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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Michael F. Gadola, Kirsten Frank Kelly, and Philip P. Mariani (dissenting)

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
Circuit Court No. 22-028824-NO

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THE MICHIGAN DEFENSE TRIAL COUNSEL'S AMICUS CURIAE BRIEF

Dated: November 14, 2025

SMITH HAUGHEY RICE & ROEGGE, A Professional Corporation

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STATEMENT OF APPELLATE JURISDICTION

Plaintiff-Appellant Jan Bowerman ("Plaintiff") seeks leave to appeal from the September 12, 2024 opinion of the Court of Appeals, which affirmed the trial court's determination that Defendant-Appellee Red Oak Management Co., Inc. ("Red Oak") and Defendant-Appellee Westveld Services, LLC ("Westveld") were entitled to summary disposition in this general negligence/premises liability action.

The case is properly before this Court based on the June 6, 2025 Order[1] which directed "the Clerk to schedule oral argument on the application." That MOAA Order further directed the parties to file supplemental briefs addressing "whether genuine issues of material fact exist as to whether: (1) defendant Westveld Services, LLC, breached a duty that it owed to the plaintiff; and (2) defendant Red Oak Management Co., Inc., violated MCL 554.139(1)(a)."[2] The MOAA Order also invited the Michigan Defense Trial Counsel ("MDTC") and others "to file briefs amicus curiae."[3]

[1] *Bowerman v Red Oak Mgmt Co,* 21 NW3d 186, 187 (Mich, 2025), hereinafter referred to as the "MOAA" (Mini-Oral Argument on the Application) Order.
[2] *Bowerman,* 21 NW3d at 187.
[3] *Id.*

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INTRODUCTION AND STATEMENT OF THE AMICUS CURIAE

The MDTC is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. The MDTC was established in 1979 to enhance and promote the civil-defense bar. It accomplishes that goal by facilitating dialogue among and advancing the knowledge and skills of civil-defense lawyers. The MDTC appears before this Court as a representative for Michigan's civil-defense lawyers and their clients, a significant portion of which could be affected by the issues involved in this case.[4]

This Court has invited, or accepted by motion, amicus curiae briefs from the MDTC in a wide variety of cases, including multiple cases dealing with premises liability and related concepts. See *Molitoris v Saint Mary Magdalen Cath Church*, 12 NW3d 618 (Mich, 2024); *Radke v Truesdell,* 12 NW3d 623 (Mich, 2024); *Kandil-Elsayed v F & E Oil, Inc,* 512 Mich 95; 1 NW3d 44, 47 (2023); *Janini v London Townhouses Condo Ass'n*, 509 Mich 1072; 975 NW2d 500 (2022).

[4] None of the parties or their counsel contributed monetarily or to the authorship of this brief. MDTC made the only monetary contribution to preparing this brief.

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STATEMENT OF THE QUESTION PRESENTED

I. Did Westveld breach a duty owed to the Plaintiff where Westveld did not own or possess the property and therefore, its duty was limited to performing its work with ordinary care so as not to unreasonably endanger persons lawfully on the worksite?

Plaintiff-Appellant answers: "Yes."

The Court of Appeals answered: "No."

Defendant-Appellee Westveld answers: "No."

Amicus Curiae, the MDTC, answers: *"No."*

II. Was Red Oak entitled to summary disposition where the record established that the parking lot was fit for its intended use under MCL 554.139(1)(a) because Plaintiff and others successfully avoided the trench on other occasions?

Plaintiff-Appellant answers: "Yes."

The Court of Appeals answered: "No."

Defendant-Appellee Red Oak answers: "No."

Amicus Curiae, the MDTC, answers: *"No."*

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STATEMENT OF FACTS

The MDTC adopts the Statements of Facts provided by Westveld and Red Oak. In short, Westveld was a contractor hired by Red Oak to perform concrete work in the parking lot of Red Oak's apartment complex. As part of that work, Westveld created a "trench" that the Plaintiff was admittedly aware of – and had walked around multiple times – before she alleged tripped in it during the early morning of October 30, 2021.[5]

Plaintiff filed suit, alleging a violation of MCL 554.139 against Red Oak and negligence against Westveld.[6] Westveld and Red Oak each moved for summary disposition. The trial court found that Red Oak did not violate § 139 because the parking lot was fit for its intended use, and granted Red Oak summary disposition.[7] The trial court also found that Westveld was entitled to summary disposition of plaintiff's negligence claim because the trench was an open and obvious condition without special aspects that would preclude recovery.[8]

The Court of Appeals affirmed as to Red Oak because "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."[9] Red Oak "provided two entrances to and exits from the dumpster area that avoided the trench."[10] "Further, because plaintiff was also able to walk around the trench successfully many times, the trench was a mere inconvenience…."[11]

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[5] Westveld's September 19, 2025 Supplemental Answer Brief, pp 2-3.
[6] Ex. 2 to Westveld's Answer to Application, p 2.
[7] Id., p 3.
[8] Id.
[9] Id., p 5.
[10] Id.
[11] Id.

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The Court of Appeals affirmed as to Westveld because – although summary disposition couldn't be affirmed based on the open and obvious doctrine[12] – "Westveld was not in possession or control of the land at the time of plaintiff's fall," so it couldn't have liability under a premises liability theory.[13] And while Plaintiff also pled an ordinary negligence theory, Westveld's duty was limited to performing "its work with ordinary care so as not to create an unreasonable risk of harm."[14] The panel found that Westveld didn't breach that duty where "plaintiff was aware of the hazard; she and others had safely accessed the dumpster for two weeks before plaintiff's fall."[15] "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."[16] "The concrete slab was visible even in the darkness, as is shown from the photograph plaintiff provided."[17] "[D]espite her awareness of the trench," Plaintiff "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."[18]

[12] Ex. 2 to Westveld's Answer to Application, p 5, citing *Kandil-Elsayed,* 512 Mich at 95.
[13] Ex. 2 to Westveld's Answer to Application, p 6.
[14] Id., p 7.
[15] Id.
[16] Id.
[17] Id.
[18] Id.

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ARGUMENT

I. Westveld did not breach a duty owed to the Plaintiff where Westveld did not own or possess the property and therefore, its duty was limited to performing its work with ordinary care so as not to unreasonably endanger persons lawfully on the worksite.

Before addressing the issues identified in the MOAA Order, the MDTC asks this Court to consider whether its review is warranted. "As the last word on Michigan law, we try to choose cases presenting complicated and far-reaching legal issues."[19] Plaintiff seeks leave to appeal from an unpublished, fact-specific opinion that has not been cited as persuasive authority more than a year after its release.[20] The case just doesn't seem to meet any of the criteria set forth in MCR 7.305(B)(1)-(6).[21]

If this case raises " a legal principle of major significance to the state's jurisprudence,"[22] it would be to clarify the narrow scope of a contractor's duty to third parties. After all, it wasn't that long ago that Westveld likely would have had a complete defense under *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). Although it's been some time since this Court rejected "a form of tort immunity that bars negligence claims raised by a noncontracting third

[19] *Touma v McLaren Port Huron*, 508 Mich 976; 965 NW2d 550, 551 (2021) (Viviano, J., dissenting).

[20] Although unpublished Court of Appeals opinions lack precedential weight, they may still be cited in accordance with MCR 7.215(C)(1).

[21] See *Doster v Covenant Med Ctr, Inc,* 509 Mich 910; 971 NW2d 605, 608 (2022) (Zahra, J., dissenting) (suggesting that reviewing unpublished decisions, particularly for error correction, "is a waste of our judicial resources" and "not why the people of Michigan elected us to serve at the highest level of the judicial branch of government"). "As Michigan's court of last resort, we should use our precious resources to interpret the Constitution and laws of Michigan and to correct errors of lower courts that, if left uncorrected, will stain the fabric of Michigan's jurisprudence." *Id.*

[22] MCR 7.305(B)(3).

party,"[23] there must still be a duty owed to the plaintiff "separate and distinct from defendant's contractual obligations with the general contractor."[24]

The Court of Appeals held that Westveld's duty couldn't emanate from premises liability because it didn't have possession and control.[25] At page 22 of her Application, Plaintiff concedes this point.[26] Before Westveld's breach of duty can be analyzed, the nature of Westveld's duty must be defined. "To establish a prima facie case of negligence, a 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."[27] "[T]he threshold question in a negligence action is whether the defendant owed a duty to the plaintiff."[28] "It is axiomatic that there can be no tort liability unless" the defendant "owed a duty to" the plaintiff.[29] Factors relevant to the determination of whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.[30]

"The most important factor to be considered in this analysis is the relationship of the parties...." [31] "Before a duty can be imposed, there must be a relationship between the parties...."[32] "A duty arises out of the existence of a relationship between the parties of such a character that social policy justifies' its imposition."[33] "The determination of whether a legal duty

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[23] *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 168; 809 NW2d 553 (2011).
[24] *Id.* at 172.
[25] Ex. 2 to Westveld's Answer to Application, p 6.
[26] See also Plaintiff's October 3, 2025 Reply Brief on Appeal, p 4.
[27] *Hill v Sears, Roebuck and Co*, 492 Mich 651, 661; 822 NW2d 190 (2012).
[28] *Id.* at 660 n 18.
[29] *Id.* at 660.
[30] *Id.* at 661.
[31] *Id.*
[32] *Id.*
[33] *In re Certified Question,* 479 Mich 498, 505-506; 740 NW2d 206 (2007).

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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."[34] "[W]hen there is no relationship between the parties, no duty can be imposed...."[35]

Here, there was absolutely no relationship between Westveld and the Plaintiff. Therefore, Westveld's duty was limited to what this Court described in *Clark v Dalman,* 379 Mich 251, 261; 150 NW2d 755 (1967): the "basic rule of the common law" that "every person engaged in the prosecution of any undertaking an obligation" must "use due care" or "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."[36] In other words, it is a duty "of ordinary care."[37]

As a contractor hired by Red Oak, Westveld's only "common-law duty [was] to perform [its] work with ordinary care so as not to unreasonably endanger employees of other subcontractors or anyone else lawfully on the worksite."[38] "The reasonableness of [the contractor'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...."[39]

Generally, it is for a jury to decide whether a defendants' conduct in a particular case created an unreasonable risk of injury. But here – as in *Finazzo* – "the undisputed facts allowed the trial court to find that all reasonable persons would agree that defendant did not create an

[34] *Id.*
[35] *Id.* at 504-505.
[36] *Finazzo v Fire Equipment Co,* 323 Mich App 620, 635; 918 NW2d 200 (2018), quoting *Clark,* 379 Mich at 261.
[37] *Finazzo,* 323 Mich App at 635, citing *Clark,* 379 Mich at 261.
[38] *Finazzo v Fire Equipment Co,* 323 Mich App 620, 634; 918 NW2d 200 (2018).
[39] *Id.* at 635 (citation omitted).

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unreasonable risk of harm."[40] This is where the fact-specific nature of the lower courts' holdings come into focus. Plaintiff doesn't challenge the contours of that duty, only whether a fact question existed about whether it was breached here.[41] The Court of Appeals correctly determined that it wasn't. Plaintiff had been an employee of Red Oak for over 19 years, which included being the site manager for around nine years.[42] Even after her retirement, she continued to maintain detailed notes about the condition of the property.[43] These notes confirmed that Plaintiff knew exactly what was happening in this area each day of the project.[44] Indeed, she testified that she knew she was walking toward the trench when she took her garbage out on the morning of her fall.[45] She had seen the trench every day for about two weeks.[46] She had previously selected a route to the dumpster specifically to avoid the trench.[47] In addition, photographs show that the contrast between the concrete pad and the asphalt was visible even at night.[48] At best, Plaintiff presents an "error correction" argument that doesn't invoke this Court's law development role.[49]

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[40] *Id.* at 636.
[41] See Plaintiff's October 3, 2025 Reply Brief on Appeal.
[42] Westveld's Supplemental Answer Brief, p 5.
[43] Id.
[44] See Id.
[45] See Westveld's Answer to Application, p 2.
[46] See Id., p vii.
[47] See Id., p 2.
[48] See Id., pp 3, 20; Westveld's Supplemental Answer Brief, pp 3, 23.
[49] See *Doster,* 971 NW2d at 607 (Zahra, J., dissenting), suggesting that it is "imprudent" for this Court to engage "in error correction involving applications taken from unpublished opinions of the Court of Appeals." "We should not spend our judicial resources on matters that lack jurisprudential significance." *Id.*

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II. Red Oak was entitled to summary disposition because the record established that the parking lot was fit for its intended use under MCL 554.139(1)(a), as Plaintiff and others successfully avoided the trench on other occasions.

The claim against Red Oak likewise involves settled law, but a case-specific argument over whether the facts support the claim.[50] The landlord's duty has changed little *Allison v AEW Cap Mgmt, LLP,* 481 Mich 419; 751 NW2d 8 (2008). Plaintiff doesn't dispute that her fall occurred in a common area,[51] so Red Oak's "duty to repair under" MCL 554.139(1)(b) "does not apply…."[52]

While § 139(1)(a) does apply, that subpart "does not require lessors to maintain a common area in an ideal condition or even in the most accessible condition possible."[53] "Rather, the statute requires the lessor to maintain a common area in a condition that renders it fit for its intended use."[54] For purposes of § 139(1)(a), "common areas" are "those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants."[55]

As the *Allison* Court noted, because only the covenant of 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."[56] "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).[57] Consistent with this lesser duty, "[m]ere inconvenience of access … will not

[50] See Plaintiff's Application for Leave to Appeal, p 25; Plaintiff's October 3, 2025 Reply Brief on Appeal, p 1.
[51] Plaintiff's Application for Leave to Appeal, pp 10, 29.
[52] Ex. 2 to Westveld's Answer to Application, p 4.
[53] *Gabrielson v Woods Condo Ass'n, Inc*, __ Mich App __; __NW3d __ (2024) (Docket No. 364809); slip op at 15 (citation omitted).
[54] *Id.* (citation omitted).
[55] *Id.*, citing *Allison,* 481 Mich at 427.
[56] *Allison,* 481 Mich at 433.
[57] *Id.*

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defeat the characterization of a lot as being fit for its intended purposes."[58] The duty wasn't breached unless Plaintiff was denied "reasonable access" to her dwelling or the dumpster.[59]

Again, none of these *legal* standards are disputed. Plaintiff's Application makes an entirely record-specific argument about how Red Oak supposedly breached that duty.[60] It is, again, solely an error-correction argument[61] "Typically, this Court refrains from engaging in error correction."[62] "The time expended on error correction is time taken away from matters that are of significant and vital concern to the more than 10 million people of Michigan."[63] This Court generally denies leave unless it can improve or clarify a particular area of the law.[64]

If there is anything to clarify about § 139(1)(a), it would be to answer the question left open by footnote 3 of *Allison*: whether "a plaintiff who proves a claim under MCL 554.139(1) is entitled to full damages for the injury…."[65] Red Oak discussed in detail why the answer should be "no."[66] Indeed, the *Allison* majority stated that any damages for a lessor's breach of § 139(1)(a) "would consist exclusively of a contract remedy."[67] Plaintiff says that's dicta.[68] But this Court confirmed in *Mullen v Zerfas*, 480 Mich 989, 990; 742 NW2d 114 (2007) that "[b]y the terms of the statute,

[58] *Id.* at 430.
[59] See *Id.* at 429.
[60] Plaintiff's Application for Leave to Appeal, pp 27-29.
[61] And it's a difficult error correction argument to make, given the undisputed fact that 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." Ex. 2 to Westveld's Answer to Application, p 5. This meant she "was not forced to encounter the trench to access the dumpster. Id. Moreover, "Red Oak provided two entrances to and exits from the dumpster area that avoided the trench." Id.
[62] *People v Shaw,* 500 Mich 941; 891 NW2d 226, 228 (2017) (Zahra, J., dissenting).
[63] *Doster,* 971 NW2d at 608 (Zahra, J., dissenting).
[64] *People v Bryant*, 491 Mich 575, 633; 822 NW2d 124 (2012) (Kelly, J., dissenting).
[65] *Allison,* 481 Mich at 426 n 3.
[66] See Red Oak's August 8, 2025 Supplemental Brief, pp 13-15.
[67] *Id.* at 425-426.
[68] Plaintiff's July 18, 2025 Supplemental Brief, p 30.

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the duties exist between the contracting parties." So, as Red Oak has explained, this point seems to be relatively uncontroversial.[69]

CONCLUSION AND REQUEST FOR RELIEF

The Court of Appeals correctly affirmed the summary disposition rulings in favor of Westveld and Red Oak. Plaintiff's challenges to that unpublished decision are specific to this case, and do not question the fundamental legal standards governing either ordinary negligence claims or claims under § 139(1). Apart from this Court releasing *Kandil-Elsayed* while the appeal was pending,[70] and one Court of Appeals judge writing a record-specific dissent, there is nothing remarkable about this case. For these reasons, the MDTC respectfully requests that this Honorable Court either deny leave or affirm the Court of Appeals.

Date: November 14, 2025

By: */s/ Drew W. Broaddus*

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[69] See Red Oak's August 8, 2025 Supplemental Brief, p 14.

[70] Which affected the analysis for Westveld but not Red Oak, since Red Oak couldn't raise open and obvious as a defense to the statutory claim in the first place. See *Allison*, 481 Mich at 425.

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CERTIFICATE OF COMPLIANCE

I certify that this Amicus Brief contains 2,665 words. The word processing software that was used to generate the word count is Microsoft Word 365.

Date: November 14, 2025

By: */s/ Drew W. Broaddus*

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