

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARK A. BREWER and TAMMY J. BREWER,

Plaintiffs-Appellees,

v

CITY OF WYANDOTTE and JIM KNOPP,

Defendants-Appellants.

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UNPUBLISHED

March 9, 2006

No. 257395

Wayne Circuit Court

LC No. 03-309462-NO

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant City of Wyandotte<sup>1</sup> appeals as of right from the circuit court's order denying its motion for summary disposition predicated on governmental immunity. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff Mark Brewer, a scout leader, accompanied some scouts to an event at Yack Arena in Wyandotte. Brewer grabbed a guardrail while attempting to hop or climb over it, but the rail moved, causing him to lose his balance and fall. Plaintiffs filed suit alleging negligence and invoking the public building exception to governmental immunity, MCL 691.1406. Defendant moved for summary disposition on the basis that the guardrail in question was not part of the public building. The circuit court agreed with plaintiffs, and denied defendant's motion.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). When deciding a motion under MCR 2.116(C)(7) (immunity granted by law), the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999).

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<sup>1</sup> Defendant Jim Knopp was dismissed from this case by stipulation and is not participating in this appeal; therefore, the unqualified use of the singular "defendant" in this opinion will refer exclusively to the city.

Governmental agencies have general immunity from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407. Several exceptions exist, however, including an exception regarding the maintenance of public buildings. MCL 691.1406. The general statutory immunity is broad in scope, and the exceptions are to be narrowly construed. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984). To come within the narrow confines of the public building 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 Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998) (emphasis omitted).]

The instant case concerns the third of these elements.

For purposes of the public building exception, “[a] temporary object or structure is normally not part of a building,” e.g., “scaffolding attached to a building only for the period necessary to complete construction.” *Fane v Detroit Library Comm*, 465 Mich 68, 78 n 11; 631 NW2d 678 (2001). But “a dangerous or defective fixture can support a claim of liability under the public building exception.” *Id.* at 78. An object qualifies as a fixture “if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty.” *Id.*

Defendant argues that the guardrail here at issue is not a fixture, relying in part on *Fane*, *supra*. However, *Fane* concerned structures lying outside the four walls of a public building, *id.* at 70, while the instant case indisputably concerns an object or item within the arena building. Moreover, even for outside structures, a fixtures analysis is not always appropriate. *Id.* at 78-79. The Supreme Court explained in *Fane* that although a terrace attached to the outside of a building comprises a part of the building itself because it is physically connected to the building and not intended to be removed, a fixtures analysis is not appropriate if the terrace has no existence apart from the building. *Id.* at 79. The Supreme Court distinguished that a portable access ramp that is not physically attached to a building and could be easily removed is not part of the building, and that because the ramp has a possible existence apart from that particular application, a fixtures analysis is appropriate. *Id.*

Defendant Jim Knopp, Wyandotte’s recreation superintendent, testified in his deposition that the guardrails separate the aisle or walkway at the bottom of the retractable bleachers from the arena surface. According to Knopp, the rails serve to “help keep the people from falling off . . . on the walk way, so to speak, so that they don’t fall off . . . like when they’re coming down out of the bleachers or walking. So they don’t fall off or fall into the glass per se during a hockey game,” and also to provide stability for those passing by. Knopp added that although the guardrails are designed for ready removal, they need not be removed in order to retract the bleachers fully. Knopp estimated that the rails were removed and replaced five or six times a year.

The evidence in this case thus reflects that the guardrails in question are designed for ready removal, but no indication exists that, once removed, the guardrails have some independent existence. Because the guardrails have no existence apart from their positioning as part of the arena bleachers, a fixtures analysis does not apply. Plaintiffs emphasize that the guardrails in question can be removed, but the fact that defendant finds it expedient to remove those guardrails occasionally does not by itself mean that they lack the permanence required to establish that they are an integral part of the building's interior. The removals described by Knopp include only occasional removals for purposes of maintenance and inspection, or to reconfigure the interior of the building itself to accommodate the various events hosted therein.

In summary, there is no dispute that the bleachers themselves are permanently affixed as part of the arena realty. Because the guardrails in question are designed to attach securely to those bleachers, despite their ready removability, for the purpose of protecting patrons at the front of the bleachers from falling, we conclude that the trial court did not err in regarding those rails as part of the realty for purposes of invoking the public building exception to governmental immunity.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Kathleen Jansen  
/s/ Jane E. Markey