# STATE OF MICHIGAN

# COURT OF APPEALS

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| JOANN HETHERINGTON,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 17, 2009 |
| v | No. 283543<br>Court of Claims |
| UNIVERSITY OF MICHIGAN REGENTS,<br><br>Defendant-Appellant. | LC No. 07-000036-MZ |

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals the trial court's order denying its motion for summary disposition that was pursued on the basis of governmental immunity. We reverse and remand for entry of judgment in favor of defendant.

In this case, plaintiff fell and injured herself in defendant's auditorium located in Flint when she misjudged the vertical height of a riser while stepping down from the riser. The auditorium has risers that stretch across the room, with staircases on the far sides of the auditorium. The height of the risers is equal to about the height of two steps in the staircases. Plastic chairs, stored on the sides of the auditorium, or any other free-standing seating devices[1] can be placed on the risers for performances and events. The public entrance to the auditorium is from the rear of the room and, from the entrance area, the risers and staircases lead down to the stage, which is at the lowest point in the room. Although no seats or chairs are bolted or physically connected to any of the risers, the last riser level at the back of the auditorium, next to the entrance, has plastic chairs on it that are tethered together and are always left in place. This was done several years ago, following an accident, so as to prevent patrons entering the auditorium from using the risers as steps, forcing them instead to walk over to the side staircases and make their way downward, entering the risers from the side. Plaintiff was seated on one of the tethered chairs in the back row during a performance by her granddaughter. When the performance concluded, she desired to go down to the stage to see her granddaughter, but persons who had been sitting to her left and right were milling around, blocking her from exiting

[1] It was indicated that when the auditorium opened in the 1970s some students placed beanbag chairs on the risers for their classes.

the riser by way of a staircase. There were no persons or obstacles in the first few risers directly in front of plaintiff, so she decided to use the riser as a step to make her way down to the stage. And the accident occurred as she stepped down and forward, misjudging the height of the riser, thinking it to be an ordinary step. She tumbled and stumbled down multiple risers until stopping when another patron grabbed her.

This case presents issues concerning the imposition of governmental immunity, the construction of the public building exception to governmental immunity, MCL 691.1406, the interpretation of *Renny v Dep't of Transportation*, 478 Mich 490; 734 NW2d 518 (2007), and the question whether *Renny* should be given prospective application only. The trial court denied defendant's motion for summary disposition under its interpretation of *Renny* and the public building exception to governmental immunity. Defendant appeals as of right pursuant to MCR 7.203(A)(1) and MCR 7.202(6)(a)(v).

On appeal, defendant argues that, under *Renny*, the public building exception was not implicated because defendant did not fail to repair or maintain the auditorium, where the height of the risers would be a design defect and where the lack of handrails or guardrails (hereinafter simply referred to as guardrails) or warnings do not support a claim under the public building exception. Further, according to defendant, plaintiff's claims based on lack of designations on the edge of the riser and on the placement of the chairs on the top riser level do not implicate the public building exception and, regardless, such claims or defects were never presented in the notice required by MCL 691.1406. Moreover, defendant contends that any claim related to the placement of chairs on the back riser fails because the chairs are not part of the building. Finally, defendant maintains that any claim based on a lack of safety devices is not cognizable under the public building exception.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The question whether governmental immunity is applicable in a given case is one of law that is also reviewed de novo on appeal. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310-311; 732 NW2d 164 (2007).

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides a broad grant of immunity from tort liability to government agencies, absent the applicability of a statutory exception, when they are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984). An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function. *Maskery, supra* at 613-614. This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. *Id.* at 614. The party that seeks to impose liability on a governmental entity has the burden of pleading in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002).

The public building exception to governmental immunity, MCL 691.1406, provides in relevant 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. 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. As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. [[2]]

The focal point of this case entails interpretation of *Renny, supra.* In *Renny*, the plaintiff slipped on a patch of snow and ice on a sidewalk while leaving a public rest area building, severely injuring her wrist. The opinion set forth the nature of the plaintiff's allegations in her suit against the defendant Michigan Department of Transportation (MDOT):

> Plaintiff sued MDOT, alleging that her injuries resulted from a defective condition of the rest area building. According to plaintiff, "by [MDOT] designing, constructing, keeping and/or maintaining" the rest area in a defective condition, melted snow and ice accumulated on the sidewalks in front of the entranceway and created a hazardous, slippery surface. Plaintiff attributed the accumulated snow and ice, in part, to MDOT's failure to install and maintain gutters and downspouts around the roof of the building. Plaintiff maintained that gutters and downspouts would have safely channeled the snow and ice that melted off the roof away from the sidewalks. Moreover, plaintiff alleged that MDOT had actual or constructive notice of these defects for more than 90 days before the accident, but failed to remedy them. MDOT moved for summary disposition, which the Court of Claims granted on the basis of governmental immunity. [*Id.* at 493-494.]

The Court framed the plaintiff's case as one claiming that the dangerous or defective condition of the rest area building arose from a design defect that was cognizable under the public building exception. *Id.* at 496. The Court held "that the public building exception to governmental immunity does not permit a cause of action premised upon an alleged design defect." *Id.* at 492. The Court reasoned as follows:

> 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;

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[2] The second paragraph of MCL 691.1406 outlines the manner in which to serve the notice, which is not an issue here.

> 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 conception 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. [*Id.* at 500-501.[3]]

Here, plaintiff makes a general claim that her fall and injuries were caused by design defects. Under *Renny*, such a claim is not cognizable under the public building exception.

Plaintiff also claims that the auditorium should have had guardrails along the fronts of the risers. Plaintiff characterizes the claim as one asserting an absence of safety devices, which, according to plaintiff, was not an issue decided in *Renny*, leaving in place caselaw that supported imposition of the public building exception relative to such claims. We tend to agree that *Renny* left intact prior precedent recognizing a safety-device claim under the public building exception. See *Renny, supra*; *Reardon v Dep't of Mental Health*, 430 Mich 398, 409-410; 424 NW2d 248 (1988); *Bush v Oscoda Area Schools*, 405 Mich 716, 730; 275 NW2d 268 (1979); *Lockaby v Wayne Co*, 406 Mich 65; 276 NW2d 1 (1979). However, with respect to the absence of guardrails in particular, we view the claim as one alleging a design defect. Guardrails are generally included as part of the construction of a building. We fail to see any real difference between the lack of guardrails here, which ostensibly would have prevented plaintiff from taking her misstep had they been installed, and the lack of gutters and downspouts in *Renny*, which, if installed, ostensibly would have safely channeled water away from the sidewalk and prevented the accumulation of water and ice on the sidewalk upon which the plaintiff slipped. The *Renny* Court remanded the case because there was evidence suggesting that the rest area building was once equipped with gutters and downspouts, thereby possibly implicating the duty to repair and

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[3] The *Renny* Court, however, did not rule entirely in favor of MDOT in the case, stating as follows:

> Consistent with today's decision, to the extent that plaintiff's claim is premised on a design defect of a public building, it is barred by governmental immunity. However, plaintiff also alleged that MDOT failed to repair and maintain the rest area building. *Indeed, there is record evidence suggesting that the rest area building was once equipped with gutters and downspouts.* Although we do not pass judgment on the legal viability of plaintiff's claim or whether her claim may ultimately proceed to trial, plaintiff sufficiently pleaded in avoidance of governmental immunity. Accordingly, we remand to the Court of Claims to determine whether plaintiff's suit may proceed with respect to the alleged failure to repair and maintain the public building. [*Renny, supra* at 506-507 (emphasis added).]

maintain the building as constructed. Here, however, the evidence conclusively established that the auditorium never had guardrails in the places relevant to plaintiff's argument. If plaintiff's claim were successful, it would necessarily mean that defendant was being held liable for failing to design the auditorium without guardrails. Accordingly, the claim fails as a matter of law.

Plaintiff's contention that the auditorium was defective and dangerous because of the height of the risers clearly encompasses a design defect. There has been no change in the steps and risers since construction, and thus no change in the height of the risers. Regardless of whether there are any code violations relative to the height of the risers, the claim constitutes a design defect not cognizable under the public building exception pursuant to *Renny*. We also note that the trial court's statements from the bench when ruling did not suggest that the case could go forward on the basis that the risers were too high or in violation of any building codes.

With respect to a claimed lack of warnings, plaintiff appears to rely only on the failure of defendant to use contrasting marking strips on the risers that could potentially warn or alert a patron of the drop down to the next riser and its true height. The evidence reflected that there has been no change in the carpeting since the date of construction. Given the holding in *Renny* and the Court's definitions of "repair" and "maintain," the public building exception cannot be read to include a duty to warn by use of a means that could alert a patron of a danger.

In *Walker v Flint*, 213 Mich App 18, 21; 539 NW2d 535 (1995), this Court stated that "a claim of a duty to warn is a separate and distinct theory of liability from a statutory duty to maintain and repair under the highway exception to governmental immunity." Further, also with respect to the highway exception to governmental immunity, our Supreme Court has clearly stated that allegations concerning a lack of warning and traffic control signs do not implicate the highway exception and the government's duty to repair and maintain a highway. *Hanson v Mecosta Co Rd Commrs*, 465 Mich 492, 499; 638 NW2d 396 (2002); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 183-184; 615 NW2d 702 (2000)(rejecting an argument that a governmental agency had a duty to install signs and signals that might conceivably make the roadway safer). By analogy, the duty of a governmental agency to repair and maintain a public building does not include the duty to utilize measures that warn of an unsafe condition or that make a condition less hazardous.

In regard to the use of a solid color of carpeting throughout the auditorium that makes it somewhat difficult to judge the depth or height of the risers, the issue is touched on in the previous paragraphs relative to the claim that the carpeting should have had some markings to improve safety. Under *Renny* and its definitions of "repair" and "maintain," defendant's use of the orange or red colored carpeting simply does not implicate the duties to repair and maintain; therefore, the public building exception is not applicable.

With respect to the alleged low lighting, plaintiff merely suggested in her deposition that it might have contributed to her fall. Nevertheless, the lighting would clearly be a fixture, see *Fane v Detroit Library Comm*, 465 Mich 68; 631 NW2d 678 (2001), and if there was any evidence suggesting that the lighting was low because of a repair or maintenance failure or that the lighting had been brighter as operated at the time the auditorium was constructed, an argument could be made that there was a failure to repair and maintain. But there is no evidence supporting this proposition.

Plaintiff also presents a defect claim associated with the "permanent" placement of the plastic chairs on the top riser. There is no claim that the chairs, in and of themselves, are dangerous and defective; rather, the opinion asserted by plaintiff's expert was that the placement of the chairs played a role in causing the injury in that there was an insufficient amount of room to maneuver on the risers given the space taken up by the tethered chairs. Indeed, plaintiff frames an argument that the defective condition was the lack of adequate floor space on the riser to move about safely. Plaintiff argues that, because the auditorium was constructed with risers back in the 1970s that did not have any chairs, seats, or other items placed on them, defendant failed to "maintain" the building as constructed when placing the tethered chairs on the top riser on what appears to be a permanent basis.

It is evident that the intent of the designers was that chairs, bean bags, or some other seating devices would be used at times when patrons attended events. The same problem would have surfaced here had plaintiff and others grabbed untethered chairs from the storage area on the side of the auditorium and placed them on the top riser in order to sit and watch the performance. Plaintiff's claim is not comparable to the situation in *Renny*, where the rest area building may have once been equipped with gutters and downspouts that were no longer present due to, allegedly, a failure to maintain the building. It cannot be reasonably argued that placing the tethered chairs on the top riser reflected a failure to properly maintain the riser. One of multiple problems with the chair-related claim is that it is inconsistent with causation as described by plaintiff. According to plaintiff's testimony, the only problem caused by the narrowed riser space was that she could not get around patrons who were standing by their chairs and engaged in conversation with others. Such is the case in almost every performance or sporting venue; you excuse yourself and hope that others around you will move to let you through, even if it requires them moving to the end of the row. Plaintiff did not fall because she slipped as she was walking on the riser in an attempt to maneuver around other patrons and exit a side staircase. Rather, plaintiff intentionally stepped forward off the riser, but fell when she misjudged the depth or height of the riser, thinking it was an ordinary step.[4]

Finally, in a very cursory argument, plaintiff claims that *Renny* should only be given prospective application and that the instant suit was filed prior to the issuance of *Renny*. We conclude that this issue is not sufficiently briefed such that it requires resolution by this panel. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

We reverse the trial court's order and remand for entry of judgment in favor of defendant. We do not retain jurisdiction. Pursuant to MCR 7.219, taxable costs are awarded to defendant as the prevailing party.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[4] In light of our conclusions on the various alleged defects, it is unnecessary to address issues concerning satisfaction of the statutory notice provision found in MCL 691.1406.