

STATE OF MICHIGAN
COURT OF APPEALS

ANN E. MASKERY and ROBERT MASKERY,

Plaintiffs-Appellants,

v

BOARD OF REGENTS OF THE UNIVERSITY
OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

January 11, 2002

No. 187738

Court of Claims

LC No. 94-015604-CM

ON REMAND

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

In lieu of granting leave to appeal, our Supreme Court has remanded this case to our Court with instructions to reconsider our decision in *Maskery v University Bd of Regents*, unpublished opinion of the Court of Appeals, issued March 24, 2000 (Docket No. 187738) in light of *Brown v Genesee Co Bd of Comm'rs*, 464 Mich 430; 628 NW2d 471 (2001), *Fane v Detroit Library Comm*, 465 Mich 68; 631 NW2d 678 (2001), and *Cox v University of Mich Bd of Regents*, 465 Mich 68; 631 NW2d 678 (2001).¹ We reverse and remand.

I. Basic Facts and Procedural History

Plaintiffs sought to recover from defendant after plaintiff Ann E. Maskery allegedly fell on the steps leading to a university residence hall where plaintiffs' daughter lived. The trial court ruled, however, that plaintiffs' lawsuit could not proceed against defendant because the public building exception to governmental immunity, MCL 691.1406, did not apply to the residence hall. Accordingly, the trial court granted defendant's motion for summary disposition.

On appeal, we affirmed, noting that the residence hall was not open to the public because only residents were provided keys for access to the external doors and visitors entered only if admitted by a resident. Our Supreme Court remanded with instructions to reconsider our decision in light of *Horace v City of Pontiac*, 456 Mich 744; 575 NW2d 762 (1998).

¹ The *Fane* and *Cox* decisions were consolidated in one opinion. See *Fane*, *supra* at 79-80.

After remand, we again affirmed, opining that the *Horace* decision did not disturb our conclusion that the residence hall was not a public building:

Application of *Horace, supra*, to the facts of this case fails to cause us to change our previous conclusion that the residence hall owned and operated by defendant University was not open to the public. This residence hall is indistinguishable from the privately occupied public housing in *Griffin v Detroit*, 178 Mich App 302; 443 NW2d 406 (1989), and *White v Detroit*, 189 Mich App 526; 473 NW2d 702 (1991), where the buildings were similarly not freely accessible to the public. Although *Kerbersky [v Northern Mich Univ*, 458 Mich 525, 529, 582 NW2d 828 (1998)] . . . might, at first blush, lend support to plaintiff's argument that because non-residents were occasionally let into the building, it was "open to the public," this argument impermissibly attempts to broaden the public building exception beyond acceptable bounds. While access to *some portions* of the building in *Kerbersky* may have been restricted at the time of the plaintiff's injury, access to the *entire* building in the present case was limited to the building's residents, guests admitted by the residents, and maintenance personnel. [*Maskery, supra* slip op at 3.]

The majority opinion further concluded that the steps on which plaintiff Ann E. Maskery fell were not part of the residence hall building, thereby providing an additional basis for affirming the trial court's refusal to apply the public building exception. However, in a concurring opinion, Judge Hoekstra opined that the area in dispute was sufficiently part of the building to permit application of the public building exception.

As noted above, our Supreme Court has again remanded this case for our reconsideration of plaintiffs' attempt to rely on the public building exception.

II. Standard Of Review

The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). "In deciding a motion for summary disposition based on governmental immunity, a court must consider all documentary evidence submitted by the parties. *Terry v Detroit*, 226 Mich App 418, 428; 573 NW2d 348 (1997)." "All well-pleaded allegations are accepted as true and construed most favorably to the nonmoving party in determining whether the defendant is entitled to judgment as a matter of law." *Id.*

III. Analysis

In the instant matter, there were alternative bases for granting defendant's motion for summary disposition: (i) the residence hall was not a public building, and (ii) even if the residence hall was a public building, the steps on which plaintiff Ann E. Maskery fell were not

part of the residence hall. We are asked to reconsider these conclusions in light of the *Brown*, *Fane*, and *Cox* decisions.

A. The *Brown* Decision

In *Brown*, an inmate at a county jail brought an action against the county after he slipped and fell on a wet floor after showering. *Brown, supra* at 432. The trial court concluded that the public building exception did not apply and granted the defendant's motion for summary disposition. *Id.* at 433. We initially affirmed in *Brown*, but reversed after the case was remanded by our Supreme Court for reconsideration in light of *Kerbersky, supra*. *Brown, supra* at 433.

On appeal, our Supreme Court reversed, thereby affirming the trial court's decision. *Brown, supra* at 440. A plurality of the Court opined as follows:

Mere public ownership of a structure does not satisfy the express language of the public building exception. A building must also be *open for use by members of the public*. *Kerbersky, supra* at 533; 582 NW2d 828. When determining the public's access, we analyze the building itself, *not* the specific accident site within the building. *Id.* at 527; 582 NW2d 828.

* * *

We would reaffirm that a jail is open for use by members of the public. Family, friends, and attorneys may generally visit inmates. Members of the public may also enter a jail for other reasons, e.g., to apply for a job or make a delivery.

The fact that public access to a jail is limited does not alter our conclusion. Schools fall within the exception even though members of the public may not enter whenever and wherever they please. See *Sewell v Southfield Public Schools*, 456 Mich 670; 576 NW2d 153 (1998); *Bush v Oscoda Area Schools*, 405 Mich 716; 275 NW2d 268 (1979). The public building exception applies to buildings with limited access, including schools and prisons. *Kerbersky, supra* at 534, 582 NW2d 828; *Steele v Dep't of Corrections*, 215 Mich App 710, 715; 546 NW2d 725 (1996). [*Brown, supra* at 435-436.]

In addition, Justice Markman agreed with the plurality's analysis and conclusion that the county jail was open for use by members of the public. *Id.* at 440 (Markman, J., concurring). Thus, a majority of the Court opined that the county jail was "open for use by members of the public."²

² Nevertheless, a majority of the Court also concluded on other grounds that the plaintiff could not rely on the public building exception. The plurality opinion concluded that the plaintiff, as an inmate, was not a member of the public for purposes for the public building exception. *Brown, supra* at 439. Justice Markman agreed with this conclusion, but applied a different analysis in reaching that result. *Id.* at 440-452 (Markman, J., concurring).

Here, the building in question is not a jail, but a residence hall. If a jail is “open for use by members of the public” by virtue of the family and friends that may visit inmates, it certainly follows that a residence hall would also be “open for use by members of the public.” Indeed, we would suspect that there is more, or at least equal, ingress and egress in a residence hall than in a jail. Similarly, a residence hall is likely to receive deliveries of supplies, mail, and food by non-residents. Moreover, if the very limited access to a jail is not sufficient to preclude its characterization as a public building, the instant residence hall’s minimal security measures, while presumably effective, further justify a finding that the residence hall was a public building. Thus, we believe that the *Brown* decision leads only to a conclusion that the residence hall was “open for use by members of the public.” Therefore, we conclude that the residence hall was a public building, as necessary to permit plaintiff’s reliance on the public building exception to governmental immunity, MCL 691.1406.

B. The *Fane* and *Cox* Decisions

In *Fane*, the plaintiff was injured after slipping on a terrace that provided access to the Detroit Public Library. *Fane*, *supra* at 71. The trial court denied the defendant’s motion for summary disposition, which was based on an argument that the public building exception was inapplicable to the terrace because it was not part of the building. *Id.* We reversed, relying on the *Horace* decision. *Id.* Our Supreme Court vacated the reversal, and remanded for reconsideration. *Id.* at 71-72. We again reversed the trial court, concluding that the trial court erred as a matter of law by ruling that the terrace was part of the building. *Id.*

On appeal, our Supreme Court opined as follows:

A fixtures analysis is not applicable to the elevated library terrace in *Fane* because the terrace does not have an existence apart from the library. Therefore, we must determine whether it is physically connected to and not intended to be removed from the building, making the terrace part “of a public building.”

The terrace is a large stone area that is physically abutting and built into the library building. It is not intended to be removed from the rest of the building in the foreseeable future. Normally, to reach the main entrance, one walks along a sidewalk, up stairs to the elevated terrace, across the terrace, and up additional stairs. If the terrace were removed, the doors to the library would be located approximately four feet off the ground.

We conclude that the elevated terrace is physically connected to and not intended to be removed from the library. Accordingly, we are persuaded that the terrace is part of the building within the meaning of the public building exception. [*Id.* at 79.]

Thus, the Court concluded that this Court erred by reversing the trial court. *Id.* at 79, 81.

In *Cox*, the primary plaintiff was injured when she slipped and fell on a ramp leading from a building to an outdoor porch. *Fane*, *supra* at 72. Our Supreme Court noted that the ramp

was portable, unattached to the building, and readily removable. *Id.* at 72-73, 79. Thus, the Court affirmed rulings by the trial court and this Court that the ramp was not part of the building, preventing the plaintiffs from relying on the public building exception. *Id.* at 79-80.

Here, we believe that the residence hall steps are more analogous to the terrace in *Fane* than the portable ramp in *Cox*. The residence hall steps are certainly not portable. Although the height of the residence hall door is unclear, we do not believe that the residence hall's architects anticipated the door being used for ingress and egress without its steps. In other words, like the terrace in *Fane*, the steps allow the door to remain functional, and their removal is certainly not plausible. Further, the steps appear to be physically connected to the building. In fact, much like the terrace in *Fane*, the steps have no existence apart from the residence hall. Accordingly, we believe that the *Fane* and *Cox* decisions justify a conclusion that the residence hall steps were part of the residence hall for the purposes of applying the public building exception.

III. Conclusion

Having reconsidered our earlier rulings in light of the *Brown*, *Fane*, and *Cox* decisions, we conclude that the residence hall was a public building and that the residence hall steps were a part of the residence hall. Thus, precluding plaintiffs' reliance on the public building exception to governmental immunity, MCL 691.1406, was erroneous. Therefore, we reverse the trial court's decision granting defendant's motion for summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens