STATE OF MICHIGAN

COURT OF APPEALS

AMEENA HAMOOD,

Plaintiff-Appellant,

v

CITY OF DEARBORN,

Defendant-Appellee.

UNPUBLISHED
February 11, 2021

No. 350924
Wayne Circuit Court
LC No. 18-005062-NO

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

PER CURIAM.

Plaintiff, Ameena Hamood, appeals the trial court's order, which granted summary disposition in favor of defendant, City of Dearborn, under MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact). We affirm.

I. BACKGROUND

This case arises out of a slip and fall that occurred in a women's locker room at Jack Dunworth Memorial Pool in Dearborn, which is owned and operated by the City. On June 28, 2017, Hamood slipped and fell on the floor, which was wet, while she was walking into the women's locker room from the pool deck. According to Hamood, at the entrance of the locker room, the floor sloped downward and caused water to pool. Hamood fell "sideways" and tried to "grab the wall." However, there was nothing for Hamood to grab onto to prevent or break her fall. Hamood allegedly sustained injuries as a result of the fall.

In May 2018, Hamood filed a complaint against the City, alleging that the City's negligence caused her injuries. Specifically, Hamood alleged that "she was caused to slip and fall because of an unreasonable and unsafe differential in the ramp walkway and lack of handrail[.]" Hamood alleged that the City was liable for her injuries under the public-building exception to governmental immunity, MCL 691.1406. The City answered the complaint and denied liability. The City also filed affirmative defenses alleging that because no exceptions applied, Hamood's claim was barred under the governmental tort liability act ("GTLA"), MCL 691.1401 *et seq*.

Discovery commenced. Francesca Arnold testified that, during the time that she worked for the City as a lifeguard, there was an area in the women's locker room where water "naturally pooled[.]" According to Arnold this area was "in the area where [Hamood] fell."[1] Arnold noted that employees were responsible for "squeegee[ing]" that area because it was known that water accumulated there. Although Arnold testified that the floor "sank," she also believed that the water accumulated there because the floor was not "designed very well." Caitlyn Villa, who worked as a head lifeguard at all relevant times, testified that "the floor is set up so that it doesn't drain correctly to the drain in some spots." Villa noted that one of the areas that accumulated water was "by one of the showers that's towards the exit towards the pool deck."

After the close of discovery, the City filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that it was shielded by governmental immunity and that the public-building exception did not apply because Hamood's claims arose out of a design defect, as opposed to the City's failure to repair or maintain the building. The City also argued that, to the extent that the wet floor caused Hamood's fall, the presence of "[w]ater is a transitory condition . . . and not a defect in the building itself." Hamood opposed the motion, arguing that the City had failed to establish that the issues with the building were design defects. Hamood also pointed to evidence that the pooling of water in the locker room had been a consistent issue for several years.

Following oral argument, the trial court granted the City's motion for summary disposition, holding that the public-building exception did not apply and that the City was shielded from liability by the GTLA. This appeal followed.

II. STANDARDS OF REVIEW

The applicability of governmental immunity is reviewed de novo as a question of law. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010). "This Court [also] reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7) and (C)(10)." *McLean v Dearborn*, 302 Mich App 68, 72; 836 NW2d 916 (2013). A motion for summary disposition is proper under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 432; 824 NW2d 318 (2012).

> A summary disposition motion brought under subrule (C)(7) does not test the merits of a claim but rather certain defenses that may eliminate the need for a trial. When reviewing a grant of summary disposition under subrule (C)(7), this Court accepts as true the plaintiff's well-pleaded allegations and construes them in the light most favorable to the plaintiff. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, whether immunity bars the claim is a question of law for the court. Under this subrule, summary disposition may be granted when a claim is barred because of immunity granted by law. [*Nash v Duncan Park Comm*, 304 Mich App 599, 630; 848 NW2d 435 (2014),

[1] Arnold heard Hamood fall and came to her assistance on the day of the incident.

vacated in part on other grounds by 497 Mich 1016 (2015) (quotation marks and citations omitted).]

In reviewing a decision to grant summary disposition under MCR 2.116(C)(10), "a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Summary disposition under (C)(10) is appropriate "when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citations omitted). When the nonmoving party bears the burden of proof on an issue, the moving party may support its motion by showing that the nonmoving party does not have enough evidence to support its claim. *Lowrey v LMPS & LMPJ*, 500 Mich 1, 7; 890 NW2d 344 (2016).

