its work it was hired to do when it left the premises 9 days prior to the date Plaintiff was allegedly injured.

Plaintiff-Appellant has failed to proffer evidence below that Westveld, as a sub-contractor (as opposed to a general contractor), had a contractual continuing duty to

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(1) ensure that Bob's Asphalt showed up to complete its work on time, (2) install lighting at the premises despite being a concrete sub-contractor specialist – not a lighting specialist, or (3) maintain a company presence onsite for days on end after the completion of its work to guard, warn, or protect residents from the trench after completing the scope of its work. As a result, there is no genuine issue of material fact that exists regarding whether Westveld owed a duty to Plaintiff – let alone a breach of a non-existent duty.

c. Even assuming *arguendo* that a duty existed under a premises liability theory, there is no genuine issue of material fact that no evidence of a breach exists on the part of Westveld.

Next, even assuming *arguendo* that a duty is imposed under a premises liability theory, Plaintiff-Appellant has not shown a genuine issue of material fact that Westveld breached its standard of care—namely, that it failed to protect her "from an unreasonable risk of harm caused by a dangerous condition of the land." *Kandil-Elsayed*, 512 Mich at 148 (quotation marks and citation omitted). And so, "[a]ccordingly, a valid premises-liability claim requires a showing that (1) there is a condition on the land, and (2) the condition is dangerous"). *Tripp v Baker*, 346 Mich App 257, 266; 12 NW3d 45 (2023).

Here, the alleged dangerous condition, i.e., the trench, was only "around 3 inches" deep and bordered bright, lightly colored concrete that had recently been poured.[35] Just as an ordinary elevation change is not an unreasonable risk of harm, this trench was also not an unreasonable risk of harm as the duty owed to invitees is

[35] **Westveld Ex. 5-B**, Deposition Testimony of Randy Westveld, pp 21, **Appx.**, p 62.

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only to protect them against "*unreasonable* risks of harm." *Bertrand*, 449 Mich at 614 (emphasis in original).

Even if the trench constituted an *unreasonable* risk of harm, Westveld exercised reasonable care while it was onsite at the premises. Indeed, its duty only extends insofar as "the work [was] in his charge." *Finazzo*, 323 Mich App at 629. According to Randy Westveld, he took action to remove the dumpster from the construction area to protect the tenants because by moving the dumpster, there was no need for tenants to encounter the trench.[36] Indeed, Plaintiff-Appellant acknowledges that Westveld moved the dumpster away from the trench. (Appellant's Supplemental MOAA Brief, p 23). When Randy Westveld was asked "[w]hy would you have left the dumpster in that position as seen in this picture?" Westveld responded, "So it was safe for people to dump in so they didn't have to go across the trench."[37]

Additionally, he testified that he did put yellow tape up around the trench sometime between October 14th when he started the job and October 21st when the scope of his work was completed.[38] He did this in order to alert individuals to take care in and around the trench and the freshly poured concrete slab.[39] Westveld did not fill the trench because Bob's Asphalt was supposed to come within a couple days after Westveld completed its project to fill the trench with asphalt.[40] There is no

[36] **Id**. at pp 20, 22, 36.
[37] **Id**. at 36.
[38] **Id**. at 20, 26-27.
[39] **Id**. at 30-31, 36.
[40] **Id**. at 29.

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evidence presented that Westveld maintained a contractual obligation to remain onsite to guard and protect the trench. Finally, Randy Westveld testified that he has not been back to Stanton Park Apartments since he completed his role in the project.

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

Even assuming that Westveld had not taken any action in putting up yellow caution tape, the trench was still open and obvious to a reasonable person with ordinary intelligence such that Westveld did not breach any duty owed. As can be seen by the pictures, the trench was surrounded by concrete of a different color, which was sufficient to alert a reasonable person that there may be an elevation change. At the very least, to take care in walking toward that area. Eric Koch even described the trench as "so wide and so big that it was pretty obvious for sure . . . ."[41]

Not only was the trench an open and obvious condition that an ordinary person would discover, the darkness itself was an open and obvious condition, that would

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

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have alerted an individual to take care in where they are walking as soon as they walked out of his or her apartment door. Even despite the darkness, the concrete slab was visible, as shown in the relevant photographs. Thus, even if Westveld was considered a premises possessor for the purpose of being subject to premises liability, the condition was still open and obvious. Therefore, the Court of Appeals majority correctly still considered the open and obvious nature of the condition in analyzing the element of breach and, therefore, it correctly concluded, as an alternative ground for affirmance, that no genuine issue of material fact exists regarding whether Westveld breached a duty owed to Plaintiff-Appellant. A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong or a different reason. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10, 443 NW2d 340 (1989).

II. No genuine issue of fact exists as it relates to whether Westveld breached a duty owed under an ordinary negligence theory.

Finally, even assuming *arguendo* that Plaintiff-Appellant's claim could sound in an ordinary negligence theory as well such that a separate and distinct common law duty was owed to Plaintiff-Appellant outside Westveld's contract to complete concrete work, she did not establish a prima facie case for liability to be imposed on Westveld. "Contractors have a common-law duty to perform their work with ordinary care so as not to unreasonably endanger employees of another subcontractors or anyone else lawfully on the worksite." *Finazzo*, 323 Mich App at 634. "To establish a prima facie case of negligence, plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4)

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damages." *Id.* at 635 (citation omitted). These are principle points of law governing a contractor's duty in the tort context. See *In re Sprenger's Estate*, 337 Mich 514, 523; 60 NW2d 436 (1953) (stating that a rule of stare decisis refers to principles of points of law and not to factual situations existent in cases where such principles apply)

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

Additionally, Plaintiff-Appellant completely overlooks the part of the *Finazzo* opinion that addresses whether a contractor breached its duty under an ordinary negligence claim, stating, "many of the same reasons that the [condition] was an open and obvious hazard" are relevant. *Finazzo*, 323 Mich App at 637. It is equally relevant because "[t]he reasonableness of the defendant's conduct must be weighed against the principles that persons lawfully on the site must use good judgment and common sense for their own safety and factors such as the potential degree of harm and whether the risk at issue is known." *Id.* at 635 (citations omitted).

Here, Westveld took measures while it was still on site to prevent injury to others. It moved the dumpster away from the work area so there was no need for

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anyone to encounter the trench or the concrete slab. Plaintiff-Appellant admitted that the dumpster was moved and that she successfully traversed to the dumpster several times prior to her injury without coming into contact with the trench.

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

With Plaintiff-Appellant having the benefit of knowledge of the trench's location and its close proximity to the newly poured concrete slab, the visible concrete slab served effectively as a warning sign for Plaintiff-Appellant to take care in where she was walking. Accordingly, the majority properly reviewed the record evidence as a whole before concluding that no reasonable person could find that Westveld breached its duty to Plaintiff-Appellant even under an ordinary negligence theory. In doing so, the majority properly applied governing law that has been consistently applied by other panels of the Court of Appeals. See, e.g., *Debano v Flooring Edge*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2023 (Docket No. 362766)[42]; *Moss v Joe Young Excavating*, unpublished per curiam opinion of the

[42] **Westveld's Ex. 8**, **Appx.**, pp 234-236.

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Court of Appeals, issued October 22, 2020 (Docket No. 350948).[43] Therefore, there is no reason for this Court to weigh in on this matter and Plaintiff-Appellant's application must be denied.

It is worth noting that the Court of Appeals dissent seems to implicitly focus on a *Fultz*-type analysis without ever relying or citing to *Fultz* or its progeny. Picking up on where the Court of Appeals dissent left off, Plaintiff-Appellant now relies on *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), *Fultz v Union-Commerce Assocs*, 470 Mich 460; 683 NW2d 587 (2004), *Loweke v Ann Arbor Ceiling*, 489 Mich 157; 809 NW2d 553 (2011), and *Osman v Summer Green Lawn Care Inc*, 209 Mich App 703; 532 NW2d 186 (1995) for her argument that her claim sounds in ordinary negligence, that a duty is owed, and that Westveld breached that duty.

First of all, Plaintiff-Appellant's reliance on *Osman* is misplaced because *Osman* is factually distinguishable. While the plaintiff's alleged injury occurred because of a slip and fall incident on the landowner's parking lot, the sub-contractor's "contract was in effect at the time of the plaintiff's injury." *Id.* at 704. In other words, the scope of the defendant sub-contractor's snow removal contract was not complete when the injury occurred; rather, the scope of its work continued in accordance with its contract. This is a critical distinction because the *Osman* Court found that the contract very clearly stated the defendant would remain liable for its negligent conduct. *Id.* at 707. Even apart from the contract, during the snow removal process, the defendant in Osman possessed and controlled the premises.

[43] **Westveld's Ex. 9**, **Appx.**, pp 238-241.

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Unlike in *Osman*, the scope of Westveld's work was completed 9 days before Plaintiff-Appellant's alleged injury occurred, meaning not only had Westveld completed the scope of its work under its contractual duty for services, but also it was no longer on site for any active negligence to occur, as discussed above regarding the inapplicability of *Laier*. Further, unlike *Osman*, there was no evidence presented below that Westveld owed a continuing contractual duty after the completion of the scope of its work for any negligent conduct that it may have engaged in while on the premises. See *id*.

Plaintiff-Appellant's reliance on *Clark* is also misplaced as she misconstrues the factual basis of *Clark* and of which is inapposite of the present case. The parties in *Clark* were bound by a contractual relationship aside from the alleged injury occurring from a condition on the land. For example, the *Clark* Court pointed out that "defendant contractor was obligated to notify the engineer [i.e., the plaintiff's employer] . . . of work so that the engineer could provide for inspection of the work completed." *Clark*, 379 Mich at 257. In *Clark*, the defendant failed to provide such notification and failed to adhere to contract specifications, which resulted in the plaintiff slipping and suffering injury during his inspection of the premises. *Id*. at 257-258.

In holding that a duty existed, the *Clark* Court held that the evidence indicated that a contractual relationship was created as a contract between defendant and the city existed and of which the plaintiff was a duly authorized agent inspector with obligations of general inspection. *Id*. at 262. The *Clark* Court reasoned that "the

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existence of a contract is ordinarily a relevant factor, competent to be alleged and proved in a negligence action to the extent of showing the relationship of the parties and the nature and extent of common-law duty on which the tort is based." *Id.* at 261. Further, the *Clark* Court clarified that the common law duty "arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another." *Id.*

Important distinctions exist in *Clark* that are not present in this case. First of all, there was no contractual relationship between Plaintiff and Westveld, nor has Plaintiff alleged that she is owed a benefit as a third-party beneficiary to the contract. Second, there was no evidence of a contract submitted below between Red Oak and Westveld and certainly no evidence that Westveld owed a continuing contractual duty beyond the scope of its work. And lastly, a common law duty is centered around what is within the contractor's control. When Plaintiff's alleged injury occurred, Westveld had completed the scope of its work that it was hired to do and off site of the premises for at least 9 days prior to the incident. There is no continuing duty under these circumstances, let alone evidence of a breach of duty.

Similarly, *Fultz* and *Loweke* are factually distinguishable. In *Fultz*, the plaintiff was allegedly injured when the defendant, within the scope of its oral contractual duties, failed to plow or salt the parking lot. Indeed, the plaintiff "contend[ed] that defendant [], *by contracting to plow and salt the parking lot, owed a common-law duty to plaintiff* to exercise reasonable care in performing its contractual duties. Plaintiff further alleged *that defendant's failure to plow or salt the*

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parking lot breached that duty under the common-law tort principles . . . ." *Fultz*, 470 Mich at 463-464 (emphasis added). The *Fultz* Court instructed "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 the '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." *Id*. at 467. "If no independent duty exists, no tort action based on a contract will lie." *Id*.

Here, the duties Plaintiff allege Westveld owed to her all fail to satisfy the separate and distinct approach as set forth in *Fultz*. Plaintiff asserts that Westveld owed the duty to correct the trench so it would not constitute a trip hazard, to install guards around the trench so that it would not constitute a trip hazard, and to install warnings around the trench.[44] However, all these alleged "duties" are not required by law or under contract. As discussed above, Plaintiff is not owed a duty on the part of Westveld under a premises liability theory. Plaintiff never offered evidence of the contract between Westveld and Red Oak and, so, there is no tangential limited special relationship between Westveld and Plaintiff to give rise to an ordinary negligence duty. It is beyond dispute that Westveld promised to complete the scope of its contract work, which it did and then left without the charge of its work continuing when Plaintiff allegedly sustained her injury. As held by *Fultz*, "no tort liability arises

[44] **Westveld's Ex. 4**, Plaintiff's Complaint, **Appx.**, p 30.

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for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made." *Id*. at 470.

In other words, there is no tort liability implicated upon Westveld here because it beyond dispute that it did not create a *new* hazard beyond the scope of its work – instead, the undisputed evidence reveals it completed the scope of its promised work and it even went above and beyond to try to prevent any injury to residents by moving the dumpster so that residents would not come into contact with the trench. And contrary to Plaintiff's insinuation that Westveld's past practice or act of filling trenches, leaving cones out, and tape up to warn others somehow creates a duty, by itself, and a breach of that duty misses the mark. This Court has long held that a private entity's internal rules or policies do not create a standard of duty owed to others, nor does it constitute negligence per se. *Meyers v Rieck*, 509 Mich 460, 473; 983 NW2d 747 (2022). For this reason, the Court of Appeals dissent was likewise incorrect that evidence of normal protocol creates a question of fact of whether Westveld created an unreasonable risk of harm.

As clarified in *Loweke*, the question "aside from the contract, is [whether] a [is] defendant under any legal obligation to act for the benefit of the plaintiff?" *Loweke*, 489 Mich at 168. Stated differently, "the operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law." *Id*. at 171. Here, there is no duty that would support a cause of action in tort as discussed above.

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Nevertheless, even if Westveld owed a preexisting common law duty to use ordinary care to avoid physical harm to foreseeable persons and property in the execution of its undertakings,[45] as a general rule, " there is no duty that obligates one person to aid or protect another." *Hill v Sears, Roebuck and Co*, 492 Mich 651, 660; 822 NW2d 190 (2012).

Here, the parties had no special or legal relationship. The limited undertaking Westveld was engaged in on the premises was the concrete demolition/removal and installation of a new concrete pad where the dumpster is normally located. There is no evidence that the contract obligated Westveld to fill the trench, install guards, or warning signs around the trench. In fact, Red Oak admitted that it never asked Westveld to fill the trench or put up any warning indicators.[46] Moreover, there is no evidence that Westveld asserted any duty relative to the trench beyond the contractual scope of its work. Given the extremely limited nature of the relationship between Plaintiff and Westveld, it was under no obligation to warn or protect from the trench. See, e.g. *Hill*, 492 Mich at 663-664. And because of the limited relationship, Plaintiff's ordinary negligence claim fails as a matter of law. See *id*.

Notwithstanding the fact that it was under no legal or contractual obligation to warn or protect Plaintiff from the trench, Westveld did not breach a hypothetical duty. That is because it moved the dumpster to a spot separate and apart from the trench – "so it was safe for people to dump in so they didn't have to go across the

[45] See *Loweke*, 489 Mich at 172.
[46] **Westveld's Ex. 5-E**, Deposition Testimony of Eric Koch, **Appx.**, p 87.

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trench."[47] It was not foreseeable that Plaintiff would walk out of her apartment in obvious darkness and go to the exact spot in which she knew recent concrete work was completed. Plaintiff's argument that Westveld failed to fill, protect, and guard the trench is flawed as Westveld was not hired to do any of those things, nor was it in the position to do any of those things when it had been off the premises for at least 9 days before Plaintiff sustained her alleged injury.

This Court rejected a similar argument made in *Hill*, holding that there is no duty to protect or aid another where no special relationship exists between a defendant and plaintiff. *Hill*, 492 Mich at 665 n 39. Reasonable minds could not differ that Westveld did not create an unreasonable risk of harm, particularly where Westveld had been offsite for at least 9 days before Plaintiff sustained her alleged injury and Westveld did not undertake an act besides completing the scope of the concrete work it was hired to do.

III. This case lacks jurisprudential significance, which presents an additional basis for denial of Plaintiff-Appellant's application for leave to appeal.

Finally, aside from the lack of legal or factual merit to grant Plaintiff-Appellant's requested relief, this case lacks jurisprudential significance. In particular, the Court of Appeals opinion is unpublished, meaning it is not precedentially binding. Moreover, this Court has asked a legal question focused on the factual record (i.e., is there a question of fact regarding breach) in which there

[47] **Westveld's** Ex. 5-B, Deposition Testimony of Randy Westveld, **Appx.**, p 66.

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are several alternative grounds for affirmance of the trial court's decision as discussed above.

In other words, this is not a question centered upon a legally significant issue affecting a global scope of cases within the state; rather, it impacts this case alone, particularly where the focus is on the factual record and how the law is applied to that factual record. As routinely acknowledged by this Court, jurisprudential significance involves something more – such as a need to clarify confusion in the law or correct a precedentially binding opinion. Neither party has raised the issue of whether an area of law needs to be clarified surrounding the issue involved in this case. Instead, within its MOAA order, this Court asks the parties to focus on a legal question focused on the factual record – not on any perceived need to clarify the law surrounding the issues presented within this appeal. This Court is not a court of error correction like the Michigan Court of Appeals. Compare *Teel v Meredith*, 284 Mich App 660, 663, 774 NW2d 527 (2009) ("The function of this Court is to correct errors."). And so, this Court should deny Plaintiff-Appellant's application for leave to appeal, or alternatively, affirm the trial court's grant of summary disposition in favor of Westveld by order or opinion.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant-Appellee, Westveld Services, LLC, respectfully requests that this Court ***deny*** Plaintiff-Appellant's application for leave to appeal by issuance of an order. Alternatively, if this Court is inclined to weigh in by issuance of an opinion or order, Defendant-Appellee respectfully requests that this

Court affirm the trial court's order granting summary disposition in favor of Defendant-Appellee Westveld Services, LLC.

Respectfully submitted,

/s/ L. Charlynn Turner

L. CHARLYNN TURNER (P80746)
SECREST WARDLE
Attorneys for Defendant-Appellee
Westveld Services, LLC
2600 Troy Center Dr #100
Troy, MI 48084
(248) 851-9500

Dated: September 19, 2025

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CERTIFICATE OF WORD COUNT COMPLIANCE

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

Court Rule	Pleading Type	Word Limitation	Word Count
MCR 7.312(A)(1) and MCR 7.212(B) and (D)	Supplemental Answer MOAA Brief to Plaintiff's Supplemental Application for Leave to Appeal	16,000	8,644

Respectfully submitted,

/s/ L. Charlynn Turner

L. CHARLYNN TURNER (P80746)
SECREST WARDLE
Attorneys for Defendant-Appellee
Westveld Services, LLC
2600 Troy Center Dr #100
Troy, MI 48084
(248) 851-9500

Dated: September 19, 2025

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PROOF OF SERVICE

I hereby certify that on September 19, 2025, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile E-Filing File and Serve System which will send notification of such filing to the following:

Christopher P. Desmond (P71493)
Thomas P. Carr (P87746)
Ven Johnson Law, PLC
Attorneys for Plaintiff-Appellant
535 Griswold Street, Ste 2600
Detroit, MI 48226
(313) 324-8300

Respectfully submitted,

/s/ L. Charlynn Turner
L. CHARLYNN TURNER (P80746)
SECREST WARDLE
Attorneys for Defendant-Appellee
Westveld Services, LLC
2600 Troy Center Dr #100
Troy, MI 48084
(248) 851-9500

Dated: September 19, 2025