STATE OF MICHIGAN

COURT OF APPEALS

BRANDON JOSEPH, a Minor, by his Next Friend, KAYATANA PRICE, Plaintiff-Appellee, v SOUTHFIELD PUBLIC SCHOOLS, Defendant-Appellant.	UNPUBLISHED May 8, 2008 No. 275869 Oakland Circuit Court LC No. 2006-076177-NO

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this negligence action, defendant Southfield Public Schools (SPS) appeals as of right the trial court's order denying its motion for summary disposition. Because a factual dispute exists as to whether a defective or dangerous condition existed and whether defendant had notice of the condition, we affirm.

In September 2001, plaintiff Brandon Joseph, then a first-grader at Brace Lederle Elementary School, stopped in the hallway to tie his shoelaces. When finished, Joseph ran to catch up with his classmates. While running, Joseph ran his hand along the edge of a drinking fountain, which was built into the wall of the hallway, and sliced his left pinky finger on an unfinished metal edge, nearly severing the finger from his hand. Joseph required surgery on his finger to repair damaged nerves.

Joseph, through his next friend, sued SPS, claiming that SPS allowed the drinking fountain to be and to remain in a dangerous and defective condition and that defendant was not afforded governmental immunity, as MCL 691.1406, the public building exception to governmental immunity, applied. SPS moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). It argued that, because Joseph was not using the drinking fountain for its intended purpose and because a person drinking water from the fountain would not come into contact with the exposed metal edge, the drinking fountain was not defective under the public building exception. In the alternative, SPS argued that it had no notice, either actual or constructive, of the exposed metal edge.

The trial court denied SPS's motion for summary disposition, concluding that reasonable minds could disagree whether the exposed metal edge of the drinking fountain was a defective or dangerous condition. The trial court also concluded that, because the elementary school was

inspected every year and plaintiff's expert averred that the metal plate had been in an improper position since the drinking fountain had been installed, reasonable minds could differ regarding whether SPS should have discovered the alleged defective condition through the exercise of reasonable diligence.

On appeal, SPS argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(7). We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Summary disposition is proper under MCR 2.116(C)(7) if the plaintiff's claim is barred by immunity granted by law. *Marchyok v Ann Arbor*, 260 Mich App 684, 687; 679 NW2d 703 (2004). In order to survive a motion for summary disposition based on governmental immunity, a plaintiff must allege facts justifying the application of an exception to governmental immunity. *Id.* We review the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the nonmoving party. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000). Summary disposition should be granted only if no factual development can provide a basis for recovery. *Id.* at 7.

Generally, a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004). The operation of a public school is a governmental function. *Id.* Several exceptions to governmental immunity exist, however, including the public building exception, MCL 691.1406. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). These exceptions are to be narrowly construed. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 112; 729 NW2d 883 (2007). MCL 691.1406, in pertinent part, provides:

> 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.

In order to avoid governmental immunity under the public building exception, a plaintiff must prove that (1) a governmental agency is involved, (2) the public building is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the agency had actual or constructive notice of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time. *de Sanchez v Dep't of Mental Health*, 467 Mich 231, 236; 651 NW2d 59 (2002). In the present case, the parties dispute whether Joseph has established the third and fourth elements.

As to the third element, SPS asserts that because Brandon was not using the drinking fountain for its intended purpose when he was injured, he cannot establish that the drinking fountain presented a dangerous or defective condition of the building. We disagree.

As emphasized by SPS, MCL 691.1406 imposes a duty upon a governmental entity to maintain the safety *of* public buildings rather than *in* public buildings. See, *Johnson v City of Detroit*, 457 Mich 695; 579 NW2d 895 (1998). "[T]he alleged defect must be a defect of the building itself. . ." *Id.* at 704.

SPS likens the facts of this case to those in *Hickey v Zezulka*, 440 Mich 1203; 487 NW2d 106 (1992). In *Hickey*, an individual being detained in a holding cell at a public university committed suicide by hanging himself on a heating unit attached to a wall in the cell. Our Supreme Court held that the public building exception to governmental immunity was inapplicable, noting that the critical question is whether the physical condition complained of was dangerous or defective under the circumstances presented:

> To suggest that any physical feature of a jail cell, otherwise benign, that can conceivably become a part of a plan of one who is desperately driven to self destruction can become a "dangerous or defective condition" under the public building exception statute, simply crosses the outer limits of any reasonable reading of the intent of that statute when considered in the context of its history, purpose, and wording. *Id.* at 426.

This case is distinguishable from *Hickey* (and other cases cited by SPS) in that a defect of the drinking fountain itself is alleged to have caused the injury—not the improper use of an otherwise benign feature in the building. A metal plate on the bottom edge of a drinking fountain sharp enough to nearly sever a finger at a simple touch is hardly comparable to the intentional misuse of a building aspect that was not otherwise alleged to be defective or dangerous. Not only is it questionable whether a child running his hand under the edge of a drinking fountain constitutes misuse of the drinking fountain, the presence of the sharp metal plate attached to the drinking fountain could easily be viewed as a defect in the physical structure itself.

Whether plaintiff was actually drinking out of the drinking fountain when he was injured is of little consequence to the issue before this Court. Under the circumstances presented, i.e., a drinking fountain containing a sharp metal edge, placed at child height and located in a school where small children would (and were intended to) touch the fountain (perhaps even hold the bottom of the fountain while getting a drink), the complaint and the facts thus far revealed through discovery demonstrate a factual dispute as to whether the sharp edge of the drinking fountain constituted a defect of the building itself. The trial court thus properly denied summary disposition.

In addition, there is a question of fact as to whether defendant had notice of the defective drinking fountain. As set forth in MCL 691.1406, "knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place." Joseph's expert, Steven J. Ziemba, averred that the drinking fountain was defective because an adjustable metal plate on the bottom of the fountain was not in the proper position. Ziemba opined that had the metal plate been in the proper position, Joseph would not have injured his left pinky finger and further opined that the adjustable metal plate had been in an improper position since the installation of the drinking fountain.

Additionally, plaintiff's employees testified that the entire building was inspected prior to the opening of the school year and that inspections were periodically conducted throughout the school year. Defendant's employees also testified that upon inspection of the drinking fountain after the incident, they were able to feel and see the cause of the injury. Whether the defect was readily apparent to an ordinarily observant person was thus a question of fact.

We are cognizant of the recent case of *Renny v Dep't of Transportation*, 478 Mich 490; 734 NW2d 518 (2007), wherein our Supreme Court found that the public building exception to governmental immunity was not applicable to claims of design defect. In the present case, however, the defective condition is not alleged to be due to a design defect. Rather, it was the result of alleged faulty construction/installation. *Renny*, then, is inapplicable to the facts before us. *Renny* is further inapplicable where, as here, the summary disposition hearing was held prior to the close of discovery and crucial facts such as who installed the drinking fountain and whether it was ever repaired or handled by employees of defendant, remain unresolved.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey