

STATE OF MICHIGAN
COURT OF APPEALS

TERRY ALLEN,

Plaintiff-Appellant,

v

WAYNE COUNTY and WAYNE COUNTY
SHERIFF,

Defendants-Appellees.

UNPUBLISHED

November 27, 2001

No. 216841

Wayne Circuit Court

LC No. 97-726391-NO

ON REMAND

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

This case arrives before us for the second time. The instant appeal involves plaintiff's challenges to the trial court's order granting defendants summary disposition of plaintiff's complaint, which alleged gross negligence and state constitutional due process violations. In our previous decision, we upheld the trial court's dismissal of plaintiff's constitutional claims, but reversed the trial court's grant of summary disposition with respect to plaintiff's negligent maintenance claim against defendant Wayne County because we found that plaintiff had adequately set forth the public building exception to governmental immunity, MCL 691.1406. *Allen v Wayne Co*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 2001 (Docket No. 216841). In lieu of granting leave to appeal our decision, the Supreme Court remanded this case for our "reconsideration in light of *Brown v Genesee Co Bd of Comm'rs*, 464 Mich 430[; 628 NW2d 471 (2001)]." 465 Mich 873. After reviewing *Brown*, *supra*, we find that we must likewise affirm the trial court's dismissal of plaintiff's negligent maintenance claim.

In our initial decision, we stated the following relevant facts:

Plaintiff averred that as a pretrial detainee in the Wayne County Jail, he was injured when an inmate pushed him while plaintiff stood in a puddle of water. He slipped and fell, hitting his back against a metal table and chair. The source of the water was a plumbing leak in the ceiling. Although plaintiff and his fellow inmates had complained about the leak for several weeks before plaintiff's fall, no one fixed it. [*Allen*, *supra*, slip op. at 1.]

The trial court had reasoned that plaintiff could not invoke the public building exception because plaintiff's fall occurred in an area of the jail not open to the general public or general inmate

population. Relying on *Green v Dep't of Corrections*, 386 Mich 459, 464; 192 NW2d 491 (1971) and *Brown v Genesee Co Bd of Comm'rs (On Remand)*, 233 Mich App 325, 327-328; 590 NW2d 603 (1998), we rejected the trial court's analysis focusing on the location of plaintiff's injury, and instead found dispositive that a jail constituted a public building for purposes of the public building exception, and that prisoners were members of the public whether in or out of jail.

The Supreme Court in *Brown*, 464 Mich 430, reversed this Court's decision that a jail inmate could invoke the public building exception because a jail was a public building, and affirmed the trial court's grant of summary disposition regarding the jail inmate plaintiff's claims that a dangerous or defective condition in the jail caused him injuries. *Id.* at 432. The Supreme Court's lead opinion explained that while "a jail is 'open for use by members of the public,' an inmate is not a member of the 'public' as contemplated by the Legislature when it enacted the public building exception to governmental immunity." *Id.* (Corrigan, J.).¹ Although only two other Justices joined in the lead opinion, Justice Markman's concurring opinion agreed "with the plurality opinion's conclusion that a jail is 'open for use by members of the public,'" and "that an inmate is not a member of the public within the meaning of the public building exception." *Id.* at 440.²

Consequently, a majority of the Supreme Court in *Brown* has concluded that while a jail is open for use by members of the public, an inmate does not qualify as a member of the public for purposes of the public building exception, MCL 691.1406. Guided by this holding, we conclude that plaintiff, a jail inmate alleging injury occasioned by a defective condition of the

¹ The plurality opinion examined the first sentence of the public building exception, which states, "Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." MCL 691.1406. The plurality reasoned that the phrase "when open for use by members of the public" implicitly limited the class of persons who may sue under the exception, excluding "persons who are not members of the public, i.e., those persons who are not present in the building as potential invitees." *Brown, supra*, 464 Mich at 438. The plurality further explained that jail inmates did not constitute members of the public for purposes of the public building exception because "an inmate does not visit a jail as a potential invitee. Instead, inmates are *legally compelled* to be there." *Id.* at 439 (emphasis in original). The plurality explicitly overruled *Green, supra*, "to the extent that it treats inmates as members of the 'public' for purposes of the statutory exception," *id.* at 436, n 4, further criticizing the *Green* opinion's failure to provide any analysis supporting "its assertion that an inmate 'is a member of the public community.'" *Id.* at 439, n 8.

² Justice Markman reached the same conclusions as the majority "on the basis of the statutory language that limits the government's liability to injuries caused by failing to 'take action reasonably necessary to protect the public against the condition.'" *Id.* at 441. Justice Markman explained that both he and the plurality concluded that "a jail inmate is not a member of the public for purposes of the public building exception in order to avoid rendering the language of the statute meaningless by encompassing within the definition of *public* virtually everyone." *Id.* at 441 (emphasis in original). Justice Markman also concurred "with the plurality opinion's overruling of that part of *Green v Dep't of Corrections*, 386 Mich 459; 192 NW2d 491(1971), which held that inmates are members of the public community whether in or out of jail." *Brown, supra*, 464 Mich at 447.

Wayne County Jail, cannot invoke the public building exception because he is not a member of the public protected by the public building exception.

We therefore affirm the trial court's grants of summary disposition regarding all counts of plaintiff's complaint.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage