

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL BERRIS,

Plaintiff-Appellee,

v

MICHIGAN STATE UNIVERSITY BOARD OF
TRUSTEES,

Defendant-Appellant.

UNPUBLISHED

March 9, 2006

No. 256112

Court of Claims

LC No. 04-000007-MZ

Before: Kelly, P.J., and Meter and Davis, JJ.

DAVIS, J. (*dissenting*).

I respectfully disagree with the majority's conclusion that the "public building exception" to governmental immunity, MCL 691.1406, is inapplicable. For that reason, I would affirm the trial court's denial of summary disposition.

The majority correctly lists the five factors identified by our Supreme Court to be considered in determining whether the public building exception applies:

To come within the narrow confines of this exception, a plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question was 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 or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. [*Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 528 NW2d 828 (1998) (emphasis omitted).]

There is no dispute that "a governmental agency is involved," and the parties apparently do not challenge the governmental agency's knowledge of and failure to remedy the condition. Therefore, the only issues are whether the building "was open for use by members of the public" and whether "a dangerous or defective condition of the public building itself exists."

Our Supreme Court has explained that a dormitory is not "open for use by the public" where entry to the building could not be obtained except by permission of a tenant. In that case, the dispositive fact was that members of the public were required to use a courtesy telephone to

ask a resident to open the door. *Maskery v Bd of Regents of Univ of Michigan*, 468 Mich 609, 620; 664 NW2d 165 (2003). The same case also noted that “the public-building exception applies when the building is open for use by members of the public.” *Id.*, 619 (emphasis in original). Here, the dormitory could be accessed by anyone, including non-tenants and even non-students, freely during the day, which is when the incident took place. Thus, “the public building in question was open for use by members of the public.” *Kerbersky, supra*.

Defendant relies on *Horace v Pontiac*, 456 Mich 744; 575 NW2d 762 (1998), in support of its assertion that there existed no “dangerous or defective condition of the public building itself.” In that case, our Supreme Court reasoned that the word “of,” as it is used in the phrase “dangerous or defective condition of a public building” within MCL 691.1406, referred to possession. *Id.*, 756. The Court observed that case law had consistently held “areas not immediately adjacent to a building, especially if the area of the injury was not immediately in front of an area providing ingress or egress to the building” excluded from the public building exception. *Id.*, 751. It concluded that a plaintiff who fell on a walkway “between eighteen and twenty-eight feet from the south entrance doors to the [building]” did not come within the public building exception. *Id.*, 757. Thus, “[a]s we recently held in *Horace*, the public building exception does not apply to injuries sustained in a slip and fall in an area adjacent to a public building.” *Kerbersky, supra* at 535.

The majority construes this as an absolute bar where an injury happens to take place on the sidewalk outside a building. However, *Horace* explicitly left open the possibility of, among other things, “liability for injuries resulting from the collapse of an outside overhang on a public building” because “an outside overhang is a danger presented by a physical condition of a building itself.” *Horace, supra* at 756-757 n 9. Indeed, our Supreme Court later clarified that *Horace* had not been intended to create “a bright-line rule precluding liability for injuries occurring from dangerous or defective conditions of building parts outside an entrance or exit.” *Fane v Detroit Library Comm*, 465 Mich 68, 77; 631 NW2d 678 (2001). Rather, *Horace* stated that sidewalks and walkways *by themselves* were outside the scope of the exception. *Id.*, 76. The Court emphasized that the Legislature’s use of the word “of” rather than “in” was careful and intentional. *Id.*, 77. The dispositive analysis is not whether the allegedly dangerous or defective condition is inside the building, but whether it is possessed by or not intended to be physically removed from the building. *Id.*, 77-78.

Here, the photographs of the accident location demonstrate that the drainpipe and overhang over the entryway to the building meet the test set forth in *Horace* and clarified in *Fane*. The entire assembly is clearly attached to the building and not intended to be removed or to have any existence independent of the building. The assembly is not mere decoration. Rather, it is an integrated and functional component of the building’s entrance. Its purpose is to drain water from the roof of the building. It is configured so that it deposits the drained water in front of the ingress and egress door to this public facility.

Further, the runoff area here is not “mere sidewalk or walkway.” Defendant and the majority read *Horace* as removing sidewalks and walkways *per se* from the public building exception. It is true that both of the incidents rejected in that case took place on sidewalks near public buildings. However, one happened some eighteen to twenty-eight feet away, and the other took place on an open sidewalk area that merely happened to be near the building. The emphasis in *Horace* was that the public building exception does not encompass conditions that

just happen to be in close proximity to, or even abutting, public buildings solely because of that proximity. Even more significantly, the defective conditions in *Horace* were *actually defects in the sidewalks*. See *Fane, supra* at 75-76.

The situation here is significantly distinguishable. The alleged defect is in a part of the building. The situs of the alleged incident is effectively in the entryway to the building. I conclude that, under the analysis in *Horace* and *Fane*, plaintiff has alleged a dangerous or defective condition of a public building that is open to members of the public.

I would affirm the trial court.

/s/ Alton T. Davis