

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.

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

KAREN RENNY and CHARLES RENNY,

Plaintiffs/Appellees,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,  
Defendant/Appellant.

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**PLAINTIFFS/APPELLEES' BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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**STATEMENT OF THE BASIS OF APPELLATE JURISDICTION**

The Plaintiffs agree that this Michigan Supreme Court granted Defendant-Appellant Michigan Department of Transportation's ("MDOT") Application for Leave to Appeal from the March 21, 2006 Judgment of the Michigan Court of Appeals. The Plaintiffs agree that this Michigan Supreme Court has jurisdiction over MDOT'S Appeal.

**COUNTER-STATEMENT OF THE QUESTIONS INVOLVED**

- (I) WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY CHARACTERIZED THE ALLEGED DANGEROUS OR DEFECTIVE CONDITION IN THIS CASE AS A “DESIGN DEFECT”?

Plaintiffs/Appellees’ say: “No”  
Defendant/Appellant says: “Yes”  
Court of Appeals says: “Yes”  
Trial Court: “Did Not Answer this Question”

- (II) 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?

Plaintiffs/Appellees’ say: “Yes”  
Defendant/Appellant says: “No”  
Court of Appeals says: “Yes”  
Trial Court: “Did Not Answer this Question”

- (III) WHETHER THE MICHIGAN COURT OF APPEALS’ CONCLUSION THAT THE ICY SIDEWALK WAS NOT A TRANSITORY CONDITION IS CONTRARY TO THIS MICHIGAN SUPREME COURT’S DECISION IN WADE V. DEP’T OF CORRECTIONS, 439 MICH 158, 483 NW2D 26 (1992)?

Plaintiffs/Appellees’ say: “No”  
Defendant/Appellant says: “Yes”  
Court of Appeals says: “No”  
Trial Court: “Did Not Answer this Question”

## I. COUNTER-STATEMENT OF THE FACTS

On January 8, 2000, Plaintiffs were lawfully on the premises commonly referred to as a “rest area” adjacent to northbound U.S. 27, which is located south of the M-55/Houghton Lake Exit, in Roscommon Township, Roscommon County, Michigan. (Plaintiffs’ Complaint – Appendix, p. 12a) This rest area and the restroom building were open for use by the public at all relevant times. (“restroom building”) (Plaintiffs’ Complaint – Appendix, p. 12a) On January 8, 2000, Plaintiff, Karen Renny, was exiting the public restroom building at the rest area. As she pushed open the restroom buildings door, Plaintiff, Karen Renny, came into contact with snow and ice that had accumulated at or upon the entrance way of the restroom building. (Renny, 270 Mich. App. at p. 319, 320 -- Appendix, p. 21a) These facts are not in dispute.

“On January 8, 2000, the Rennys stopped at a roadside rest area located in Roscommon County, Michigan. There is no dispute that the rest area is within the jurisdiction and control of MDOT, a government agency, and that it is held open to the public. On exiting the restroom building, Karen Renny encountered a patch of snow and ice, which was located directly in the path of the building's doorway. The ice caused Karen Renny to slip and fall, and she sustained various injuries to her right wrist, which required several corrective surgeries.” (Renny, 270 Mich. App. at p. 319, 320 -- Appendix, p. 21a)

This accumulation of ice and snow is the result of the known defective condition of the roof of the restroom building located immediately above this entrance/exit way to the restroom building. (Plaintiffs’ Complaint – Appendix, p. 12a ) Specifically, the roof of the restroom building did not have gutters or proper insulation which led to heat loss causing the snow and ice on the roof to melt and drip. (Plaintiffs’ Complaint – Appendix, p. 13a) This water created ice in the entranceway/egress way of the restroom building at the rest area.

“Alan Burns, an attendant at the rest area, maintained the rest stop daily, clearing snow and ice and salting the walkways. Beginning in 1999, Burns observed that snow and ice would melt off the building roof, as a result of the building's interior "heat loss," causing a "slippery spot" to develop and freeze in front of one of the building's doors.” (Renny, 270 Mich. App. at p. 320 -- Appendix, p. 22a)

It is uncontroverted that the Roscommon County Road Commission (“RCRC”) – and MDOT -- were aware of the issue with the roof, the heat loss, and the resulting ice formation. (Burns Dep at p. 12 – Appendix, 8b) In fact, prior to Plaintiff, Karen Renny’s fall, the RCRC had expressly informed MDOT of this problem.

“Burns stated that he first notified MDOT that this condition existed in 1999; other evidence suggested that MDOT had been aware of the condition "for many years." Further evidence indicated that the ongoing condition was presumed to be a result of both a lack of gutters and inadequate ceiling insulation: the purported heat loss and ice and snow melting were consequences of inadequate insulation, and the water runoff and ice formation were consequences of a lack of gutters and downspouts.” (Renny, 270 Mich. App. at p. 320 -- Appendix, p. 22a)

## **II. STATEMENT OF THE PROCEDURAL FACTS**

On December 26, 2002, the Plaintiffs filed suit in the Roscommon County Circuit Court against Defendants, RCRC and Roscommon Township. On December 26, 2002, the Plaintiffs also filed suit in the Court of Claims against MDOT. On April 25, 2003, an Order of Joinder was entered joining the MDOT case with the Roscommon County Circuit Court case. (Order of Joinder Dated April 25, 2003 – Appendix, p. 4b) On June 15, 2004, the Trial Court entered an Order granting the RCRC Motion for Summary Disposition under MCR 2.116(C)(7). (**Order Granting RCRC Motion for Summary–** Appendix, p. 12b) On July 7, 2004, the Trial Court entered an Order granting MDOT’s Motion for Summary Disposition under MCR 2.116(C)(7) – governmental immunity.

**(Order Granting MDOT's Motion for Summary–** Appendix, p.17a.) In making this ruling, the Trial Court judge noted on the record that he may be wrong:

“So since I believe that, I will probably be reversed for granting summary disposition. . . Based on that, I – think they are entitled to the – to summary disposition under (C)(7) motion.” (Trial Court Transcript at p. 32– Appendix, p. 11b)

The Plaintiffs filed a Claim of Appeal as a matter of right from the Order granting MDOT's Motion for Summary Disposition. On March 21, 2006, the Michigan Court of Appeals issued its Opinion reversing the trial court and remanding for further proceedings.

”Construing all reasonable inferences in favor of the Rennys, **summary disposition was improper. The Rennys have both alleged sufficient facts to come under the statutory exception to government immunity and produced sufficient evidence to establish a valid claim at law.** We reverse and remand for further proceedings. We do not retain jurisdiction.” (**Renny**, 270 Mich. App. at p. 338 -- Appendix, p. 33a)

On May 2, 2006, MDOT filed its Application for Leave to Appeal. On December 6, 2006, this Michigan Supreme Court issued an Order granting the Application for Leave to Appeal limited to three defined issues:

“On order of the Court, the application for leave to appeal the March 21, 2006 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be addressed: (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, 483 N.W.2d 26 (1992).” (**Renny** v. **MDOT**, 723 NW2d 911, 911 (2006).)

This serves as the Plaintiffs' Brief on Appeal on the three (3) issues set by this Michigan Supreme Court.

### **III. BRIEF SUMMARY OF THE LEGAL ARGUMENTS**

The public building exception to governmental immunity at MCL 691.1406 ("public building exception") provides that governmental agencies have the obligation to repair and maintain public buildings under their control and these governmental agencies are liable for bodily injury resulting from a dangerous or defection condition of a public building if the government agency had actual or constructive knowledge of the defect and for a reasonable time failed to remedy the condition.

"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)

This Michigan Supreme Court's Order dated December 6, 2006 identified three (3) issues for this appeal with regard to the public building exception to governmental immunity. Each is initially answered as follows:

#### **A. Is The Defective Condition a Design Defect – "No"!**

The record shows that the public building at issue originally had gutters on it. In a memo from Bob Bedell, Supervisor, of the RCRC dated February 20, 2002 to Tim Jones, Bedell states that the public building at issue had gutters all the way around the building when it was first built. These gutters were then removed. As a result, the gutters were part of the original design/construction, but were later removed. MDOT failed to

maintain the existence of the required gutters. The failure to maintain or keep the gutters on the public building is not a design defect, but a failure to maintain. This is covered under the public building exception to governmental immunity.

**B. Does The Public Building Exception Allow A Party To Bring A Design Defect Claim – “Yes”!**

This Michigan Supreme Court and the Michigan Court of Appeals have consistently ruled that design defects fit within the public building exception to governmental immunity at MCL 691.1406 (“public building exception”). (SEE: **Hickey v. Zezulka**, 440 Mich. 1203; 487 NW2d 106 (1992); **Sewell v. Southfield Public Schools**, 456 Mich. 670, 675; 576 NW2d 153 (1998).) and **Williamson v. Department of Public Health**, 176 Mich. App. 752, 757; 440 NW2d 97 (1989).) In the case at hand, there is no question that the restroom building was defective for its intended use. The restroom building where the Plaintiff, Karen Renny was injured was designed to be a public restroom building open to the public where people could safely enter and exit it. Here, the Plaintiff, Karen Renny, was making use of the restroom building for that very use when she was injured. The injury-causing condition was directly attributable to the restroom building’s defective condition. The defective condition of the restroom building included the failure to install and maintain gutters and downspouts to redirect melting snow and ice. MDOT knew of this defective condition and failed to remedy it. MDOT, a governmental agency, had a duty to repair and maintain the restroom building which was under their control and open to the public. The public building exception to governmental immunity has been triggered.

C. **Is The Michigan Court of Appeals’ Opinion Consistent With Wade – “Yes”!**

In **Wade**, this Michigan Supreme Court granted leave to determine whether the public building exception applied to a slip and fall injury caused by grease on a hallway floor. According to this Michigan Supreme Court in **Wade**, the significant and determining factor was that the dangerous condition was not caused by a dangerous or defective condition of the building itself.

“The significant, and we believe determining, aspect of both situations is that the **dangerous condition was not caused by a dangerous or defective condition of the *\*\*31* building itself.**” (**Wade**, 439 Mich. at p. 169.) (Emphasis Added)

In **Wade**, there was no record that the dangerous condition -- the slippery oil -- was caused by a dangerous condition of the building itself. In fact, the plaintiff in **Wade** did not plead that the oil was caused by a defective condition of the building itself. Unlike in **Wade**, the record here is clear that the dangerous condition -- the ice -- was caused by a dangerous or defective condition of the restroom building itself -- the lack of gutters. As a result, the Court of Appeals’ current ruling is in complete harmony with the rulings in **Wade**.

IV. **LEGAL ARGUMENTS**

A. **The Michigan Court of Appeals Incorrectly Characterized The Alleged Dangerous or Defective Condition In This Case As A “Design Defect”.**

The first request from this Michigan Supreme Court reads as follows:

“On order of the Court, the application for leave to appeal the March 21, 2006 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be addressed: (1) whether the Court of Appeals correctly characterized the alleged dangerous or defective condition in this case as a **design** defect;” (**Renny**, 723 NW2d at p. 911.)

The Michigan Court of Appeals ruled that the defective condition included the failure to install and maintain gutters and downspouts to redirect melting snow and ice.

**“By way of illustration, not limitation, [the] defective conditions include the failure to install and maintain gutters and downspouts to redirect melting snow and ice on the roof above the entrance/exit away from the walkway.**

We conclude that this allegation, that the injury-causing condition arose out of a dangerous or defective condition of the building itself, is sufficient to meet the pleading requirement of the public building exception.” (**Renny**, 270 Mich. App. at p. 334, 335 -- Appendix, p 31a) (Emphasis Added)

The underlying trial record shows that the restroom building – as constructed -- had gutters on it. In a memo from Bob Bedell, Supervisor, Roscommon County Road Commission dated February 20, 2002 to Tim Jones, Bedell states and makes clear that the restroom building at issue had gutters all the way around the restroom building when it was first built.

**“There used to be gutters all the way around the building when it was first built.”** (Bedell Memo – Appendix, p. 2b) (Emphasis Added)

These gutters were then removed. There is no record fact to show that the restroom building was designed to not have gutters. The removal of the gutters is not a design defect, but a failure to repair and maintain which triggers the public building exception to governmental immunity.

Although not involving the public building exception to governmental immunity, this Michigan Supreme Court in **Hanson** v. **Mecosta**, 465 Mich. 492; 638 NW2d 396, 401-402 (2002) offered a definition for the term “maintain”. According to this Michigan

Supreme Court the term “maintain” means to keep in a state of repair preserve from failure to decline.<sup>1</sup>

“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 **\*\*402** 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. In common usage, “maintain” means “to keep in a state of repair, efficiency, or validity: preserve from failure or decline.” *Webster's Third New International Dictionary*, Unabridged Edition (1966), p. 1362. Similarly, “repair” means “to restore to a good or sound condition after decay or damage; mend.” *Random House Webster's College Dictionary* (2000), p. 1119” (**Hanson** v. **Mecosta**, 465 Mich. 492; 638 NW2d 396, 401-402 (2002).)

When examining the term “maintain”, this Michigan Supreme Court ruled that it is not a technical legal term. According to this Michigan Supreme Court, the term “maintain” means to keep in a state of repair. Here, the restroom building’s original design had gutters. These gutters were not maintained or kept in a state of repair – in fact they were completely removed. This is not a case where the Plaintiffs are alleging that the original design was defective or a case where the Plaintiffs are alleging that a better/safer design from the original design could have been implemented. As a result, the removal of the

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<sup>1</sup> While **Hanson** does not involve, the public building exception to governmental immunity, it offers insight into the meaning of the terms “design” and “maintain”. The Plaintiffs only cite to **Hanson** to illustrate the meaning of the term “design” when compared to the meaning of the term “maintain”. The Plaintiffs further state that although design defects due not fit within the highway exception to governmental immunity as illustrated in **Hanson**, design defects do fit within the public building exception to governmental immunity under **Bush** v **Oscoda**, 405 Mich. 716; 275 NW2d 268, 273 (1979) and as discussed below.

gutters is not a design defect, but a failure to repair and maintain. This triggers the public building exception to governmental immunity.

B. **The Public Building Exception, Which Obligates A Governmental Agency “To Repair And Maintain Public Buildings,” Permits A Party To Bring A Design Defect Claim.**

The second request from this Michigan Supreme Court reads as follows:

“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;” (**Renny**, 723 NW2d at p. 911.)

The case law from this Michigan Supreme Court and the Michigan Court of Appeals shows that design defect claims fit within the public building exception to governmental immunity. The Michigan Court of Appeals, in its Opinion, amplified this controlling precedent:

“**However, MDOT's claim that the public building exception does not apply to the Rennys' claim based on defective design is without merit. The Michigan Supreme Court has held that a "building may be dangerous or defective because of *improper design*, faulty construction, or the absence of safety devices."** [\[FN25\]](#) Further, the Court has held that " '[a]s 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.**' " [\[FN26\]](#) Design defects are, therefore, actionable under the public building exception to immunity.” (**Renny**, 270 Mich. App. at p. 326 -- Appendix, p. 25a, 26a)

The case law history on the question is instructive. In 1979, this Michigan Supreme Court ruled that a building “may be” defective because of “improper design”. (**Bush v. Oscoda**, 405 Mich. 716; 275 NW2d 268, 273 (1979).) In 1988, this Michigan Supreme Court reiterated this rule of law.

“The first sentence imposes upon governmental agencies the duty to “repair and maintain public buildings under their control....” In

[Bush v. Oscoda Area Schools](#), 405 Mich. 716, 275 N.W.2d 268 (1979), we held that this duty is not strictly limited to the repair or maintenance of public buildings. Instead, we held that “a **\*410 building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices.**” *Id.* at 730, 275 N.W.2d 268. 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.**” (Reardon v. Department of Mental Health, 430 Mich. 398, 409; 424 NW2d 248 (1988).)

In 1989, the Michigan Court of Appeals cited to and relied on the Bush ruling that a building may be dangerous or defective because of improper design.

**“A building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices. *Bush v. Oscoda Area Schools*, 405 Mich. 716, 730, 275 N.W.2d 268 (1979).”** (Williamson v. Department of Public Health, 176 Mich. App. 752, 757; 440 NW2d 97 (1989).) (Emphasis Added)

In 1992, this Michigan Supreme Court again ruled that a public building may be defective because of improper design regardless of repair or maintenance issues:

“In general, governmental agencies "are subject to liability for a dangerous or defective condition of a public building without regard to whether it \*422 arises out of a failure to repair and maintain." [\*Bush v. Oscoda Area Schools\*](#), 405 Mich. 716, 730, 275 N.W.2d 268 (1979). **A public building may be dangerous or defective because of improper design, faulty construction, or absence of safety devices.** *Id.* However, a court should only look to the uses or activities for which the public building is assigned to determine if a dangerous or defective condition exists. *Id.* at 731, 275 N.W.2d 268.” (Hickey v. Zezulka, 440 Mich. 1203; 487 NW2d 106 (1992).) (Emphasis Added)

\* \* \*

**“Although we agree that a claim of improper design may allow the public building exception to be applied, that outcome is not required here.”** (Hickey v. Zezulka, 440 Mich. 1203; 487 NW2d 106 (1992).) (Emphasis Added)

In 1998, this Michigan Supreme Court again made it clear that design defect claims fit within the public building exception to governmental immunity:

”Because the public building exception applies only where the physical condition of the building itself causes the injury, the government's duty is to "maintain safe public buildings, but not necessarily safety in public buildings." Reardon, supra at 417, 424 N.W.2d 248. **We have previously held that a building may be dangerous or defective because of improper design, faulty construction, or the absence of safety devices.** Hickey, 439 Mich. at 422, 487 N.W.2d 106.” (Sewell v. Southfield Public Schools, 456 Mich. 670, 675; 576 NW2d 153 (1998).) (Emphasis Added)

In 2002, the Michigan Court of Appeals again ruled that design defects trigger the public building exception to governmental immunity.

“Traditionally, a five-part test has been applied to determine whether this exception applies to a particular case: 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 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 period. [Sewell, supra at 675, 576 N.W.2d 153.]

"[T]he public building exception applies only where the physical condition of the building itself causes the injury...." *Id.* "[A] **building may be dangerous or defective because of improper design, faulty construction, or the absence of safety devices.**" *Id.* "[W]hether a building is dangerous or defective must be determined in light of the uses or activities for which it is assigned." *Id.* "[I]n certain circumstances, the public building exception will not apply where proper supervision would have offset any shortcomings in the configuration of the room." *Id.* "[W]here the essence of a \*626 plaintiff's claim is negligent supervision, the plaintiff cannot properly allege a building defect merely because a superior building design would have facilitated better supervision." *Id. at 676, 576 N.W.2d 153.*” (Kruger v.

**White Lake Tp.**, 250 Mich. App. 622; 648 NW2d 660 (March 8, 2002).) (Emphasis Added)

As this Michigan Supreme Court ruled in **Reardon** and **Sewell**, the government's duty is to maintain safe public buildings. As stated above, this Michigan Supreme Court and the Michigan Court of Appeals have historically recognized that a component of maintaining safe public buildings is design. This Michigan Supreme Court and the Michigan Court of Appeal's history on this issue is logical. It is difficult, if not impossible, to maintain safe public buildings if the design is not considered. The Michigan Court of Appeals' Opinion is consistent with this Michigan Supreme Court and the Michigan Court of Appeals history of rulings on this issue.

1. **MDOT'S Reliance on this Michigan Supreme Court's Opinion in Nawrocki v. Macomb County Road Commission et. al., 463 Mich. 143; 615 NW2d 702 (2000) is Misplaced.**

On this issue, MDOT argues that this Michigan Supreme Court ruling in **Nawrocki** stands for the proposition that design defect claims do not fit within the highway exception to governmental immunity. The **Nawrocki** ruling has no relevance to the public building exception to governmental immunity. In 2002 – two years after **Nawrocki** – the Michigan Court of Appeals again ruled that design defects do fit within the public building exception to governmental immunity. (See: **Kruger** v. **White Lake Tp.**, 250 Mich. App. 622; 648 NW2d 660 (March 8, 2002)) Moreover, this Michigan Supreme Court -- one year after **Nawrocki** -- analyzed the public building exception to governmental immunity extensively in **Fane** v. **Department of Corrections**, 465 Mich. 68; 631 NW2d 678 (2001), and at no point ruled that design defect claims do not fit within the public building exception. The Michigan Supreme Court's ruling in **Nawrocki** has no bearing on this case.

It is important to note that underneath the public building exception, the governmental agency is liable for bodily injury resulting from a dangerous or defective condition – MCL 691.1406. However, under the highway exception to governmental immunity, a person who sustains bodily injury may recover damages only if they show that the governmental agency failed to keep the highway in reasonable repair and in a condition reasonably safe and fit for travel – MCL 691.1402. The scope of liability imposed on the government under the public building exception is arguably broader because it imposes liability where a dangerous or defective condition is established. This Michigan Supreme Court has historically interpreted this language to include design defects.

2. **The Michigan Court of Appeals Properly Ruled That the Plaintiffs Have Alleged Sufficient Facts to Come Under The Public Building Exception to Governmental Immunity.**

The Michigan Court of Appeals ruled that the Trial Court erred in granting MDOT’S Motion for Summary Disposition because the Plaintiffs have alleged sufficient facts to come under the public building exception to governmental immunity. This remains true today.

**”Construing all reasonable inferences in favor of the Rennys, summary disposition was improper. The Rennys have both alleged sufficient facts to come under the statutory exception to government immunity and produced sufficient evidence to establish a valid claim at law.**

We reverse and remand for further proceedings. We do not retain jurisdiction.” (**Renny**, 270 Mich. App. at p. 338 -- Appendix, p. 33a)

In coming to this conclusion, the Michigan Court of Appeals ruled that the injury-causing condition was, arguably, directly attributable to the restroom building itself.

“We conclude that this case is distinguishable both because the condition was not transitory **and because the injury-causing condition was, arguably, directly attributable to the building’s defective condition.**” (Renny, 270 Mich. App. at p. 334 -- Appendix, p. 30a)

Specifically, the defective condition included the failure to install and maintain gutters and downspouts to redirect melting snow and ice.

“By way of illustration, not limitation, [the] **defective conditions include the failure to install and maintain gutters and downspouts to redirect melting snow and ice on the roof above the entrance/exit away from the walkway.**

We conclude that this allegation, that the injury-causing condition arose out of a dangerous or defective condition of the building itself, is sufficient to meet the pleading requirement of the public building exception.” (Renny, 270 Mich. App. at p. 334, 335 -- Appendix, p 31a)

The Michigan Court of Appeals is right. There is no question that the injury causing condition included the failure to install and maintain gutters and downspouts to redirect melting snow and ice. The record is clear that the restroom building had an improperly insulated roof and lacked the gutters as originally installed. As a result, the restroom building suffered heat loss which melted the snow on the roof creating water that dripped off the roof and form ice at the entrance door. Al Burns, an employee of the RCRC, the public entity in charge of maintaining the premises, testified to this very fact.<sup>2</sup> Therefore, the underlying record is clear that the defective condition included the failure to install

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<sup>2</sup> According to MDOT, it had a binding contract with the RCRC for the maintenance of the restroom building and its grounds.

“13. As of the day of the Accident, identify each person or entity that had jurisdiction or control over the Building and the surrounding sidewalks.

ANSWER: MDOT. We contracted with the Roscommon County Road Commission for the maintenance and attendance of the building and grounds.” (MDOT’s Response to Plaintiffs’ First Discovery Request -- Appendix, p. 6b) (Emphasis Added)

and maintain gutters and downspouts to redirect melting snow and ice. The controlling record shows that there were gutters originally on the restroom building, but they had been removed.

“There used to be gutter all the way around the building when it was first built.” (Bedell Memo Dated 2-20-02– Appendix, p 2b)

The Michigan Court of Appeals properly concluded that the injury-causing condition was attributable to the restroom building itself.

“We conclude that Karen Renny’s injury was arguably a direct consequence of the rest area building's defective condition; that is, we conclude that her injuries could legally be considered to have resulted from a defective condition of the public building itself.” (**Renny**, 270 Mich. App. at p. 337 -- Appendix, p 32a)

“Unquestionably, Karen Renny was using the rest area for its designed purpose. Further, the Rennys presented sufficient evidence to the trial court that indicated that heat loss from the building, due to inappropriate insulation and a lack of gutters, caused snow and ice to melt, drip and form slippery spots on the sidewalk; that this condition continuously caused such ice patches to form; that no amount of supervision effectively rendered the condition safe; and that the condition had existed over a period of years. [\[FN29\]](#) Further, the roof was unquestionably part of the building. [\[FN30\]](#) Therefore, we conclude that the Rennys pleaded facts sufficient to establish a design defect of the building.” (**Renny**, 270 Mich. App. at p. 327 -- Appendix, p 26a)

3. **Application of this Michigan Supreme Court’s Opinion in Johnson v. City of Detroit, 457 Mich. 695; 579 NW2d 895 (1998).**

This Michigan Supreme Court’s split Opinion in **Johnson v. City of Detroit**, 457 Mich. 695; 579 NW2d 895 (1998) involved application of the public building exception to governmental immunity. In **Johnson**, the plaintiff was placed in the defendant’s jail cell which was a suicide-deterrent cell. The cell previously had wire mesh on the ceiling to prevent inmates from hanging themselves. However, the wire mesh had been torn

away leaving a hole and access to the support bars above. The plaintiff decedent James T. Johnson (“Johnson”) accessed these bars and hung himself.

Chief Justice Mallett wrote the lead opinion in this case. Chief Justice Mallett found that once the cell was converted to a suicide-deterrent cell, the City of Detroit was obligated to “maintain” the specific safety feature designed to accomplish this purpose.

“Similarly, once this cell was converted to a suicidedeterrent cell, the city was obligated to maintain it as a safe suicide-deterrent \*709 cell, in that it had a duty to maintain the specific safety **feature** designed to accomplish this purpose in good repair.” (Johnson, 579 NW2d at p. 901)

According to Chief Justice Mallett, a defect in a feature designed to protect the inmate from his own devices, triggers the public building exception if that plaintiff can show that the defect was a contributing cause of the injuries at issue.

“A defect in a **feature** designed to protect the inmate or arrestee from his own devices comes within the building exception if the plaintiff can show that the defect was a contributing cause of the injuries.” (Johnson, 579 NW2d at p. 901)

Chief Justice Mallett concluded that the City of Detroit had failed to maintain this feature, as a result, the plaintiff in Johnson had plead sufficiently to invoke the public building exception to governmental immunity. Justice Mallett went on to state that, although the public building exception to governmental immunity had been triggered, there was no negligence.

“In her negligence claim, the plaintiff has to establish that the defendant had a duty to this particular decedent, that it breached that duty by placing the decedent in the defective cell, and that the breach was a proximate and factual cause of the decedent's death. A defendant does not owe a duty to an unforeseeable plaintiff. In this case, plaintiff failed to present a genuine issue of material fact establishing the existence of a duty owed to plaintiff's decedent because defendants were actually unaware, and it was not reasonably foreseeable, that the decedent was suicidal before

placing him in the defective cell.” (Johnson, 579 NW2d at p. 901, 902)

\* \* \*

“While the plaintiff has established evidence sufficient to allow her claim to go forward under the public building exception to governmental immunity, the underlying negligence claim fails because it was not reasonably foreseeable that the decedent would attempt suicide.

The torn mesh rendered this cell, which was intended to function in fact as a suicide-deterrent cell, defective within the meaning of the public building exception. The evidence also supports a conclusion that the city **\*\*903** had notice of the torn mesh and had reasonable time in which to repair it.

Although summary disposition was improper on the ground of governmental immunity, it is proper on the underlying negligence claim.” (Johnson, 579 NW2d at p. 902, 903)

Justice Taylor wrote a concurrence in Johnson which was joined by Justice Boyle and Justice Weaver. In his concurrence, Justice Taylor stated that he agreed that the Trial Court did not err in granting the City of Detroit’s Motion for Summary Disposition because the plaintiff in Johnson could not establish negligence as a matter of law. However, Justice Taylor stated that he did not believe that the public building exception to governmental immunity had been triggered because the cell was not defective for its use.

“I agree with the lead opinion's conclusion that **\*713** the trial court did not err in granting defendants' motion for summary disposition because the plaintiff could not establish negligence as a matter of law. I therefore join part III(B) of the lead opinion. However, I disagree with the lead opinion's conclusion that the public building exception to governmental immunity applies to this case.” (Johnson, 579 NW2d at p. 902, 903)

According to Justice Taylor, the cell was used as a general holding cell and not strictly for suicide detainees. In the Johnson record facts, there was no indication that the

plaintiff was suicidal. As a result, the cell was not defective with regard to its use as a general holding cell.

“The lead opinion concludes that this case qualifies for application of the public building exception to governmental immunity. The foundation of the lead opinion's analysis is the notion that the cell at issue here was converted from a nondefective general holding cell to a defective suicide deterrent cell by reason of the installation of wire mesh preventing access to the overhead bars of the cell and the subsequent failure to repair a hole in the mesh before the decedent hanged himself. I disagree.” (**Johnson**, 579 NW2d at p. 903)

\* \* \*

“Thus, under the rationale of *Bush*, cells such as the one at issue are required to meet standards consistent with their use in order to avoid the defective building exception. . . . This means when it is being used as a general holding cell, i.e., a cell to be used for those such as this plaintiff who give no indication of suicidal tendencies, that the standards for such a cell (that is a nonsuicide deterrent cell) are the standards to be employed in determining whether the cell was defective. This the lead opinion fails to do, instead \*716 saying merely that if the suicide prevention “add-ons” to the cell are in any way defective there is a cause of action if a detainee commits suicide in it without regard to how the cell really was being used.” (**Johnson**, 579 NW2d at p. 904)

Justice Brickley dissented and ruled that he concurred in the conclusion that the **Johnson** plaintiff had stated a claim in avoidance of governmental immunity under the public building exception, but he dissented from the lead opinion’s resolution of the plaintiff’s negligence claim. Justice Brickley said he would order supplemental briefing or remand the matter accordingly.

“I concur in the conclusion that plaintiff has stated a claim in avoidance of governmental immunity under the public building exception. However, I dissent from the lead opinion's resolution of the plaintiff's negligence claim against the defendants city of Detroit and Detroit Police Department. The trial court's grant of summary disposition to the defendants and the Court of Appeals affirmance of that order were clearly premised on the plaintiff's inability to plead in avoidance of governmental immunity. The separate issue, whether defendants owed plaintiff a duty under

these circumstances, was, therefore, not addressed below.<sup>[FN1](#)</sup> Nevertheless, the lead opinion, without affording the parties the opportunity to brief the matter, and without meaningful analysis, rules sua sponte that plaintiff's claim is \*719 barred because defendant owed the deceased no duty as a matter of law.” (Johnson, 579 NW2d at p. 905)

Justice Brickley was joined by Justice Cavanagh and Justice Kelly.

As a result, four (4) Justices of this Michigan Supreme Court in Johnson agreed that the public building exception to governmental immunity had been triggered because the City of Detroit had installed meshing but failed to “maintain” it. Here MDOT had installed gutters, but failed to maintain the gutters and actually removed them. As the defect in Johnson was a contributing cause to the Johnson plaintiff's injuries, here, the defect – lack of gutters – was a contributing cause to the Plaintiff's injuries. As a result, the public building exception is similarly triggered in the case at hand.

If this Michigan Supreme Court applied the rationale of Justice Taylor's concurrence in Johnson to the facts at hand, the public building exception is still triggered. The use of the public restroom building was for the use of travelers as a rest/building. Here, the record is clear that the Plaintiff, Karen Renny, was using the restroom building for its intended use. In fact, the Court of Appeals noted this in its Opinion.

“The Rennys' claim focuses on the nonexistence of proper gutters and downspouts to redirect melting snow and ice on the roof above the doorway away from the walkway.

[FN27. Sewell, supra at 676, 576 N.W.2d 153.](#)

[FN28. Id. at 678-681, 576 N.W.2d 153.](#)

**Unquestionably, Karen Renny was using the rest area for its designed purpose.** Further, the Rennys presented sufficient evidence to the trial court that indicated that heat loss from the building, resulting from inappropriate insulation and a lack of

gutters, caused snow and ice to melt, drip, and form slippery spots on the sidewalk; that this condition continuously caused ice patches to form; that no amount of supervision effectively rendered the condition safe; and that the condition had existed seasonally for years.” (**Renny**, 270 Mich. App at p. 327-- Appendix, p 26a) (Emphasis Added)

Here, MDOT failed to maintain the restroom building by failing to keep the gutters on the restroom building. The public building exception to governmental immunity is triggered.

C. **The Michigan Court of Appeals' Conclusion That The Icy Sidewalk Was Not A Transitory Condition Is Not Contrary To This Michigan Supreme Court's Decision In *Wade v. Dep't of Corrections*, 439 Mich. 158, 483 N.W.2d 26 (1992).**

The third request from this Michigan Supreme Court reads as follows:

“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, 483 NW2d 26 (1992).” (**Renny**, 723 NW2d at p. 911.)

In ***Wade***, this Michigan Supreme Court granted leave to determine whether the public building exception applied to a slip and fall injury caused by grease on a hallway floor in the public building.

"We granted leave to appeal to determine whether the public building exception to governmental immunity, [M.C.L. § 691.1406](#); M.S.A. § 3.996(106), <sup>FNI</sup> applies to a slip and fall injury occasioned\***161** by an accumulation of grease or oil on a hallway floor.” (***Wade***, 439 Mich. at p. 160.)

“The duty to repair and maintain relates to the structural condition of the premises, and a government engaged in a governmental function is open to liability only where the injury results from a dangerous or defective condition *of* a building.” (***Wade***, 439 Mich. at p. 163.)

In ***Wade***, this Michigan Supreme Court ruled that the public building exception is limited to injuries caused by a “dangerous or defective physical condition of the building itself” and not transitory conditions.

“Having reconsidered the scope of the governmental immunity statute, this Court remains persuaded that the legislative intent regarding application of the public building exception statute is limited to injuries occasioned by a “dangerous or defective physical 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.” (**Wade**, 439 Mich. at p. 168.)

According to this Michigan Supreme Court in **Wade**, the significant and determining fact was that the dangerous condition was not caused by a dangerous or defective condition of the building itself but was caused, instead, by a negligent janitor.

“The significant, and we believe determining, aspect of both situations is that the dangerous condition was not caused by a dangerous or defective condition of the **\*\*31** building itself. We agree with the reasoning of dissenting Judge MacKenzie who found in this case:

“[p]laintiff has alleged nothing more than negligent janitorial care. That is not enough to bring this case within the public building exception to governmental immunity.” [Wade, supra 182 Mich.App. at 527, 453 N.W.2d 683.](#)” (**Wade**, 439 Mich. at p. 169.)

In **Wade**, there was no record that the dangerous condition -- the slippery oil -- was caused by a dangerous condition of the building itself. In fact, the plaintiff in **Wade** did not even plead that the oil was caused by a defective condition of the building itself.

“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. We find, therefore, that plaintiff failed to state a claim upon which relief could be granted, and the trial court properly granted defendant’s motion for summary disposition.” (**Wade**, 439 Mich. at p. 171.)

Here, the evidence demonstrates that the ice condition was caused directly by a dangerous/defective condition of the restroom building -- the removal and lack of gutters and proper insulation as originally constructed.

Al Burns testified that he first noticed the problem in 1999.

“Q. So sometime around 1999, you determined that there was a slippery spot in front of this door is that correct?

A. Yes.” (Burns Dep at p. 12 – Appendix, p. 8b) (Emphasis Added)

Al Burns also testified that the problem related to the lack of gutters, downspouts, and proper insulation:

“Q. And in particular, what did you say to Mr. Ridgeway?

A. **They are having heat loss, and it’s dripping on the cement and freezing.**

Q. When you say, ‘heat loss,’ do you mean the heat from the **building?**

A. **Yes.**

Q. From the interior of the building?

A. Yes.

Q. **Would cause the ice and the snow on the roof to melt and drip?**

A. **Uh-huh.**

Q. Is that – am I correct?

A. You are correct, yeah.” (Burns Dep at p. 13– Appendix, p. 9b) (Emphasis Added)

Al Burns further testified that it would have been appropriate to install gutters over the doorway and downspouts to divert the water away from the entranceway.

“Q. When you were communicating to Mr. Ridgeway, did you indicate to him that it might be a **good idea to put up gutters and downspouts** over that entranceway?

A. Yes.

Q. Okay. In order to divert the dripping water from --

A. Yes.

Q. the roof?

A. Yes.” (Burns Dep at p. 15 – Appendix, p 9b) (Emphasis Added)

The problem was so pervasive that Gloria Burns, Manager and CFO of the RCRC, in a letter to MDOT dated February 20, 2002, confirmed that there was an ongoing problem involving the continuous dripping of water from the roof:

“ . . . when we salt the sidewalks, we are treating the symptom of an ongoing problem. Water drips off of the roof continually. The RCRC has reported this to MDOT for many years, including a time prior to the three years that Mr. Bedell mentions in his report.” (Burns Correspondence to MDOT dated February 20, 2002 – Appendix, p. 1b) (**Emphasis Added**)

On March 5, 2002, MDOT admitted the problem. In a letter from MDOT’s Resource Analyst, Tim Jones, MDOT admitted that Brian Martin of MDOT’s Statewide Maintenance division had investigated the ice situation and confirmed that the problem was caused by a lack of insulation and gutters.

“Brian Martin from the Michigan Department of Transportation (MDOT) Statewide Maintenance, visited the Houghton Lake rest area on February 27, 2002 concerning complaints received from you of the ice problem. Brian thinks that adding insulation and the gutters will eliminate the problem of snow melting from the roof and freezing on the sidewalk in front of the entrance door.” (MDOT correspondence dated March 5, 2002 – Appendix, p. 3b) (Emphasis Added)

Unlike **Wade**, the record evidence in this case that the dangerous condition -- the ice -- was caused directly by a dangerous or defective condition of the restroom building itself.

As a result, the Court of Appeals' current ruling is in harmony with **Wade**.

**V. CONCLUSIONS AND RELIEF SOUGHT**

The Plaintiffs/Appellees, Karen and Charles Renny, respectfully request that this Honorable Michigan Supreme Court enter an Order Affirming the Michigan Court of Appeals.

Respectfully submitted,

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