

STATE OF MICHIGAN
COURT OF APPEALS

MARCENA NEW, Individually and as Next
Friend of ANGELA BENNETT, a Minor,

UNPUBLISHED
June 17, 2004

Plaintiff-Appellant,

v

OAK PARK SCHOOL DISTRICT,

No. 245749
Oakland Circuit Court
LC No. 02-041266-NZ

Defendant-Appellee.

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's ward, a student at a middle school in defendant's district, was injured when a bank of lockers came loose from the wall and fell, knocking her to the floor. The incident occurred when a student stood in his locker and allowed his weight to pull against the brackets that fastened the lockers to the wall. Plaintiff filed suit alleging that defendant negligently failed to brace the lockers to prevent them from falling, particularly when they were subjected to a foreseeable use such as "doubling up," i.e., two students placing possessions in one locker.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that it was entitled to governmental immunity because plaintiff could not establish that: (a) the lockers constituted a defective condition of the building itself; (b) it had actual or constructive knowledge of any defect; or (c) it failed to repair any defect within a reasonable time. The trial court granted the motion, finding that plaintiff failed to show that the lockers were attached to the walls in an inadequate fashion, or that defendant had actual or constructive knowledge of any defective condition.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The public building exception to governmental immunity provides that a governmental agency must repair and maintain public buildings under its control when those building are open for use by the public. MCL 691.1406. To establish that a claim is subject to the public building

exception, a plaintiff must prove that: (1) a governmental agency was involved; (2) the public building was open for use by members of the public; (3) a dangerous or defective condition of the building itself existed; (4) the governmental agency had actual or constructive knowledge of the alleged defect; and (5) the governmental agency failed to remedy the allegedly defective condition after a reasonable period of time. *DeSanchez v Dep't of Mental Health*, 467 Mich 231, 236; 651 NW2d 59 (2002).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. Plaintiff failed to produce admissible evidence that the manner in which the lockers were attached to the walls prior to the accident was inadequate and thereby defective. A contractor who inspected the lockers after the accident indicated that some banks moved as much as one inch when shaken; nevertheless, he concluded that the lockers were in no danger of falling unless a person applied vigorous force to pry them away from the wall.¹ Whether the physical condition of a public building is defective depends on the uses for which the building was specifically assigned. *Id.* at 237. No evidence showed that the lockers were defective when used for the purpose for which they were assigned, i.e., the storing of students' possessions.

Even assuming arguendo that the manner by which the lockers were fastened to the wall prior to the accident constituted a defective condition, no evidence showed that defendant was actually or constructively aware of the condition and failed to take steps to remedy the condition within a reasonable time. Constructive notice is established if the governmental agency should have discovered the defect in the exercise of reasonable diligence. *Ali v Detroit*, 218 Mich App 581, 586-587; 554 NW2d 384 (1996). The evidence showed that had defendant inspected the lockers on a regular basis, as plaintiff claims it was required to do, it would have found only that some banks of lockers moved as much as one inch when shaken. That degree of movement was not unacceptable. Absent any evidence of a defect, defendant would not have been prompted to take remedial action. No evidence created a question of fact as to whether defendant was actually or constructively aware of any alleged defect and failed to take steps to remedy that defect within a reasonable time. Plaintiff failed to establish that her claim was subject to the public building exception to governmental immunity. *DeSanchez, supra* at 236. The trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray

¹ Contrary to plaintiff's assertion, the contractor did not testify at his deposition that any locker movement beyond one-quarter of an inch was unacceptable. He stated that unacceptable movement existed when a bank of lockers could be moved back and forth with only minimal effort. He did not state that his inspection revealed unacceptable movement in the lockers.