STATE OF MICHIGAN

COURT OF APPEALS

BESSIE MCCOY and EMERY MCCOY,

Plaintiffs-Appellants,

v

SAGINAW TOWNSHIP COMMUNITY SCHOOLS,

Defendant-Appellee.

UNPUBLISHED
October 21, 1997

No. 188649
Saginaw Circuit Court
LC No. 94-005160-NO

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting defendant's motion for summary disposition and dismissing their complaint for damages suffered when plaintiff Bessie McCoy tripped and fell over a doorstop in a hallway of defendant's elementary school. The trial court held that defendant was entitled to governmental immunity. We reverse and remand.

Plaintiffs claim that their complaint invoked two exceptions to the governmental immunity statute: the proprietary function exception, MCL 691.1413; MSA 3.996(113), and the public building exception, MCL 691.1406; MSA 3.996(106). Plaintiffs do not challenge the trial court's determination that they failed to demonstrate the applicability of the proprietary function exception but argue that the trial court should have addressed the open and obvious danger rule and the public building exception to governmental immunity. Plaintiffs contend that the record demonstrates the existence of a genuine issue of material fact with regard to whether the open and obvious danger rule precludes liability and that the public building exception is applicable to this case.

The affidavit of plaintiff Bessie McCoy stated that the doorstop was hidden from her view because it blended into the carpet and was camouflaged. The affidavit of Jack Cleveland, the principal of the school, stated that the doorstop was screwed to the floor and was intended to hold the teachers' lounge door open by means of a hook; that the doorstop stood in the school corridor since the building was constructed and no one else had been known to fall or trip over it; that the doorstop was not camouflaged by a lack of contrasting color; and that the doorstop was silver-colored stainless steel

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

while the carpeting surrounding it was brown. A photograph submitted to the trial court by defendant shows a small white square on brown carpet. A separate photograph reveals a silver-colored doorstop surrounded by brown carpeting with flecks of lighter colors in it. The affidavit of George Bombyk, plaintiff's professional accident prevention specialist and safety consultant, also stated that the doorstop was located approximately twenty-seven inches from the wall, which is in the corridor where pedestrians normally walk.

We believe that this evidence demonstrates the existence of a factual question with regard to whether the risks associated with the doorstop were open and obvious and that defendant cannot rely on the open and obvious danger rule to escape liability. See, generally, *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995); *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).[1] The color of the doorstop shown in one of the photographs is not in strong contrast to the color of the carpet, which contains flecks of lighter colors. Although the dimensions of the doorstop are not contained in the record, the white square shown in the other photograph suggests that the doorstop was only a few inches wide, if that. In addition, neither photograph shows the actual doorstop over which plaintiff tripped and fell. Therefore, the record fails to establish whether the risks associated with the doorstop were open and obvious.

The question then becomes whether defendant is entitled to governmental immunity. While generally immune from tort liability pursuant to MCL 691.1407; MSA 3.996(107), governmental agencies are liable for injuries arising out of dangerous or defective public buildings under MCL 691.1406; MSA 3.996(106). *Brown v Genesee Co Bd of Commr's*, 222 Mich App 363, 365; 564 NW2d 125 (1997). "Before the public building exception will apply to pierce the shield of 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." *Id.* at 365-366.

The evidence submitted to the trial court fails to demonstrate that defendant is entitled to immunity. With regard to the first and second prongs of the test, the record establishes that plaintiff fell in a school hallway as she was walking to the pool to attend a swimming class. Through Cleveland's affidavit, defendant conceded that the school is a public building. See *Steele v Dep't of Corrections*, 215 Mich App 710, 715; 546 NW2d 725 (1996) (the public building exception is applicable to schools). With respect to the third prong of the test, Cleveland's affidavit indicated that the doorstop was affixed to the floor by screws and had been in place since the school was constructed. Accordingly, the doorstop was a fixture of the building for which liability may arise. Cf. *Carmack v Macomb Co Comm College*, 199 Mich App 544, 547; 502 NW2d 746 (1993). Because a factual question exists as to whether the open and obvious danger rule precludes liability, the third prong has been satisfied. With regard to the fourth and fifth prongs of the test, considering Cleveland's statement that the doorstop had been affixed to the floor of the school since the school was constructed (although no one else had been known to fall or trip over it), we believe that evidence, when viewed most

favorably to plaintiffs, may be sufficient to establish that defendant had knowledge of the defect and failed to take any remedial action.

Because the record establishes the existence of a factual question with regard to whether the open and obvious danger rule precludes liability and sufficient facts may have been presented to justify the application of the public building exception to governmental immunity, the trial court's grant of summary disposition to defendant was improper.

Reversed and remanded for further proceedings on plaintiffs' complaint. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan

[1] "Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection." *Eason, supra*.