

STATE OF MICHIGAN
COURT OF APPEALS

STEPHANIE BAKER,

Plaintiff-Appellee,

v

FLINT HOUSING COMMISSION,

Defendant-Appellant.

UNPUBLISHED

September 23, 1997

No. 192083

Genesee Circuit Court

LC No. 95-035227-NI

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court order granting in part and denying in part plaintiff's motion for summary disposition and denying defendant's motion for summary disposition. We reverse and remand the case to the trial court for entry of an order granting summary disposition in favor of defendant and denying summary disposition to plaintiff.

Plaintiff sustained injuries when she slipped and fell on an icy sidewalk that led to the Aldridge Place Apartments, a low-income senior citizen housing project owned and operated by the City of Flint through its Housing Commission. Plaintiff brought suit against defendant claiming that the accumulation of ice on the sidewalk was caused by the design and construction of the building itself. Plaintiff moved for partial summary disposition pursuant to MCR 2.116(C)(9), arguing that the area where she fell was within the highway exception to governmental immunity. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Defendant denied that the area where plaintiff fell was within the highway exception and argued that the public building exception to governmental immunity did not apply because a public housing apartment is not a "public building" and therefore plaintiff's claim was barred.

The trial court found that the highway exception to governmental immunity was inapplicable to the case because the exception only applies when the disputed area is actually a part of an improved portion of a roadway. However, with regard to the public building exception to governmental immunity, the trial court found that the decision in *Wade v Dep't of Corrections*, 439 Mich 158; 483 NW2d 26

(1992), was controlling and that plaintiff had pleaded a cause of action within the exception. The trial court found that *Griffin v Detroit*, 178 Mich App 302; 443 NW2d 406 (1989), and *White v Detroit*, 189 Mich App 526; 473 NW2d 702 (1991), were distinguishable from the present case and that, in any event, the rule of *White* was of questionable effect when read in the light of *Wade*. The trial court granted plaintiff's summary disposition motion as to the public building exception, denied the summary disposition motion as to the public highway exception and denied defendant's summary disposition motion.

On appeal, an order granting or denying summary disposition is reviewed de novo. *Mallard v Hoffinger Industries, Inc (On Remand)*, 222 Mich App 137, 139; 564 NW2d 74 (1997). When a motion for summary disposition is brought under MCR 2.116(C)(7), the pleadings, together with all documentary evidence submitted, are reviewed in a light most favorable to the non-moving party to determine whether the moving party has established that it is entitled to governmental immunity. *Brown v Genesee County Board of Commissioners*, 222 Mich App 363, 364-365; 564 NW2d 125 (1997). In order to survive a motion brought under MCR 2.116(C)(7), the plaintiff must allege facts that justify an exception to governmental immunity. *Id.* at 365. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Mallard, supra* at 139-140. A motion brought pursuant to MCR 2.116(C)(9) is tested by the pleadings alone and the court must accept all well-plead allegations as true. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740; 550 NW2d 265 (1996). Where the non-moving party's defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery, summary disposition pursuant to MCR 2.116(C)(9) is warranted. *Id.* A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *McGuirk Sand & Gravel, Inc v Meridian Mutual Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996). MCR 2.116(C)(10) permits summary disposition when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it in a light most favorable to the opposing party. *Id.*

We believe the trial court erred in failing to grant summary disposition in favor of defendant, and concomitantly that it erred in granting summary disposition in favor of plaintiff, because the apartment building at issue was not a "public building" within the public building exception to governmental immunity. While generally immune from tort liability pursuant to MCL 691.1407; MSA 3.996(107), governmental agencies nevertheless are liable for injuries arising out of dangerous or defective public buildings under MCL 691.1406; MSA 3.996(106). *Brown, supra* at 365.

In order to invoke the public building exception to governmental immunity, the plaintiff must prove 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 defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period. MCL 691.1406; MSA 3.996(106); *Brown, supra* at 365-366. The statutory grant of governmental immunity must be

broadly construed and its exceptions narrowly drawn. *Chaney v Dep't of Transportation*, 447 Mich 145, 154; 523 NW2d 762 (1994).

The purpose of the public building exception to governmental immunity is to protect the general public from injury by imposing a duty on the government to maintain safe public buildings. *Brown, supra* at 366. Therefore, the focus of the trial court's and this Court's inquiry is on the accessibility of the accident site to members of the general public rather than on the extent to which the building might be said to benefit the public. *Id.*

In *Griffin v Detroit*, 178 Mich App 302; 443 NW2d 406 (1989), the plaintiff's decedent, a resident of a low-income housing facility owned and operated by the City of Detroit, died when she slipped and fell in her bathtub. The plaintiff claimed that the city was negligent in failing to install and maintain protective railings in the bathtub area. The trial court granted the defendant's motion for summary disposition on the basis of governmental immunity. This Court affirmed the trial court's decision, holding that the public building exception to governmental immunity did not apply. The plaintiff maintained that the dwelling in which the decedent resided was a public building because it was owned and operated by the City of Detroit as low-income housing and that, therefore, it benefited the community as a whole. However, this Court stated that the scope of the decision in *Green v Dep't of Corrections*, 386 Mich 459, 464; 192 NW2d 491 (1971), which defined the term "public building" as a "building owned by a public body, particularly if it is used for public offices or for other public purposes" should be limited to the specific facts upon which it was based. *Id.* at 306. Under the *Green* definition, the Court held, the dwelling unit in *Griffin* was not used for public offices or for a public purpose. *Id.*

In *White v Detroit*, 189 Mich App 526; 473 NW2d 702 (1991), the plaintiff, a tenant at a low-income public housing facility owned and operated by the City of Detroit, was injured when he stepped into a hole in a patio located within the facility. The trial court granted summary disposition to the defendant after finding that the facility did not fall within the public building exception to governmental immunity. Noting that the case involved a city-owned residential housing facility like *Griffin*, this Court found, as a matter of law, that such a facility is not a "public building" within the meaning of the public building exception. Because the building itself was not a public building, the adjacent patio could not fall within the exception. *Id.* at 528. The Court acknowledged that the case was distinguishable from *Griffin* in that the plaintiff's injuries occurred outside the building, in a place which arguably was accessible to the public. *Id.* However, because the building was a residential housing facility containing private housing units, and was not a building used for public offices or for a public purpose, the Court held that the public building exception did not apply. *Id.* at 529. Further, the area at issue, being adjacent to a non-public building, did not fall within the exception merely because the area may have been accessible to the public. *Id.*

We agree with defendant that the trial court's reliance on *Wade v Dep't of Corrections*, 439 Mich 158; 483 NW2d 26 (1992), rather than *Griffin* and *White* was misplaced. The Supreme Court in *Wade* addressed the issue whether transitory maintenance conditions, such as grease or oil on a prison floor, may be the basis for a negligence claim that is within the public building exception; the Court held that the condition that causes an injury must be a defect of the structure of the building itself. The *Wade* decision did not address the issue whether the prison building itself was within the public

building exception. Although plaintiff acknowledges that the Supreme Court did not expressly address the criteria by which a particular building is determined to be a “public building” within the public building exception, plaintiff argues that it is clear that the Supreme Court implicitly considered the prison at issue to be a “public building.”

As this Court noted in *Brown, supra* at 371, the Supreme Court in *Wade* apparently addressed only the “dangerous or defective condition” prong of the public building analysis. After finding that this prong was not satisfied, the Supreme Court had no need to address the remaining prongs and did not implicitly find that a hallway at the prison constituted an area of a public building open to members of the public under the public building exception. *Id.* Noting that judicial expediency frequently mandates addressing issues according to their ease of resolution, this Court refused to go beyond the second prong of the test (whether the public building in question was open for use by members of the public) or draw any further inferences from *Wade. Id.*¹

Even if the apartment building at issue were to be considered a “public building” within the exception to governmental immunity, the defect about which plaintiff complains is not related to the structure of the building itself (even though she claims that drain spouts on the building produced the unnatural accumulation of ice). Plaintiff was injured when she fell on ice on a walkway leading to the apartment building and she was not then at a point at which immediate entrance to the building could be gained. See *Henkey v Grand Rapids*, 440 Mich 867; 485 NW2d 487 (1992) (the plaintiff failed to plead a cause of action in avoidance of governmental immunity where he was injured when he slipped on snow and ice and fell on the sidewalk immediately adjacent to the entryway of the defendant’s public building); *Hall v Detroit Board of Education*, 186 Mich App 469, 470-471; 465 NW2d 12 (1990) (summary disposition was properly granted in favor of the defendants on the basis of governmental immunity where the plaintiff was injured when she slipped and fell on ice on school property adjacent to a public school building); *Wing v Detroit*, 178 Mich App 628, 631; 444 NW2d 539 (1989) (summary disposition was properly granted in favor of the defendants on the basis of governmental immunity where the plaintiff was injured when she fell on a walkway adjacent to a public building which was not part of the entrance to the building).

Because the present issue was decided in *White*, which has not been reversed, in our judgment by *Wade*, the trial court is bound by that decision. *Moorhouse v Ambassador Ins Co, Inc*, 147 Mich App 412, 417; 383 NW2d 219 (1985). The trial court, therefore, erred in failing to grant summary disposition in favor of defendant on the basis of governmental immunity.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

¹ We do not attempt to distinguish here between public housing and prisons, for purposes of the meaning of “public housing,” only because we believe that *Wade* has not undermined the viability of

Griffin and *White*. Nevertheless, we observe that the degree and nature of public access to prisons is much different than to public housing.