III. ANALYSIS

Hamood argues that the trial court erred by granting the City's motion for summary disposition because genuine issues of material fact existed as to whether the public-building exception applied. We disagree.

Governmental agencies are generally immune from tort liability when they are discharging a governmental function, unless there is an exception to governmental immunity that applies to the situation. *Tellin v Forsyth Twp*, 291 Mich App 692, 699; 806 NW2d 359 (2011). "Courts are required to broadly construe the term 'governmental function,' while strictly construing exceptions to governmental immunity." *Id*. The public-building exception is one such exception. *Id*. It provides as follows:

> 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. [MCL 691.1406.]

A plaintiff must prove the following five elements to avoid governmental immunity under the public-building exception:

> (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 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. [*Renny v Dep't of Transp*, 478 Mich 490, 495-496; 734 NW2d 518 (2007) (citation omitted).]

The issue in this case focuses on the third prong, i.e., whether "a dangerous or defective condition of the public building itself exists." *Id*. Hamood repeatedly notes on appeal that she fell as a result of the water that was permitted to pool in the locker room area. However, in *Wade v Dep't of Corrections*, 439 Mich 158; 483 NW2d 26 (1992), our Supreme Court affirmed the trial

court's ruling that the plaintiff failed to state a claim under the public-building exception for injuries caused by the accumulation of oil, grease, food, and water on the floor. In narrowly construing the public-building exception, the Court held that the exception "does not contemplate transitory conditions because they are not related to the permanent structure or the physical integrity of the building." *Id*. at 168. The *Wade* Court specifically concluded as follows:

> In sum, we conclude that the public building exception is to be narrowly construed, and does not encompass claims of negligent janitorial care. A spill on the floor does not become part of the building itself by virtue of the risk of injury it may create for the plaintiff. Moreover, we do not believe the Legislature intended "dangerous or defective condition of a public building" to refer to such transitory conditions. The use of the ninety-day period for conclusively presuming knowledge, as well as the reference to time to "repair" the defect, reinforces our belief that the public building exception does not encompass transitory conditions or ordinary daily maintenance.
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> In the present case, plaintiff's claim alleges no more than mere negligence: that grease, oil, food, and water were allowed to accumulate on the floor. *This accumulation was the transitory condition which caused the plaintiff's injury*. Furthermore, no defect of the public building itself was pleaded. [*Id*. at 170-171 (emphasis added).]

Although a possibility exists that the water accumulation arose from negligence on the part of the City's employees, the proper inquiry under *Wade* is whether the transitory condition that allegedly caused Hamood's injury constituted a dangerous or defective condition of the building itself. We conclude that, like the substances on the floor in *Wade*, the condition that allegedly caused the injury in this case was not built into the permanent structure of the building. Rather, it resulted from water accumulating on the floor after individuals entered the locker room from the pool deck and/or used locker room showers.

Hamood tries to distinguish the facts here from *Wade* by arguing that the puddle of water was "continually present" and therefore essentially part of the building itself. However, even assuming that Hamood's argument that the water was "continually present" is factually true, it is of no legal consequence. As already stated, the Court in *Wade* concluded that a governmental entity is not liable for transitory conditions, or ordinary daily maintenance failures, "because they are not related to *the permanent structure or physical integrity* of the building." *Wade*, 439 Mich at 168, 171 (emphasis added). A spill or puddle of water, even if continuously present, does not thereby become incorporated into the permanent structure of the building. See *id*. at 170 ("A spill on the floor does not become part of the building itself by virtue of the risk of injury it may create for the plaintiff."). *Wade* clearly states that governmental entities are not to be held to the same standard of liability as private tortfeasors. *Id*. Also, holding otherwise would be inconsistent with the fact that "Courts are required to . . . strictly constru[e] exceptions to governmental immunity." *Tellin*, 291 Mich App at 699. Thus, because the presence of water is "not related to the permanent structure or the physical integrity of the building," the trial court did not err by determining that the presence of the water alone did not satisfy the public-building exception.

Hamood also alleges that the building itself was defective because it had "an unreasonable and unsafe differential in the ramp walkway." However, the public-building exception does not apply to design defects. In *Renny*, 478 Mich at 500-501, our Supreme Court explained at length the differences between design defects and a failure to maintain and repair:

> 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 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.
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> 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. There is no reason to suspect that the Legislature intended to impose a duty to prevent "dangerous or defective condition[s]" in public buildings in a manner wholly unrelated to the obligation clearly stated in the first sentence. [Citations and footnote omitted.]

Notably, although the *Renny* Court held "to the extent that [the] plaintiff's claim is premised on a design defect of a public building, it is barred by governmental immunity," it also remanded the case because the plaintiff alleged that the defendant failed to repair and maintain the building. *Id*. at 506-507.

In *Tellin*, 291 Mich App at 705-706, this Court sought to further clarify the distinction between a design defect and a failure to repair and maintain:

> A design defect would appear to consist of a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose. For example, the accumulation of the snow and ice on the sidewalk in *Renny* was not from any malfunction of the roof or problem with its construction, but was a natural

> effect of the characteristics of the new roof design, which was not intended to divert melting snow and ice.
>
> In contrast, a failure to repair or maintain appears to consist of something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improperly constructed or installed. Reparative or preventative measures may also supplement the existing structure to preserve the existing design. An action could initially be a design decision, but subsequent improper installation, malfunction, deterioration, or instability could later transform this decision into a failure to repair or maintain. [Citations omitted.]

Applying *Renny* and *Tellin* in this case, we conclude that the trial court did not err by granting summary disposition in favor of the City. First, with respect to Hamood's allegations about the "unsafe differential," Hamood does not directly allege that the floor malfunctioned or that defects in the floor resulted from the City allowing the floor to fall into disrepair. Rather, Hamood repeatedly notes that Arnold testified that the floor was "sunken" and that the City failed to repair the "sunken floor." However, we see nothing in the record suggesting that the water pooled as the result of "deterioration" or "disrepair," such as cracks in the floor. Indeed, review of a photograph of the area where Hamood fell supports that the water pooled as a result of a design flaw. Specifically, the photograph shows that the floor was constructed so that it would dip in a certain area. In other words, the photograph supports that Hamood's injury was occasioned by a condition that was inherent in the design of the building itself. There is simply no indication that the City modified the floor in the locker room at any relevant time.

Nonetheless, Hamood argues that the City "did not meet its burden in offering evidence to prove that there was a 'design defect' at play" given that it relied on the testimony of Arnold, who "cannot competently testify to engineering, construction, physics, or any combination of such sciences and arts." However, the City did not bear the burden of production here. Rather, because Hamood would bear the burden of proof at trial that an exception to governmental immunity applied, *Renny*, 478 Mich at 495-496, the City only had to show that Hamood did not have evidence to support her claim that the public-building exception applied, *Lowrey*, 500 Mich at 7. Hamood simply did not demonstrate facts justifying the application of a statutory exception to governmental immunity with respect to her claim concerning the floor.[2]

Finally, Hamood argued that the building was defective because it did not have a handrail in the area where she fell. However, there is no evidence that the locker room previously had a handrail and that the City allowed it to fall into disrepair. Indeed, there is no evidence that there

[2] The fact that the City put down nonslip mats after Hamood's accident does not suggest that the City had allowed the floor to fall into disrepair. Besides, this fact would be inadmissible at trial under the Michigan Rules of Evidence. See MRE 407. Hence, even if the evidence was helpful, Hamood could not rely on the evidence to contest the City's motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999) (stating that a "court should evaluate a motion for summary disposition" by "considering the substantively admissible evidence actually proffered[.]").

was ever a handrail in the vicinity where Hamood fell. Cf. *Renny*, 478 Mich at 506-507 (remanding because there was evidence in the record suggesting that the building was once equipped with the safety feature that the plaintiff claimed was lacking). Hamood essentially speculates that the lack of a handrail could be the result of the City's failure to maintain or repair the locker room. However, speculation is not enough to create a genuine dispute of material fact. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Simply put, all Hamood has shown is that she slipped on a wet floor. As discussed above, water on a floor alone is a transitory condition that does not invoke the public-building exception.

In sum, even when viewing the evidence in a light most favorable to Hamood, we conclude that the record below presents no genuine dispute of material fact. Consequently, the trial court did not err by granting summary disposition in favor of the City.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron