STATE OF MICHIGAN

COURT OF APPEALS

KAREN RENNY and CHARLES RENNY,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
September 29, 2009

No. 285039
Court of Claims
LC No. 03-000042-MT

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Following remand to the Court of Claims from the Michigan Supreme Court, plaintiffs Charles and Karen Renny appeal by right the trial court's grant of summary disposition to defendant Michigan Department of Transportation (MDOT) in this personal injury lawsuit. We affirm. We decide this appeal without oral argument.[1]

I. Basic Facts And Procedural History

This case involves a question of the applicability of the public building exception to governmental immunity.[2] On January 8, 2000, Karen Renny[3] slipped and fell on a patch of snow and ice in front of the doorway of a state rest area building in Roscommon County, seriously injuring her right wrist. According to the materials presented by the parties, the building was initially built with "eaves troughs" and downspouts in 1975. Although Renny and the Michigan Supreme Court refer to this system as one of "gutters and downspouts,"[4] the system actually used initially was notably different. In contrast to a system using the more usual freestanding gutter attached to the edge of the roof, the "gutter" portion of the rest stop as it was initially designed in 1975 was part of the roof itself, the slope of which had been upturned by the use of an

[1] MCR 7.214(E).

[2] MCL 691.1406.

[3] Coplaintiff Charles Renny filed a claim for loss of consortium, which is derivative of his wife's claim. Therefore, we refer to Karen Renny singularly.

[4] *Renny v DOT*, 478 Mich 490, 507; 734 NW2d 518 (2007) (*Renny II*).

"outrigger" to form what appears to be a normal roof with a channel in the end of it, which drained into integral "downspouts."

The roof was remodeled, however, at some point before Renny's fall, removing the eaves trough drainage system and changing the roof to a more conventional one, albeit without gutters and downspouts. One of the Roscommon County Road Commission employees responsible for wintertime maintenance testified in his deposition that, although he could not recall exactly what had been done to the roof, he thought that the shingles were replaced "[b]ecause it leaked inside of the building." A former MDOT area coordinator testified in his deposition that the initial eaves trough system was no longer in use at the rest stop as of 1987. At some point, a four- or five-foot "diverter" made of 2½-inch high angle iron was used to divert water away from the door in the summer.[5] It is unclear when or if this diverter was removed. And although the coordinator did not know why the original eaves trough in the instant rest stop building was removed, he testified that the design caused significant snow and ice buildup at other rest stops, which created a hazard.

Renny sued MDOT[6] and alleged that her injuries resulted from a defective condition of the building. As the Michigan Supreme Court explained in *Renny v Dep't of Transportation*,[7] Renny's theories of recovery included both defective design and defective maintenance. Specifically, Renny argued that MDOT failed to install and maintain gutters and downspouts on the roof of the building and that this caused melted snow and ice to accumulate on the sidewalks in front of the entranceway and create a hazardous, slippery surface.[8] The Court of Claims granted MDOT's motion for summary disposition, but this Court reversed on the basis that the claim was cognizable under the public building exception.[9] The Michigan Supreme Court subsequently granted leave and reversed, in part, holding that design defects do not fall within the public building exception to governmental immunity.[10] The Supreme Court then remanded to the Court of Claims with the following instructions:

> Returning to the facts of this case, [Renny] alleges that she was injured by a dangerous or defective condition of the rest area building. She argues that the absence of gutters and downspouts, among other defects in the building, permitted an unnatural accumulation of snow and ice on the sidewalks in front of an entranceway and created slippery, hazardous conditions for members of the public. Consistent with today's decision, to the extent that [Renny]'s claim is

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[5] According to the employee, the rest stop was not open in the winter until 1999.

[6] Renny also sued the Roscommon County Road Commission and Roscommon Township in a separate circuit court action that was consolidated with this case at the trial court level. Both parties were dismissed, and neither party is participating in this appeal.

[7] *Renny II*, *supra* at 493-494.

[8] *Id*. at 494.

[9] *Id.*; see *Renny v DOT*, 270 Mich App 318; 716 NW2d 1 (2006) (*Renny I*).

[10] *Renny II*, *supra* at 507.

> premised on a design defect of a public building, it is barred by governmental immunity. However, [Renny] 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 [Renny]'s claim or whether her claim may ultimately proceed to trial, [Renny] sufficiently pleaded in avoidance of governmental immunity. Accordingly, we remand to the Court of Claims to determine whether [Renny]'s suit may proceed with respect to the alleged failure to repair and maintain the public building.[11]

Following remand, the trial court determined that Renny's injury was a result of a design defect rather than a failure to maintain. It found that, even if the building had in fact been altered,[12] MDOT was not required to continue to maintain an erroneous design and that when changes were made to correct the defect in the design, this did not amount to a failure to repair and maintain. It also held that the failure to place external gutters on the roof during the change would be considered a design defect, which did not fall under the public building exception. Renny now challenges the trial court's grant of summary disposition in MDOT's favor.

II. Summary Disposition

A. Standard Of Review

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[13] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[14] Further, MCR 2.116(I)(2) provides that, if it appears to the court that the opposing party rather than the moving party is entitled to judgment, the court may render judgment in favor of the non-moving party. We review de novo the trial court's ruling on a motion for summary disposition.[15]

B. Legal Standards

To avoid governmental immunity under the public building exception,

> the plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or

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[11] *Id*. at 506.

[12] Despite the trial court's statement, the parties do not dispute on appeal that the building's roof was in fact changed to remove the eaves trough system at some point prior to Renny's fall.

[13] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[14] MCR 2.116(G)(5); *Maiden*, *supra* at 120.

[15] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

> defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time.[16]

However, injuries arising from a design defect of a government building, as opposed to a failure to maintain or repair, do not satisfy the third element above.[17]

C. Applying The Standards

Renny claims that her injury resulted from MDOT's failure to maintain and repair the roof of the rest stop building. This assertion is premised on the notion that the injury occurred because MDOT removed gutters and downspouts that were included in the building's initial design and that this removal acted as a failure to repair or maintain the building as it was initially designed. Renny also asserts that the trial court violated the law of the case when it concluded that the removal of the original drainage system involved the design of the building because the Supreme Court precluded that analysis in its remand order.

Under the law of the case doctrine, if an appellate court passes on a legal question and remands for further proceedings, this Court not decide the legal question differently in a subsequent appeal in the same case where the facts remain materially the same.[18] But contrary to Renny's position, the Supreme Court did not rule as a matter of law that removal of the initial "gutters and downspouts" constituted a failure to repair or maintain. Indeed, the Court specifically stated that it was *not* passing judgment on the legal viability of Renny's failure to maintain claim. The Court concluded only that Renny had initially pleaded such a claim that, if viable, could lead to recovery under the public building exception.[19]

The crux of Renny's argument is, essentially, that once a building has been designed, the government has the duty to maintain and repair that building as it existed in the initial design, despite any problems with that design. We disagree. In *Renny*, the Supreme Court stated the following in its discussion concerning the differences between designing a building and maintaining it:

> We agree with MDOT that [MCL 691.1406] clearly does 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,"*

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[16] *Renny II*, *supra* at 495-496; see also MCL 691.1406.

[17] *Renny II*, *supra* at 507.

[18] *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000).

[19] *Renny II*, *supra* at 507.

> *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 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.[20]

We acknowledge that use of the phrase "initial conception of the building" in the Supreme Court's discussion appears to support Renny's claim. However, the Supreme Court also recognized that a building can be "redesigned." Renny's argument, if adopted, would pose a logistical nightmare for public entities trying to utilize improved technology to enhance safety in public buildings. It would also prevent alterations that are warranted by a change in the use of a building or unanticipated problems in the initial design. Buildings do not exist in a static environment. Nor are all of the possible problems inherent in a building design apparent when a building is initially conceived and built. We thus find Renny's position untenable.

Consequently, we conclude that the trial court correctly determined that Renny's injury was not caused by a failure to repair or maintain. Admittedly, a situation could arise where it would be difficult to distinguish between an act of repair or maintenance of an old design and a "redesign" that would cause a defect in the new structure to fall into the category of a design defect. Here, however, the type and extent of the change that occurred to the roof fell outside even an expansive definition of repair or maintenance, given that a portion of the roof was essentially deconstructed in order to remove the outriggers and integrated downspouts. This is not, as Renny suggests, a case where a simple gutter was either removed, or fell down and was not replaced. We thus affirm the trial court's determination that, to the extent Renny's injury was caused by a defect in the rest stop, it was due to a design defect when a new roof system was not equipped with standalone gutters and downspouts. We therefore conclude that summary disposition was proper.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

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[20] *Id.* at 500-501 (emphasis added).