STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN MURRAY,

Plaintiff-Appellant,

v

DELTA COLLEGE,

Defendant-Appellee.

UNPUBLISHED
September 26, 2000

No. 217635
Bay Circuit Court
LC No. 98-003263-NO

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(7) and (10). We reverse.

Plaintiff alleged that on entering defendant's building she was injured when she tripped and fell on the edge of a half-inch depression in the floor. The rectangular-shaped depression was structurally designed to hold a mat which, when in place, made the depressed area even with the rest of the floor. Sometime before the incident, defendant's maintenance staff removed the mat to prepare the entrance for renovation. The trial court granted defendant summary disposition on the basis that plaintiff's claim did not fall within the public building exception to governmental immunity because the depression was a transitory condition arising from negligent janitorial care and was not a dangerous or defective condition of the building itself. The trial court also concluded that the danger posed by the depression was open and obvious and did not create an unreasonable risk of harm.

Plaintiff argues that the trial court erred in concluding that the public building exception set forth in MCL 691.1406; MSA 3.996(106) did not apply because the depression in the floor was a dangerous condition of the building itself. We agree.

We review a trial court's decision on a motion for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). Summary disposition is proper under MCR 2.116(C)(7) for a claim that is barred because of immunity granted by law. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). When reviewing a grant of summary disposition based on governmental immunity, this Court considers all documentary evidence submitted by the parties. *Id.*

Unlike a motion under subsection (C)(10), the movant under (C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id*. To survive a motion for summary disposition brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith, supra* at 616.

As a general rule, a governmental agency is immune from tort liability for actions taken while performing governmental functions. MCL 691.1407(1); MSA 3.996(107)(1); *Jackson v Detroit*, 449 Mich 420, 427; 537 NW2d 151 (1995).[1] This broad grant of immunity is subject to five narrowly drawn statutory exceptions. *Id.; Nawrocki v Macomb County Road Commn*, (Docket No. 107903, issued 7/28/00), slip op pp 11 n 14, 13. The public building exception provides in pertinent part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition . . . . [MCL 691.1406; MSA 3.996(106).]

To fall within the narrow confines of the exception, a plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) *a dangerous or defective condition of the public building itself exists*, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time. *Kerbersky v Northern Michigan University*, 458 Mich 525, 529; 582 NW2d 828 (1998); *Jackson, supra* at 428. (Emphasis added.)

In cases construing the third element, at issue here, our Supreme Court has held that the intent of the Legislature in enacting the public building exception was to "impose a duty to maintain safe public buildings, but not necessarily safety in public buildings." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992), citing *Reardon v Dep't of Mental Health*, 430 Mich 398, 417; 424 NW2d 248 (1998); see also *Jackson, supra* at 428. Thus, the duty to repair and maintain relates to the structural condition of the premises, and the exception "is limited to injuries occasioned by a 'dangerous or defective physical condition of the building itself.'" *Wade, supra* at 163, 168; *Jackson, supra* at 428. As long as the injury is presented by a structural condition of the building, it does not matter whether the condition arose because of improper design, faulty construction, or the absence of safety devices. *Wade supra* at 168, citing *Reardon, supra* at 410.

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[1] The parties do not contest, and we therefore do not decide, whether defendant is a governmental agency that was engaged in the discharge of a governmental function in relation to the incident in question.

Applying these principles to the present case, we disagree with the trial court's conclusion that the depression was not a dangerous or defective condition of the building itself. The depression in the floor was clearly part of the building's design because it was structurally incorporated into the floor. It was intended to hold a mat and to work with the mat to keep water and dirt away from the surface of the floor. Defendant's removal of the mat exposed the abrupt, half-inch deep depression, thereby creating a potentially hazardous ridge around the depression against which an individual might trip and fall. In other words, plaintiff's alleged injury was occasioned by a dangerous condition inherent in the physical structure and design of the building itself. Accordingly, we hold that plaintiff has stated a claim under the public building exception to governmental immunity, and the trial court erred in granting summary disposition in favor of defendant.

We are not persuaded by defendant's argument that *Wade*, *supra*, compels the opposite result. In *Wade*, our Supreme Court affirmed the lower court's ruling that the plaintiff failed to state a claim under the public building exception for injuries caused by the accumulation of oil, grease, food, and water on the prison floor. *Id.* at 161, n 4. In narrowly construing the exception, the Court held that it does not contemplate transitory conditions "because they are not related to the permanent structure or the physical integrity of the building" or claims of negligent janitorial care. *Id.* at 168, 170. The Court specifically concluded as follows:

> In sum we conclude that the public building exception is to be narrowly construed, and does not encompass claims of negligent janitorial care. *A spill on the floor does not become part of the building itself by virtue of the risk of injury it may create for the plaintiff. Moreover, we do not believe the Legislature intended "dangerous or defective condition of a public building" to refer to such transitory conditions.* The use of the ninety-day period for conclusively presuming knowledge, as well as the reference to time to "repair" the defect, reinforces our belief that the public building exception does not encompass transitory conditions or ordinary daily maintenance.
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> In the present case, plaintiff's claim alleges no more than mere negligence: that grease, oil, food, and water were allowed to accumulate on the floor. *This accumulation was the transitory condition which caused the plaintiff's injury.* Furthermore, no defect of the public building itself was pleaded. [*Id.* at 170-171. (Emphasis added).]

Although a possibility exists that removing the mat and leaving the depression exposed arose from negligent janitorial care, the proper inquiry under *Wade* is whether the transitory condition which caused the plaintiff's injury constituted a dangerous or defective condition of the building itself. Unlike the spill on the floor in *Wade*, the condition which allegedly caused the injury in this case was built into the permanent structure of the building. Further, defendant presented no evidence establishing that the removal of the mat was a "transitory" condition. While defendant submitted an affidavit from the "Director of Physical Plant" in which he averred that defendant's maintenance staff had been instructed to remove the mat for renovation purposes, there is no indication that its removal was temporary.

Plaintiff also argues that the trial court erred in granting defendant summary disposition in reliance on the open and obvious doctrine because the shift in floor levels was not an obvious danger and, even if it were, it posed an unreasonable risk of harm. In reviewing a motion under MCR 2.116(C)(10) the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 454-455.

The parties apparently do not dispute that at the time of her injury, plaintiff occupied the status of an invitee. A business invitor must exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the invitor knows or should know invitees will not protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 527 NW2d 185 (1995), citing 2 Restatement Torts, 2d, § 343, pp 215-216. However, the business invitor owes no duty of care where the alleged risk is open and obvious, unless the landowner should anticipate the harm, or the risk of harm remains unreasonable, despite the obvious nature of the condition. *Id.* at 611; *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96-97; 485 NW2d 676 (1992). A danger is open and obvious if an average user of ordinary intelligence could have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Here, the photographs defendant submitted with its motion do not establish the full length of the depression from where it began just inside the door to the end where plaintiff allegedly tripped. Nor do the photographs clearly depict a difference in color between the depressed area and the main floor, which defendant claims would have alerted a person entering the door to the floor level shift. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence). Further, plaintiff testified at her deposition that she was following her daughter and a guide through the doors of the building and tripped "the minute I got in there and started walking," although she could not recall if she took more than one step before she tripped coming out of the depressed area. Plaintiff also testified that she had never been in the building prior to the incident and that there were no signs warning of the floor differential or the absence of a mat. While plaintiff acknowledged that she was not looking down when she entered the door and that there was nothing obscuring her vision, her escort testified that the depression was "not that obvious" and that she had walked over it three times and "didn't notice it." Given the quality of defendant's evidence, and viewing the facts in the light most favorable to plaintiff, *Quinto, supra* at 362, we cannot conclude, as a matter of law, that an average user with ordinary intelligence could have discovered the alleged hazard upon casual inspection. Thus, an issue of fact exists and the trial court erred in granting summary disposition to defendant pursuant to MCR 2.116(C)(10).

We reverse the trial court's grant of summary disposition to defendant and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot