STATE OF MICHIGAN

COURT OF APPEALS

ANGELA SMITH-JOHNSON, Personal Representative of the Estate of ANGEL POCOCK-SMITH, Deceased, Plaintiff-Appellee,	UNPUBLISHED September 28, 2010
v	No. 291404 Oakland Circuit Court
FERNDALE PUBLIC SCHOOLS, Defendant-Appellant.	LC No. 2008-088446-NO

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion for partial summary disposition and holding that the public-building exception to governmental immunity applied in this case because the accident in question was caused by a defect of a public building. Defendant also challenges the trial court's decision to deny defendant summary disposition concerning the issue of sufficient notice of the defective condition. We affirm.

Angel Pocock-Smith (hereinafter "plaintiff') was a five-year old kindergarten student at Roosevelt Elementary School in Ferndale, Michigan. On April 16, 2007, plaintiff was in the inner courtyard of the school, with her classmates, for guided classroom activities. The courtyard was commonly used to shelter children during classroom activities. Also in the courtyard was a flagpole that had been there since the school was constructed over 86 years earlier. While the classroom activities were going on, at approximately 1:00 p.m., the 44-foot long flagpole started making cracking sounds. Soon after, the flagpole broke and a 38-foot section came down towards plaintiff. The falling piece of the flagpole struck plaintiff on the back of the head and caused her to die.

A lawsuit was filed, and the parties filed cross-motions for summary disposition. The trial court ultimately ruled that the accident involved a public building for purposes of the public-building exception to governmental immunity. It also ruled that the issue of defendant's knowledge of the defective condition should proceed to trial. We find no basis on which to reverse the trial court's rulings.

This Court reviews motions for summary disposition under MCR 2.116(C)(7) de novo. *O'Connell v Kellogg Community College*, 244 Mich App 723, 725; 625 NW2d 126 (2001).

When reviewing the lower court's order, this Court looks to see if the movant "is entitled to judgment as a matter of law," and construes narrowly any exceptions to governmental immunity. *Id*.

To survive a motion for summary disposition under MCR 2.116(C)(7), a plaintiff must allege facts to justify the application of an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). To support a motion under MCR 2.116(C)(7), a party may use affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleinman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If neither party submits any documentation to contradict the complaint, then the complaint must be accepted as true. *Id*. at 434 n 6.

A governmental agency, such as a school district, is immune from tort liability when it is engaged in the exercise of a governmental function, see MCL 691.1407(1), unless one of the exceptions to governmental immunity applies. The exception at issue in the present case is the public-building exception, MCL 691.1406, which makes a governmental agency liable for "a dangerous or defective condition of a public building" if the agency had actual or constructive knowledge of the defect and failed, in a reasonable amount of time, to adequately address the defect.

Defendant contends that, as a matter of law, the courtyard at issue does not constitute a public building. In *Fane*, 465 Mich at 71, the Court considered a case involving someone tripping and falling over a stone terrace 35 yards in front of the Detroit Public Library. The *Fane* Court presumed that, in MCL 691.1406, the word "'of' rather than 'in' was carefully chosen to reflect legislative intent." *Fane*, 465 Mich at 77. This "implies that the [dangerous] conditions could pertain to parts of a building outside its walls." *Id*. The *Fane* Court stated that it is prudent to "consider the characteristics of the building and the item in question[;] [i]f it must be determined whether the building possess the item, surely the relative characteristics of both must be evaluated." *Id*.

Looking at the characteristics of the courtyard where the flagpole was located, it is plain to see that the courtyard was part "of" Roosevelt Elementary. The courtyard shares its walls and drainage system with the surrounding school. Furthermore, the only access to the courtyard is through the building itself. These characteristics demonstrate that the courtyard's use and access are directly linked to Roosevelt Elementary. As a result, it is hard to imagine the courtyard as not being part "of" Roosevelt Elementary. Moreover, it is hard to distinguish between this courtyard and the stone terrace in *Fane*. In *Fane*, 465 Mich at 79, the Supreme Court ruled that because the terrace was a permanent addition to the building, and was used to access the building, it was inherently part "of" the building. In the present case, the courtyard is essentially within Roosevelt Elementary, sharing features with the school.

Additionally, the Court in *Ali v Detroit*, 218 Mich App 581, 584-585; 554 NW2d 384 (1996), quoted Black's Law Dictionary (5th Ed), which defined a building as a "'structure designed for habitation, shelter, storage, trade, manufacturing, religion, business, education and the like. A structure or edifice enclosing a space within its walls, and usually, but not necessarily covered with a roof.'" The courtyard at issue here was being used for educational activities, and it completely enclosed those activities within its walls. We find that, under the pertinent case law, the courtyard here constituted part of a public building for purposes of MCL 691.1406.

Essentially (and as noted by the trial court), the courtyard is part of the building, and the flagpole was a fixture of that part of the building.

> Under the fixtures analysis, an item is considered part of the building if it is found to be a fixture. An item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty. [*Fane*, 465 Mich at 78.]

The flagpole was cemented three feet into the ground 86 years ago. The flagpole not only remained in its original location for almost an entire century, but it was also surrounded by brick pavers. It is therefore readily apparent that the flagpole's annexation was intended to be permanent. Moreover, it was an appropriate feature of the school. With regard to annexation, we note that "annexation occurs where the item cannot be removed from the building without impairing the value of both the item and the building." *Fane*, 465 Mich at 80. This criterion also applies to the flagpole.

In light of the above analysis, we hold that the trial court did not err in granting partial summary disposition to plaintiff.

Nor did the trial court err in finding that a question of fact existed concerning defendant's knowledge of the defective condition. According to MCL 691.1406 and *Ali*, 218 Mich App at 586, constructive knowledge can be used to satisfy the knowledge requirement set forth in the public-building exception to governmental immunity. Constructive knowledge "is demonstrated by showing that the agency should have discovered the defect in the exercise of reasonable diligence." *Id*. at 586-587.

Defendant's expert witness, Richard Schimizze, stated that in at least one area of the flagpole, rust had been painted over, anywhere from five to 15 years before the accident. In his deposition, Schimizze articulated that the proper way to repaint metal was to grind it down (removing the rust), then prime it, and finally paint it the color desired. In at least one area of the flagpole, however, rust was simply painted over, signifying that the school knew of rust before the accident, and, instead of correcting the problem related to the rust, the school simply painted over it. Plaintiff's expert, Wayne Jones, stated that while the flagpole may have looked worse when inspected post-accident, some areas of deterioration would have been visible at the time of the accident. He claimed that, because of the amount of rust and corrosion, it could be determined that not only was the pole in poor condition before the accident, but that at least 90 days before the accident, rust would have been visible throughout the length of the pole. Under 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.

We find that the evidence presented in this case presented a question of fact for the jury concerning whether defendant had notice of the defective condition sufficient to satisfy the requirements of MCL 691.1406.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio