

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
[Smolenski, P.J. and Whitbeck, C.J. and O'Connell, J.]

KAREN RENNY and CHARLES RENNY,

Plaintiffs,

v

ROSCOMMON COUNTY ROAD
COMMISSION and ROSCOMMON
TOWNSHIP and JOHN DOE I, an unknown
individual or entity,

Defendants.

Consolidated with:

KAREN RENNY and CHARLES RENNY,

Plaintiffs/Appellees,

v

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant/Appellant.

Supreme Court No. 131086

Court of Appeals No. 257018

Roscommon Circuit Court
No. 02-723681-NO

Consolidated with:

Court of Claims
No. 03-42-MT-C30

**DEFENDANT/APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED**

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

On December 6, 2006, the Supreme Court granted Defendant-Appellant's Application for Leave to Appeal the March 21, 2006 judgment of the Court of Appeals.

STATEMENT OF QUESTIONS INVOLVED

MDOT is immune from tort claims except those falling within limited statutory exceptions. The "public building exception" creates liability for negligent failure to repair and maintain buildings. This Court has interpreted virtually identical language in the "highway exception" to exclude design claims. Plaintiff claims that she slipped on ice outside of the entrance to MDOT's building, and that the ice was allegedly caused by rain water dripping intermittently from the roof.

This Court specified issues to be briefed:

- (1) whether the Court of Appeals correctly characterized the alleged dangerous or defective condition in this case as a design defect;
- (2) whether the public building exception, which obligates a governmental agency 'to repair and maintain public buildings,' permits a party to bring a design defect claim; and
- (3) whether the Court of Appeals' conclusion that the icy sidewalk was not a transitory condition is contrary to this Court's decision in *Wade v Dep't of Corrections*, 439 Mich 158 (1992)."

INTRODUCTION

In the watershed case *Ross v Consumers Power Company*, this Court held that the Legislature intended governmental immunity should be broad and that the limited exceptions are to be narrowly construed. One such exception is the public building exception, which provides that the government is liable if it negligently fails to "repair and maintain" a public building. This Court has not directly addressed the question of whether a design defect could qualify as a failure to "repair and maintain" a public building under the exception. The statute's plain language, however, makes clear that the duty to repair and maintain requires only that the government ensure the physical condition of the building is maintained in good repair, not that the government create the safest design possible. This Court has recognized the same point in interpreting similar language in the highway exception. The claim here is that the government defectively designed the building because it failed to install gutters and additional ceiling insulation to prevent the dripping that caused ice to form on the sidewalk. But there is no obligation to design the building in this fashion and the trial court properly dismissed the Plaintiffs' claim inasmuch as there was no failure to repair and maintain the building.

With respect to the question whether the icy sidewalk was a transitory condition, in *Wade v Dep't of Corrections*, this Court held that the public building exception is limited to injuries caused by a dangerous condition of the building itself. This exception does not extend to injuries caused by "transitory conditions" unrelated to the permanent structure or physical integrity of the building. In *Wade*, recovery was denied because the injuries were due to a transitory condition, i.e., a slip and fall on oil that had accumulated on the floor of a public building. Likewise here, the claim that Plaintiffs advance – a slip and fall on ice – does not allege injuries caused by a dangerous condition of the building. Consequently, Plaintiffs are not entitled to recovery.

STATEMENT OF FACTS

Plaintiff Karen Renny alleges that she was injured when she slipped on ice outside of the entrance to a public rest area. She brought this action against the Michigan Department of Transportation (MDOT) pursuant to the "public building exception" to MDOT's immunity.¹ She maintained in her Complaint that MDOT breached its statutory duty "by designing, constructing, keeping and/or maintaining the restroom building described herein which had dangerous and/or defective conditions."² The complaint claimed that the lack of adequate ceiling insulation and/or gutters on the building roof caused water to accumulate and freeze on the sidewalk that led to her fall and injury.³ There is no allegation that the roof was defective – simply that the design of the building did not include the installation of adequate insulation or gutters.

The Trial Court's Opinion

MDOT brought its Motion for Summary Disposition, based on several grounds, including that the public building exception does not create liability for defective design of a building.⁴ The trial court granted MDOT's motion on July 7, 2004, and Plaintiff appealed to the Court of Appeals.⁵

The Court of Appeals' Opinion

The Court of Appeals reversed the trial court by published decision released March 21, 2006.⁶ In its decision, the Court of Appeals explicitly held that "[d]esign defects are [] actionable under the public building exception to immunity."⁷

On May 2, 2006, MDOT filed its application for leave to appeal to the Supreme Court.

¹ MCL 691.1406.

² Complaint, ¶19(A), Appendix p 14a.

³ Complaint, Appendix p 11a.

⁴ MDOT motion and supporting brief, Appendix p 17a.

⁵ Order, Appendix, p 41a.

⁶ *Renny v Dep't of Transportation*, 270 Mich App 318; 716 NW2d 1 (2006).

⁷ *Renny*, 270 Mich App at 326.

ARGUMENT

I. The plain language of the Governmental Tort Liability Act's (GTLA) public building exception to governmental immunity makes MDOT liable for negligent failure to "repair and maintain" its public buildings. Construing very similar language in the GTLA's highway exception, this Court has held there is no liability for design defects. Thus there is no independent duty to ensure building safety through design measures. The Court of Appeals erred in holding that Plaintiff could proceed against MDOT based on design factors allegedly contributing to her fall on an icy sidewalk.

A. Standard of Review

The appropriate standard of review for a Court of Appeals interpretation of a statute is *de novo*.⁸

B. Governmental immunity is broad, and the statutory exceptions must be construed narrowly.

In general, the State of Michigan and its agencies, including MDOT, are immune from tort claims while performing governmental functions. This governmental immunity was codified by the Legislature in the Governmental Tort Liability Act⁹ following a period in which the courts had been limiting common-law immunity. The GTLA contains very specific and limited exceptions to governmental immunity — one of which, the "public building exception"¹⁰, is the basis of this lawsuit. A claim must fall squarely within one of these exceptions in order to overcome governmental immunity.¹¹

The touchstone judicial construction of the GTLA is this Court's opinion in *Ross v Consumer's Power*.¹² In that opinion, the Court noted the evolution of the common-law doctrine

⁸ *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

⁹ MCL 691.1401, *et seq.*

¹⁰ MCL 691.1406.

¹¹ MCL 691.1407 (1).

¹² *Ross v Consumers Power Co* (On Rehearing), 420 Mich 567, 618; 363 NW2d 641 (1984).

of sovereign immunity that culminated in *Williams v Detroit*¹³ – in which the courts appeared to be prepared to abolish governmental immunity – and the legislative response to that decision encompassed within the GTLA. Construing the statutory language, the Court concluded that the legislative intent was that governmental immunity should be broad, and the limited exceptions are to be narrowly construed. "This broad grant of immunity, when coupled with the four narrowly drawn statutory exceptions, suggests that the Legislature intended that the term 'governmental function' be interpreted in a broad manner."¹⁴

Virtually every case considering governmental liability since *Ross* has cited that opinion for these two propositions: (1) that governmental immunity is broad and the exceptions narrow, and (2) in considering whether a given set of facts falls within an exception, the legislative intent is to be discerned by looking to the plain language of the statute.¹⁵

C. The public building exception imposes upon governmental entities the actionable duty to "repair and maintain" buildings in their control.

The statutory public building exception to governmental immunity provides, in part¹⁶:

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. * * *

The first Supreme Court decision after *Ross* to consider the public building exception was

¹³ *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961).

¹⁴ *Ross*, 420 Mich at 618.

¹⁵ *Reardon v Dep't of Mental Health*, 430 Mich 398, 407-408; 424 NW2d 248 (1988); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000); *Hanson v Mecosta Co Rd Comm*, 465 Mich 492, 498; 638 NW2d 396 (2002).

¹⁶ MCL 691.1406 (emphasis added).

Reardon v Dep't of Mental Health.¹⁷ The plaintiffs in *Reardon* and its companion case had both been sexually assaulted in public buildings, and they alleged that certain "conditions" of the buildings gave rise to the assaults. In *Reardon*, the assailant allegedly gained entrance to the plaintiff's room with one of 18 master keys that were in possession of the defendant's employees. The existence of these keys was alleged to render the building unsafe. The plaintiff in the companion case, *Schafer v Ethridge*, was assaulted while she was a patient on an acute care ward at the mental health facility where she resided. Her guardian claimed that the physical layout of the ward created a defective condition that allowed for the assault to occur.

The Court reiterated the *Ross* formulation that immunity is broad, and the public building exception is to be narrowly construed¹⁸:

In light of the historical context in which the statute was enacted, as well as the language chosen by the Legislature, and the generally broad scope of immunity, we hold that the Legislature intended the public building exception to apply in cases where the injury is occasioned by *the physical condition of the building itself*.

The Court held that neither plaintiff's claim fell within the exception. The existence in *Reardon* of a number of master keys was simply not a "physical condition of the building", and in *Schafer* although the physical layout of the ward was alleged to be a cause of the assault, the Court found that it did not constitute a defect "of" the building that led to the plaintiff's injury: "While 2-West may not have been configured in the most modern design possible at the time of the assault, there is no evidence that the physical condition of the ward posed a danger to plaintiff."¹⁹

¹⁷ *Reardon*, 430 Mich at 398.

¹⁸ *Reardon*, 430 Mich at 412-413 (emphasis added).

¹⁹ *Reardon*, 430 Mich at 416-417.

The crux of the *Reardon* decision, then, is that although extraneous factors may arguably lead to an unsafe condition in a public building, the exception to immunity applies only to injuries caused by a physical condition of the building.

Since *Reardon*, this Court has developed a five-part test to determine whether a claim falls within the public building exception. A plaintiff must establish 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 defective condition of the 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 period.²⁰

D. Historically, the courts have indicated that design defects may fall within the public building exception to immunity. This assumption has not been directly addressed since this Court's decision in *Ross*.

Although the subject has been addressed several times in *dicta*, there have been no post-*Ross* cases decided directly on the question of whether an alleged design flaw may constitute a building defect. This Court recognized that the issue was not settled in *de Sanchez v Michigan Dept of Mental Health*²¹:

Despite the oft-cited proposition that a public building may be dangerous or defective because of its improper design, the issue whether a design defect may actually constitute a defect in a public building sufficient to invoke the public building exception has caused this Court considerable difficulty. Nonetheless, that issue is not before this Court.

Cases that have discussed design as a potentially actionable building defect cite *Reardon* and the pre-*Ross* decision in *Bush v Oscoda Area Schools*,²² (upon which *Reardon* relied in

²⁰ *Sewell v Southfield Public Schools*, 456 Mich 670; 576 NW2d 153 (1998); *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 528 NW2d 828 (1998).

²¹ *de Sanchez v Michigan Dept of Mental Health*, 455 Mich 83, 96; 565 NW2d 358 (1998).

²² *Bush v Oscoda Area Schools*, 405 Mich 716; 275 NW2d 268 (1979).

dictum, although the issue was not germane to the case)²³:

In *Bush v Oscoda Area Schools*, [], we held that this duty is not strictly limited to the repair or maintenance of public buildings. Instead, we held that "a building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices." *Id.* at 730. We reiterate this proposition, as the holding in *Bush* is entirely consistent with today's conclusion that the injury must be occasioned by the dangerous or defective physical condition of the building itself. As long as the danger of injury is presented by a physical condition of the building, it little matters that the condition arose because of improper design, faulty construction, or absence of safety devices.

In *Bush*, the claimed defect was the absence of safety devices in a classroom being used as a chemistry laboratory. The trial court granted summary disposition to the defendant school district on the grounds that this theory failed to state a claim under the exception. Despite the fact that the statute describes the government's obligation as one to "repair and maintain," this Court indicated that the duty imposed in the public building exception went beyond mere repair and maintenance, and that defective design could negatively impact the safety of the building and therefore constitute a defect.²⁴ The Court arrived at this conclusion based on its review of cases decided under the highway negligence exception to immunity. However, the Court decided the case on a narrower issue, agreeing with the Court of Appeals that "the question whether a part of a building, in this case a classroom, is dangerous or defective is to be determined in light of the 'uses or activities' for which it is 'specifically assigned', in this case a physical science class."²⁵

The Court found that whether the classroom was defective under this standard was a question of fact²⁶:

²³ *Reardon*, 430 Mich at 409-410.

²⁴ *Bush*, 405 Mich at 730.

²⁵ *Bush*, 405 Mich at 731.

²⁶ *Bush*, 405 Mich at 732.

To be sure, the lack of certain safety devices did not render the classroom defective per se; it is ordinarily unnecessary to install laboratory safety equipment in classrooms. In determining whether a place is safe, one must consider the use or purpose it serves.

The case was remanded for trial for determination of that and other facts, including notice.

Based upon *Bush* and *Reardon*, the courts have avoided deciding the design question largely by relying upon either an examination of whether the building was being used for its intended purpose as in *Bush*, or, as in *Schafer*, the claimed defect could have been overcome by proper supervision, resulting in a pure negligence claim.²⁷

E. The public building exception obligates a government agency to "repair and maintain" public buildings; it does not permit a party to bring a claim based on alleged design defect.

It is important to reiterate that *Bush's* declaration that allegedly flawed design could constitute a building defect was based on previous cases brought under another of the statutory exceptions, the highway exception²⁸:

The defective building provision is structurally similar to the defective highway provisions. It states a duty, "repair and maintain", and in providing a cause of action extends it to "a dangerous or defective condition of a building". *We construe the defective building provision as we have the defective highway provision.* Governmental agencies are subject to liability for a dangerous or defective condition of a public building without regard to whether it arises out of a failure to repair and maintain.

As in the highway cases, a building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices.

It is certainly the fact that the great bulk of the current Michigan jurisprudence explaining

²⁷ *Williamson v Department of Mental Health*, 176 Mich App 752; 440 NW2d 97 (1989); *Sewell*, 456 Mich at 670.

²⁸ *Bush*, 405 Mich at 730 (emphasis added).

the limited nature of the exceptions to governmental immunity has arisen in the context of the highway defect exception, which provides, in part²⁹:

Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway *shall maintain the highway in reasonable repair* so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair, and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

Significantly, the Legislature chose the same words to describe the duty placed on governmental entities, to "repair and maintain" both highways and buildings under their jurisdiction. This point was recognized by this Court in *Bush*, as quoted above.

The similarity of the second sentence in the respective statutes is also noteworthy in that the express duty to "repair and maintain" is in regard to the "condition of the facility":

A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair, and in *a condition reasonably safe and fit for travel* may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402]

Governmental agencies are liable for bodily injury and property damage resulting from a *dangerous or defective condition* of a public building . . . [MCL 691.1406]

It was misinterpretation of the second sentence of the highway exception that led the courts astray in expanding that exception to include not only the duty set forth in the first sentence to "repair and maintain", but also a generalized duty to ensure that highways are "in a condition reasonably safe and fit for travel."

This Court's decision in *Nawrocki v Macomb Co Rd Comm*, reversed this trend as it emphasized and clarified the narrow construction to be given to statutory exceptions to

²⁹ MCL 691.1402 (1) (emphasis added).

governmental immunity generally.³⁰ The Court acknowledged that there had been "an exhausting line of confusing and contradictory decisions" in the highway tort liability area. Then it reaffirmed the principle of *Ross* "that the immunity conferred on governmental agencies is *broad*, with *narrowly* drawn exceptions," and indicated that it was "duty-bound to overrule past decisions that depart from a narrow construction and application of the highway exception and the plain language of the statutory clause."³¹

Thus, the Court explicitly overruled *Pick v Szymczak*,³² which held that highway authorities could be liable for "points of special hazard"³³:

Pick failed to simply apply the plain language of the highway exception and, instead, relied on judicially invented phrases nowhere found in the statutory clause, thus thrusting upon the state and county road commissions a duty not contemplated by the Legislature. *Pick* unacceptably departed from the plain language of the statute, thus allowing a plaintiff to avoid governmental immunity for conditions arising at 'point[s] of hazard,' affecting travel on the surface of the improved portion of the highway, regardless of whether those conditions originated on the surface of the roadbed or not. . . .

This Court found that, where the duty imposed upon government entities is established in the clear language of the statute — in this case, the first sentence — liability could not be inferred from any generalized responsibility for safety parsed from other, non-specific language contained in the exception³⁴:

This [first] sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." *Pick, supra*, at 635-636 (RILEY, J., dissenting).

³⁰ *Nawrocki*, 463 Mich at 143.

³¹ *Nawrocki*, 463 Mich at 149 (emphasis in original).

³² *Pick v Szymczak*, 451 Mich 607; 458 NW2d 603 (1996).

³³ *Nawrocki*, 463 Mich at pp 175-176.

³⁴ *Nawrocki*, 463 Mich at 160.

The Court observed that, due to overbroad interpretation of the exception, as exemplified by *Pick*: "[t]here is ample evidence [] that lawsuits never contemplated or intended by the Legislature have been brought under the auspices of this statutory clause."³⁵ The Court gave examples of cases that included defective design claims that should never have been allowed under the statute.³⁶

More recently in *Hanson v Mecosta Co Rd Comm*, this Court specifically addressed the issue of governmental liability for alleged design defects when it agreed with the Court of Appeals' rejection of such design claims³⁷:

[N]owhere in the statutory language is there a duty to *install*, to *construct*, or to correct what may be perceived as a dangerous or defective "*design*." Moreover, it is not the province of this Court to make policy judgments or to protect against anomalous results. See *Nawrocki, supra*, at 171, n 27.

We agree with the Court of Appeals majority and hold that the road commission's duty under the highway exception does not include a duty to design, or to correct defects arising from the original design or construction of highways. In the highway exception, the Legislature has said that the duty of the road commission is to "*maintain* the highway in reasonable repair so that it is reasonably safe and convenient for public travel." The statute further provides that the specific duty of the state and county road commissions is to "*repair and maintain*" highways. "Maintain" and "repair" are not technical legal terms. . . . It was noted above that the Legislature used the same terms, "repair and maintain" when limiting a government's duty under both the highway defect and the public building exceptions to governmental immunity.

³⁵ *Nawrocki*, 463 Mich at 178.

³⁶ *Nawrocki*, 463 Mich at 178, fn 34, citing *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579; 546 NW2d 690 (1996), rem 455 Mich 863 (1997) (lack of a left turn lane), and *McIntosh v Dep't of Transportation*, 234 Mich App 379; 594 NW2d 103 (1999) (too narrow a median and lack of median barriers).

³⁷ *Hanson*, 465 Mich at 501-502 (emphasis in original).

F. The Court of Appeals correctly characterized the alleged dangerous or defective condition as a design defect claim.

In this case the plaintiff does not allege a defective condition of the building itself, that MDOT failed to "repair and maintain." Instead, she claims that the building is unsafe because MDOT did not install gutters and additional ceiling insulation to the building. As in *Bush v Oscoda Schools*, Ms. Renny essentially complains of an absence of safety measures to prevent snow on the roof from melting and dripping such that in freezing weather ice could form on the sidewalk. This claim that the building should have been enhanced with safety measures can only be characterized as a design issue. She did not claim that the roof was in disrepair, but only that the building should be redesigned to prevent melting snow from contributing to ice buildup on the sidewalk.

Beyond the clear meaning of "repair and maintain," if building design claims were viable under the exception, the State of Michigan would be subjected to a myriad of faulty design allegations. In this matter, if gutters did not prevent icing of sidewalks because they themselves filled with ice, would heat tape be required? Bigger gutters? There will arguably always be a "better" way to design a building.

These potentially creative and innovative theories of liability were rejected in *Nawrocki*³⁸ and *Hanson*³⁹ as not reflective of the plain language of the statute and not giving appropriate deference to the authorities responsible for the allocation of limited public funds.

³⁸ *Nawrocki*, 463 Mich at 179.

³⁹ *Hanson*, 465 Mich at 503.

II. This Court held in *Wade v Dep't of Corrections* that the GTLA's public building exception is limited to the physical condition of a building itself, and not transitory conditions unrelated to the structure; in that case, oil on the floor. Plaintiff here claims injuries allegedly caused by accumulation of ice on a sidewalk leading into a building. This was a "transitory condition" and not a condition of the building itself. Plaintiff's claim is not actionable under the GTLA.

A. Standard of Review

The appropriate standard of review for a Court of Appeals interpretation of a statute is *de novo*.⁴⁰

B. Discussion

It was pointed out above that the question of liability under the public building exception relies upon a five-part test⁴¹:

A plaintiff must establish 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 defective condition of the 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 period.

The question presented by this case relates to the third factor: whether there is a dangerous or defective condition of the building itself.

Ms. Renny does not claim that she was directly injured by a condition of the rest-area building. Instead, she claims that the alleged defect (the lack of gutters and lack of insulation) led to a temporary condition outside of the building — an icy sidewalk — that caused her injuries.

Thus, in *Wade v Dep't of Corrections*, the plaintiff slipped and fell on oil or grease that had accumulated on the floor of the building, the Court held that this "transitory condition" was

⁴⁰ *Grossman v Brown*, 470 Mich at 598.

⁴¹ *Kruger v White Lake Township*, 250 Mich App 622, 625; 648 NW2d 660 (2002) *citing Sewell v Southfield Public Schools*, 456 Mich 670; 576 NW2d 153 (1998).

not a defect in the building itself, and that, while the government is liable for the safety *of* a building, it is not liable for safety *in* a building⁴²:

[T]his Court remains persuaded that the legislative intent regarding application of the public building exception is limited to injuries occasioned by some "dangerous or defective condition of the building itself." The statutory scheme does not contemplate transitory conditions because they are not related to the permanent structure or physical integrity of the building.

The Michigan courts have repeatedly rejected claims for liability for conditions outside of public buildings. In *Horace v City of Pontiac*, this Court considered and rejected liability for slip and fall injuries occurring on a sidewalk leading into the Pontiac Silverdome, and also outside the entrance to a highway rest area building⁴³:

We granted leave to appeal in these consolidated cases to determine whether the public building exception to governmental immunity applies to slip and fall injuries arising from a dangerous or defective condition existing in an area adjacent to an entrance or exit, but nevertheless still not part of a public building. We are persuaded that the Legislature did not intend this exception to the broad grant of governmental immunity to apply in such circumstances because it is inconsistent with a narrow reading of the exception. We therefore hold that the public building exception is inapplicable in both cases.

Focusing on the statutory reference to defects in the "condition *of* a public building," this Court noted inconsistencies in its, and the Court of Appeals', treatment of claims involving injury resulting from slip and falls in areas immediately adjacent to entrances/exits of public buildings⁴⁴:

One does not need a legal dictionary to understand the meaning of a nonlegal term such as "of." Thus, when considering a nonlegal word or phrase that is not defined within a statute, resort to a layman's dictionary such as Webster's is appropriate. This is because the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary and not a legal dictionary. Review of Webster's Collegiate Dictionary shows that the word "of" can have many different meanings, depending on the context. The most obvious definition

⁴² *Wade v Dep't of Corrections*, 439 Mich 158, 168; 483 NW2d 26 (1992).

⁴³ *Horace v City of Pontiac*, 456 Mich 744, 746; 575 NW2d 762 (1998).

⁴⁴ *Horace*, 456 Mich at 755-757 (emphasis added).

applicable here is "used to indicate possession." *This is entirely consistent with this Court's conclusion in Wade that the defect or condition must be "of the building itself."*

* * *

We further indicate our agreement with the logic of the following statement from *Stanton v Garfield Twp*, 75 Mich App 537, 539; 255 NW2d 675 (1977): "We do not believe that in the usual commonly accepted sense of the term the ground adjacent to a public building is a public 'building,' statutorily speaking, and we so hold."

This holding is not affected by *Fane v Detroit Library Commission*, a case factually distinguishable from *Adams* and from the case at bar.⁴⁵ In *Fane*, the Court determined that an elevated terrace upon which the plaintiff had tripped was a part of the public building itself⁴⁶:

The terrace is a large stone area that is physically abutting and built into the library building. It is not intended to be removed from the rest of the building in the foreseeable future. Normally, to reach the main entrance, one walks along a sidewalk, up stairs to the elevated terrace, across the terrace and up additional stairs. If the terrace were removed, the doors to the library would be located approximately four feet off the ground.

We conclude that the elevated terrace is physically connected to and not intended to be removed from the library. Accordingly, we are persuaded that the terrace is part of the building within the meaning of the public building exception.

The Court reached this decision only after acknowledging *Horace* and *Adams* and leaving the holdings undisturbed: "Thus, the core holding of *Horace* is that mere sidewalks and walkways are clearly outside the scope of the public building exception."⁴⁷

The *Fane* opinion thus clarified a footnote contained within *Horace* to the effect that that decision did not set up an absolute bar to recovery for injuries due to defective conditions outside the walls of a public building. That footnote in *Horace* states⁴⁸:

⁴⁵ *Fane v Detroit Library Commission*, 465 Mich 68; 631 NW2d 678 (2001).

⁴⁶ *Fane*, 465 Mich at 79.

⁴⁷ *Fane*, 465 Mich at 76.

⁴⁸ *Horace*, 456 Mich at 756, n.9 (emphasis added).

The dissent suggests that our opinion may cut off liability for injuries resulting from the *collapse of an outside overhang* on a public building, stairs leading up to or down from an elevated building entrance, and underground tunnel leading into a building, an attached external ramp or railing. While it is not necessary for us to resolve these hypothetical situations in the case at bar, we note that an outside overhang is a danger *presented by a physical condition of a building itself* and that *some stairs may* also fit the test we adopt today *if they are truly part of the building itself*.

Plaintiff here has attempted to appropriate this footnote by arguing that the ice on the sidewalk was formed from melting snow that came off of the roof overhang, and that the lack of gutters on the overhang constitutes a building defect. This argument studiously ignores the fact that Ms. Renny's injuries were not caused by a collapse of the overhang, indeed by any contact with the overhang whatsoever. Her injuries may as well have happened had there been no overhang at all. Her injuries, as she alleges, occurred when she slipped upon ice on a sidewalk outside the entrance of the building. The statute does not impose a duty on MDOT to "repair and maintain" the sidewalk.

This is more or less the same factual scenario as the alleged defective sidewalk in the *Adams* case. The sidewalk upon which plaintiff slipped was not equivalent to the terrace in *Fane* case or the hypothetical collapsing overhang in the *Horace* footnote. The icy sidewalk in the instant case was no more "truly part of the building itself" than those in *Horace* and *Adams*, as correctly observed by the trial court.

In the present case, the essence of Plaintiff's complaint is that MDOT was negligent in allowing ice to accumulate on the sidewalk adjacent to the rest area building. In other words, she does not allege injury caused by a dangerous condition of a building, or even a dangerous condition in a building, but rather by a dangerous condition outside of a building. Although she may argue that MDOT was negligent in not clearing away accumulated ice, such negligence does not fall within any exception to MDOT's immunity. Plaintiff cannot transform this case

into a building defect claim so as to fall within that exception, merely by alleging that a superior building design (gutters, and probably heat tape, given the proclivity of gutters themselves to fill with ice) would have alleviated the necessity to be more diligent in salting and clearing sidewalks.

CONCLUSION

This is clearly not a valid building defect claim. Plaintiff is actually alleging that MDOT should have maintained the sidewalk clear of ice, a transient condition, and not that its building was a proximate cause of her injuries.

In the past, this Court has held that the governmental immunity standards employed in the "public building exception" and the "highway exception" statutes are similar and should be similarly interpreted. That doctrine is consistent with the well-settled rule that immunity is broad, and that the exceptions to that immunity are narrow.

After a period of confusion and flux in Michigan jurisprudence surrounding the highway defect exception, this Court has definitively held that claims for improper design, or defective design, or failure to redesign, etc., do not fall within the clear language of the statute imposing a duty to maintain and repair highways. Because the language of the statutes are similar, the Court should be consistent in its analysis and eliminate design claims under the building exception.

RELIEF SOUGHT

MDOT respectfully requests that this Honorable Court reverse the Court of Appeals' March 21, 2006 decision and reinstate the trial court's dismissal of this action.

Respectfully submitted,

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