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	UNPUBLISHED May 8, 2008 No. 275869 Oakland Circuit Court LC No. 2006-076177-NO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.

HOEKSTRA, J., *(dissenting).*

I respectfully dissent.

In *Renny v Dep't of Transportation*, 478 Mich 490; 734 NW2d 518 (2007), the issue before the Supreme Court was whether MCL 691.1406 supported a claim for a design defect. In *Renny*, the plaintiff, while leaving a rest area building, slipped on a patch of snow and ice on the sidewalk in front of the building's doorway. She sued the Michigan Department of Transportation (MDOT), alleging that because of its failure to install gutters and downspouts around the building, snow and ice accumulated on the sidewalk in front of the building, which created a dangerous condition. Our Supreme Court agreed with MDOT that the plain language of MCL 691.1406 did not support a design defect claim:

> The first sentence of MCL 691.1406 states that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." This sentence unequivocally establishes the duty of a governmental agency to "repair and maintain" public buildings. Neither the term "repair" nor the term "maintain," which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner. "Design" is defined as "to conceive; invent; contrive." By contrast, "repair" means "to restore to sound condition after damage or injury." Similarly, "maintain" means "to keep up" or "to preserve." Central to the definitions of "repair" and "maintain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. "Design" refers to the initial concept of the building, rather than its restoration. "Design" and "repair and maintain," then, are unmistakably disparate concepts, and the Legislature's sole use of "repair and maintain" unambiguously indicates

that it did not intend to include design defect claims within the scope of the public building exception.

> The second sentence of MCL 691.1406, which imposes liability on governmental agencies "for bodily injury and property damage resulting from a dangerous or defective condition of a public building," does not expand the duty beyond the repair and maintenance of a public building. The phrase imposes liability where the "dangerous or defective condition of a public building" arises out of the governmental agency's failure to repair and maintain that building. It is not suggestive of an additional duty beyond repair and maintenance. [*Id.* at 500-501.]

Consequently, the Supreme Court disavowed the dicta from its prior decisions in *Reardon v Dep't of Mental Health*, 430 Mich 398; 424 NW2d 248 (1988), and *Bush v Oscoda Area Schools*, 405 Mich 716; 275 NW2d 268 (1979), and any from the cases from our Court, which suggested that a design defect claim falls within the scope of the public building exception. *Renny, supra* at 505.[1] In *Reardon, supra* at 409-410, and *Bush, supra* at 730, the Supreme Court had stated in dicta that "a building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices."

Although *Renny* is a design defect case, its reasoning is equally applicable to instances where defects result from faulty construction.[2] As explained by the Supreme Court, the duty of a governmental agency under the public building exception is to "repair and maintain" public buildings, a duty which requires the governmental agency to restore or return the public building to a prior state or condition. *Renny, supra* at 500-501. Construction, however, does not refer to the restoration of a building to a prior state or condition. "Construct" means "to build or form by putting together parts." *Random House Webster's College Dictionary* (1992). It refers to the initial act of building or forming a structure. Construction and "repair and maintain" are therefore disparate concepts, and the Legislature's sole use of "repair and maintain" unambiguously indicates that it did not intend to include faulty construction claims within the scope of the public building exception. *Renny, supra* at 501. Here, the uncontroverted averments of plaintiff's own expert, Joseph Ziemba, established that the alleged defect was the result of faulty construction, specifically the improper placement of the adjustable metal plate on the bottom of the drinking fountain, and that the defect had existed since its installation. No evidence showed that the drinking fountain was repaired by Southfield Public Schools (SPS) so as to cause the defective condition or that maintenance should have resulted in the correction of

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[1] In addition, the Supreme Court overruled any cases, such as *Sewell v Southfield Pub Schools*, 456 Mich 670; 576 NW2d 153 (1998), and *Williamson v Dep't of Mental Health*, 176 Mich App 752; 440 NW2d 97 (1989), that could be construed to stand for the proposition that claims for design defects fall within the scope of the public building exception.

[2] Thus, I agree with the majority that *Renny* is factually distinguishable. But clearly *Renny* establishes the legal platform upon which to decide a construction case like this one. Indeed, the cases that *Renny* overruled, as indicated above, purported to extend the public building exception to not only design, but faulty construction and the absence of safety devices cases as well.

it. Consequently, because plaintiff's claim is a faulty construction claim rather than a repair or maintenance claim, it is barred by governmental immunity.[3]

I would reverse the trial court's order denying SPS's motion for summary disposition and remand for entry of an order granting summary disposition to SPS.

/s/ Joel P. Hoekstra

[3] Because when the motion for summary disposition was filed, extensive discovery had already been conducted regarding the origin of this defect and plaintiff's position, as stated by their expert, is that it existed since installation, I, unlike the majority, find no reason to delay addressing this issue because discovery had not closed.