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STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MACDONALD and JAMES MACDONALD,

Plaintiffs-Appellants,

v

OTTAWA COUNTY and OTTAWA COUNTY PARKS AND RECREATION COMMISSION,

Defendants-Appellees.

UNPUBLISHED
December 17, 2020
APPROVED FOR PUBLICATION
February 4, 2021
9:00 a.m.

No. 350956
Ottawa Circuit Court
LC No. 18-005408-NO

JULIE BENEDICT,

Plaintiff-Appellant,

v

OTTAWA COUNTY and OTTAWA COUNTY PARKS AND RECREATION,

Defendants-Appellees.

No. 350989
Ottawa Circuit Court
LC No. 18-005449-NO

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

These consolidated personal injury cases concern the applicability of the public buildings exception to governmental immunity, MCL 691.1406, to the collapse of a publicly operated outdoor deck in Ottawa County, Michigan. The issues in both cases are essentially the same and arise from the same facts. In Docket No. 350956, plaintiffs Patricia and James MacDonald, and in Docket No. 350989, plaintiff Julie Benedict, appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendants in both cases. On appeal,

plaintiffs[1] argue that the trial court erred by determining that defendants were not liable for the deck's collapse because its failure stemmed from a design defect. Plaintiffs also argue that a genuine issue of material fact existed as to whether defendants had actual or constructive notice of the deck's deteriorated condition. We conclude that although the deck was defectively designed, plaintiffs also sufficiently alleged that it collapsed because of a failure to repair and maintain. We further conclude that a genuine issue of material fact existed as to whether defendants had constructive knowledge of the deck's defective condition. Therefore, we reverse.

In June 2018, plaintiffs filed complaints alleging that while attending an event at Weaver House in Ottawa County, Michigan, they suffered injuries when an outdoor deck they were standing on suddenly collapsed. They alleged, in part, that defendants were liable for their injuries caused by the deck's collapse under the public-building exception to governmental immunity, MCL 691.1406. After a discovery period, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the public-building exception did not apply because plaintiffs' claims arose out a design defect. In the alternative, defendants argued that they did not know about the deck's defective condition. Plaintiffs opposed the motion, arguing that their claims arose from defendants' failure to repair and maintain the deck. The trial court granted the motion, determining that the defective condition of the deck arose from a design defect. The trial court reasoned that the deck failed because LVL lumber was used in its design and construction, even though experts for plaintiffs and defendants opined that LVL was not fit for outdoor use.

We review de novo the decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). Summary disposition is appropriate under MCR 2.116(C)(10) "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (quotation marks and citation omitted). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, "leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Id*. (quotation marks and citation omitted).[2]

Generally, governmental agencies are immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). "A governmental function is 'an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.' " *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003), quoting MCL 691.1401(f). Defendants are governmental agencies that enjoy a presumption of governmental immunity See *Mack v Detroit*,

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[1] We will refer to the MacDonalds and Benedict collectively as "plaintiffs" and will delineate between them when appropriate.

[2] The MacDonalds argue—for the first time on appeal—that defendants should have sought summary disposition under MCR 2.116(C)(7) ("immunity granted by law"). However, as defendants point out, our court rules explicitly contemplate a motion under MCR 2.116(C)(10) based on a claim of governmental immunity. See MCR 7.202(6)(a)(*v*).

467 Mich 186, 204; 649 NW2d 47 (2002). Defendants properly operate Weaver House pursuant to MCL 123.51.

The governmental immunity act, however, provides several exceptions to this general immunity. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). These exceptions are to be narrowly construed. *Maskery*, 468 Mich at 614. In order for a governmental defendant to be liable under the public-building exception, MCL 691.1406,

> 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." [*Maskery*, 468 Mich at 614-615 (quotation marks and citation omitted).]

In *Renny v Dep't of Transp*, 478 Mich 490, 500; 734 NW2d 518 (2007), our Supreme Court held that the public-building exception does not support a design defect claim. The *Renny* Court explained at length the differences between design defects and a failure to maintain and repair:

> The first sentence of MCL 691.1406 states that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." This sentence unequivocally establishes the duty of a governmental agency to "repair and maintain" public buildings. Neither the term "repair" nor the term "maintain," which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner. "Design" is defined as "to conceive; invent; contrive." By contrast, "repair" means "to restore to sound condition after damage or injury." Similarly, "maintain" means "to keep up" or "to preserve." Central to the definitions of "repair" and "maintain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. "Design" refers to the initial conception of the building, rather than its restoration. "Design" and "repair and maintain," then, are unmistakably disparate concepts, and the Legislature's sole use of "repair and maintain" unambiguously indicates that it did not intend to include design defect claims within the scope of the public building exception.
>
> The second sentence of MCL 691.1406, which imposes liability on governmental agencies "for bodily injury and property damage resulting from a dangerous or defective condition of a public building," does not expand the duty beyond the repair and maintenance of a public building. The phrase imposes liability where the "dangerous or defective condition of a public building" arises out of the governmental agency's failure to repair and maintain that building. It is not suggestive of an additional duty beyond repair and maintenance. There is no reason to suspect that the Legislature intended to impose a duty to prevent "dangerous or defective condition[s]" in public buildings in a manner wholly

> unrelated to the obligation clearly stated in the first sentence. [*Id*. at 500-501 (footnotes omitted).]

Notably, although the *Renny* Court held "to the extent that plaintiff's claim is premised on a design defect of a public building, it is barred by governmental immunity," it also remanded the case because the plaintiff also alleged that the defendant failed to repair and maintain the building. *Id*. at 506-507.

In *Tellin v Forsyth Twp*, 291 Mich App 692, 705-706; 806 NW2d 359 (2011) (citations omitted), we sought to further clarify the distinction between a design defect and a failure to repair and maintain:

> A design defect would appear to consist of a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose. For example, the accumulation of the snow and ice on the sidewalk in *Renny* was not from any malfunction of the roof or problem with its construction, but was a natural effect of the characteristics of the new roof design, which was not intended to divert melting snow and ice.
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> In contrast, a failure to repair or maintain appears to consist of something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improperly constructed or installed. Reparative or preventative measures may also supplement the existing structure to preserve the existing design. An action could initially be a design decision, but subsequent improper installation, malfunction, deterioration, or instability could later transform this decision into a failure to repair or maintain.

In the present cases, although the use of the LVL beam was a design defect, plaintiffs' claims also arose out of defendants' failure to repair and maintain the deck. See *Renny*, 478 Mich at 500-501; see also *Tellin*, 291 Mich App at 705-706. The design plans for the deck reflected that the builders were to use LVL beams to support the deck's joists. The beams were, therefore, a part of the "initial conception of the [deck], rather than its restoration." *Renny*, 478 Mich at 501. Dale Johnson, hired by defendants to investigate the collapse of the deck, reported that "LVL beams were the wrong material to use in the outdoor environment of this deck," as "LVL lumber is a product that is only intended for interior use in dry conditions."

Notwithstanding this design defect, plaintiffs presented evidence that the deck collapsed because defendants failed to repair and maintain it. As discussed, the *Renny* Court itself implied that a case can involve both a design defect and a failure to repair and maintain. See *Renny*, 478 Mich at 506-507. The record evidence suggests that in normal conditions—or, in its initial condition—the LVL beam would have supported a normal weight load for a deck. However, when the LVL beam failed, it was only carrying a small fraction of that load. Indeed, Johnson's own conclusion is instructive: "the rotted LVL Lumber is the one and only cause of the collapse." Johnson did not conclude that the use of the LVL beam in of itself caused the deck to collapse. Instead, Johnson's conclusion reflects that, but-for the rot in the LVL beam, the deck would not have collapsed. It is also notable that for the first 12 years of its life, the deck did not

collapse. It only did so when the LVL beam failed because of rot. Therefore, the evidence demonstrates that the deck collapsed because of deterioration, transforming a design defect into a failure to repair or maintain. See *Tellin*, 291 Mich App at 705-706.

Defendants argue that panels of this Court have concluded that a plaintiff's claim arose out of design defects (and not out of a defendant's failure to repair and maintain) when the "injury-causing defects were inherent to the structure, and no amount of 'restoration' would eliminate the risk of injury inherent in the initial conception of the building." According to defendants, the dispositive fact in the present cases is that when the deck is (was) restored to its initial conception, the defect—the LVL beam itself—would be preserved. Defendants are correct to the extent that, if the deck was rebuilt as it was designed, the design defect would be preserved. But the evidence suggests that the deck did not fail because of the design defect. Instead, the evidence suggests that the deck failed because the LVL beam had deteriorated and was not repaired or maintained.

We also conclude that a genuine issue of material fact existed as to whether defendants had constructive knowledge of the dangerous or defective condition of the deck. Constructive knowledge is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005) (quotation marks and citation omitted). "Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Banks v Exxon Mobil Corp*, 477 Mich 983, 983-984; 725 NW2d 455 (2007). "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Id.* at 984.

In the present cases, plaintiffs presented evidence demonstrating that if defendants had been reasonably diligent when they made repairs to the deck and discovered that some of sections of the deck had become rotted, they should have also discovered the rotted LVL beam. See *Echelon Holmes*, 472 Mich at 197. Specifically, Tom Dorton, a maintenance worker, testified that he performed repairs to areas of the deck that were rotted. And although Dorton testified that rot in one section of the deck likely meant that other sections had rot, he admitted that he did not diligently inspect the LVL beam that supported the entire weight of the deck. If Dorton had diligently inspected the LVL beam, the evidence, including an affidavit from plaintiffs' expert, suggests that he would have discovered its rotted condition. Therefore, a genuine issue of material fact existed as to whether defendants were on constructive notice of the deck's dangerous or defective condition.

Finally, we reject as misplaced defendants' argument that they did not have time to rebuild the deck. MCL 691.1406 requires defendants to remedy a defective condition "or to take action reasonably necessary to protect the public against the condition." Contrary to defendants' all-or-nothing logic, defendants could have, among other things, simply closed the deck to the public until the deck was inspected, repaired, or replaced. Presumably, this much simpler act would have protected the public against the condition. Therefore, a genuine issue of material fact existed as to whether defendants failed to act reasonably necessary to protect the public from the dangerous condition of the deck.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro