

STATE OF MICHIGAN
COURT OF APPEALS

CARLA ERVIN,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

April 14, 1998

No. 198779

Wayne Circuit Court

LC No. 95-522022-NO

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

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10) in this premises liability action. We affirm.

While defendant brought its motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), neither the opinion nor order granting defendant's motion indicate pursuant to which court rule the trial court granted defendant's motion. However, we review the trial court's grant of summary disposition as if it were based on MCR 2.116(C)(10) since the court went beyond the pleadings in deciding defendant's motion. *Espinoza v Thomas*, 189 Mich App 110, 114-115; 472 NW2d 16 (1991).

This Court reviews de novo an order granting summary disposition. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* MCR 2.116(C)(10) permits summary disposition when, except as to the amount of damages, there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 567. Giving the benefit of doubt to the nonmovant, this Court must independently determine whether the movant would have been entitled to judgment as a matter of law. *Id.*

Plaintiff first argues the trial court impermissibly engaged in fact-finding in deciding defendant's motion. We disagree.

The trial court did not err in determining that neither the defective highway nor the defective building exceptions to governmental immunity applied to plaintiff's claim, as resolution of these issues involved the interpretation of the relevant statutes, namely MCL 691.1401(e); MSA 3.996(101)(e), MCL 691.1402(1); MSA 3.996(102)(1), and MCL 691.1406(1); MSA 3.996(106)(1). Statutory interpretation is a question of law. *Golf Concepts v City of Rochester Hills*, 217 Mich App 21, 26; 550 NW2d 80 (1996). Thus, the trial court did not engage in impermissible fact-finding in deciding defendant's motion.

Plaintiff next argues Michigan public policy supports the proposition that persons who sustain injury as a direct and proximate result of the negligence of another, including negligence of a governmental agency, has a right to sue for compensatory damages. We agree. An injured party has the right to sue the responsible tortfeasor, even if the tortfeasor is a governmental agency, provided one of the statutorily enumerated exceptions applies. MCL 691.1407; MSA 3.996(107); *Phelps v State of Michigan*, 75 Mich App 442, 446; 254 NW2d 923 (1977). However, our agreement with plaintiff's contention in this regard does not alter our decision.

Plaintiff further argues the defective highway exception to governmental immunity applies in this case. We disagree.

The defective highway exception to governmental immunity allows an individual who sustains bodily injury or damage to his or her property because of the failure of a governmental agency to maintain a highway under its jurisdiction in reasonable repair to recover damages from the governmental agency. MCL 691.1402(1); MSA 3.996(102)(1); MCL 691.1401(e); MSA 3.996(101)(e). The exception is narrowly drawn. *Bachman v Wroten*, 196 Mich App 258, 260; 492 NW2d 792 (1992). The definition of "highway" includes "sidewalks . . . on any highway." MCL 691.1401(e); MSA 3.996(101)(e).

The plain meaning of this statute does not include the area of Hart Plaza where plaintiff fell within its definition because the area was not adjacent to a highway. While this area may be routinely traversed by pedestrians, and occasionally traversed by vehicles, Hart Plaza does not serve "any broader function *consistent with the usage of a road travelled by the public.*" *Ward v Frank's Nursery & Crafts, Inc.*, 186 Mich App 120, 126; 463 NW2d 442 (1990) (emphasis added.) Much like the alley in *Ward*, Hart Plaza is traversed by pedestrians desiring to get from one area *of the plaza* to another. As in *Ward*, there is no indication that the area is used as a common means of passage by persons leaving from and going to places not in close proximity to the businesses located within or on the plaza itself. Moreover, Hart Plaza acts as a destination for pedestrians, rather than as a passageway used to get from one point to another. As such, Hart Plaza is not a road, street, or highway, or a sidewalk on a road, street or highway, as defined in the statute. MCL 691.1401(e); MSA 3.996(101)(e). Accordingly, the trial court properly granted defendant's motion for summary disposition.

Plaintiff finally argues the defective building exception to governmental immunity applies to her claim. We disagree.

The defective building exception to governmental immunity, MCL 691.1406; MSA 3.996(106), is narrowly construed. *Steele v Dep't of Corrections*, 215 Mich App 710, 713; 546 NW2d 725 (1996). The statute does not define the term “public building.” See MCL 691.1401; MSA 3.996(101). However, this Court recently addressed the definition of “public building,” for purposes of the defective building exception, in *Ali v City of Detroit*, 218 Mich App 581; 554 NW2d 384 (1996). In *Ali*, the plaintiff was injured when a bus passenger shelter fell on him. In determining whether the shelter constituted a building, this Court held:

Because the term “building” is not defined in the statute, we give it its plain and ordinary meaning, and consult dictionary definitions. “Building” is defined as a “relatively permanent, essentially boxlike construction having a roof and used for any of a wide variety of activities, as living, entertaining, or manufacturing,” and a “structure designed for habitation, shelter, storage, trade, manufacturing, religion, business, education and the like. A structure or edifice enclosing a space within its walls, and usually, but not necessarily covered with a roof.” [*Id.* at 584-585.]

In light of this definition, this Court found the shelter that collapsed upon the plaintiff qualified as a building. *Id.* at 585.

Utilizing this definition in the present case, the area in which the Dodge Fountain is located on Hart Plaza does not qualify as a public building. The fountain is placed in an open square, is not covered by a roof or any other structure, has no walls, and provides little to no shelter. The fountain or area in which it is located encloses no space and, in fact, it is possible to walk completely under and through the fountain’s structure without encountering any obstacles, save for the water which spouts from the fountain. Accordingly, the defective building exception to governmental immunity does not apply to plaintiff’s claim, and the trial court properly granted summary disposition for defendant.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh