STATE OF MICHIGAN

COURT OF APPEALS

RONALD L. RUSHFORD and CONNIE F. RUSHFORD,

Plaintiffs-Appellants,

v

COUNTY OF WAYNE,

Defendant-Appellee.

UNPUBLISHED
December 29, 1998

No. 204462
Wayne Circuit Court
LC No. 96-621583 NI

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition of plaintiff's[1] slip and fall claim. We affirm.

Plaintiff was allegedly injured while approaching the Wayne County Juvenile Court and Youth Home on September 13, 1994. Plaintiff[2] alleges that he injured his elbow when he fell ten to twelve feet from the entrance to the building because of dirt and rocks on the sidewalk. Plaintiff filed suit alleging that defendant was negligent in failing to maintain the sidewalk free from defects, and that defendant failed to comply with the then Handicappers' Civil Rights Act (HCRA)(in its current form the Persons With Disabilities Civil Rights Act), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, by failing to provide handicapped parking and access to the building. Defendant moved for summary disposition under MCR 2.116(7) (claim barred by legal immunity), MCR 2.115(C)(8) (no claim stated upon which a court may grant relief), and MCR 2.116(C)(10) (insufficient evidentiary support for the claim). The trial court granted defendant's motion, holding that the sidewalk did not fall within the public building exception to governmental immunity, and that the failure to provide handicapped access to the public was not the proximate cause of plaintiff's injury.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). "Summary judgment should only be granted when the plaintiff's claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery." *Young v Michigan Mutual Ins Co*, 139 Mich App 600, 603; 362 NW2d 844 (1984). For purposes

of this appeal, this Court accepts as true plaintiff's well-pleaded allegations and considers them in the light most favorable to the plaintiff. See *Stabley v Huron-Clinton Metropolitan Park Authority,* 228 Mich App 363, 365; 579 NW2d 374 (1998).

Governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407; MSA 3.996(107). However, an exception exists with regard to maintaining public buildings:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. [MCL 691.1406; MSA 3.996(106).]

Thus, a party asserting the building exception to tort immunity must show a defect, actual or constructive knowledge of the defect on the part of the responsible agency, and the agency's failure to act within reasonable time. *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 421 (Brickley, J), 447 (Riley, J); 487 NW2d 106 (1992); *Ransburg v Wayne Co*, 170 Mich App 358, 359-360; 427 NW2d 906 (1988). In opposition to defendant's motion for summary disposition, plaintiff cited *Tilford v Wayne Co General Hospital*, 403 Mich 293, 269; 269 NW2d 153 (1978) for the proposition that the sidewalk leading to a public building that is under the control of the governmental agency comes within the public-building exception to governmental immunity. However, controlling this case is our Supreme Court's recent ruling in *Horace v City of Pontiac*, 456 Mich 744; 575 NW2d 762 (1998). In *Horace*, a plaintiff tripped and fell on allegedly defective pavement leading to, and eighteen to twenty-eight feet from, the Pontiac Silverdome. *Id.* at 757. The Supreme Court ruled held that liability did not extend to walkways leading to a public building: "A danger of injury caused by the area in front of an entrance or exit is not a danger that is presented by a physical condition of the building itself." *Id.* The Court concluded, "we hold that slip and fall injuries arising from a dangerous or defective condition existing in an area adjacent to an entrance or exit, but nevertheless still not a part of a public building, do not come within the public building exception to governmental immunity." *Id.* at 758.

In the instant case, plaintiff testified that he slid across the sidewalk on dirt and rocks covering the walkway when he was ten to twelve feet from the steps of the building. Because according to plaintiff's own representations he was not injured by the physical condition of the building itself, but instead was injured on an area adjacent to the entrance, the trial court correctly ruled that the public building exception to governmental immunity did not operate to allow plaintiff to proceed against defendant in this instance. Accordingly, the court properly granted defendant's motion for summary disposition of this claim under MCR 2.116(7) and (10).

Plaintiff further contends that the trial court erred in granting summary disposition without allowing plaintiff first to depose certain of defendant's employees to establish their knowledge of a dangerous or defective condition. The general rule is that summary disposition is premature if

discovery of a disputed issue is incomplete. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). However, "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Id.* In the instant case, plaintiff testified that his injury occurred on the sidewalk ten to twelve feet from the entrance of the building. As indicated by *Horace, supra* at 757-758, this area does not fall within the public building exception to governmental immunity. Thus, no additional discovery concerning the state of the walkway at the time of plaintiff's injury could bring to light an avenue for defeating defendant's governmental immunity. Because no material controversy existed upon which additional discovery could have shed light, the trial court properly granted defendant's motion for summary disposition without allowing plaintiff first to depose defendant's employees.

Plaintiff also contends that the trial court erred in granting summary disposition of his claim under the HCRA. We disagree. "[N]o language in the [act] provides an independent tort remedy for persons injured at a place of public accommodation because they are handicapped." *Spagnuolo v Rudds #2, Inc,* 221 Mich App 358, 363; 561 NW2d 500 (1997). Further, because plaintiff's allegations, considered in the light most favorable to him, fail to suggest that his fall was proximately caused by any failure on defendant's part to accommodate plaintiff's handicap, we agree with the trial court that no alleged breach by defendant of any duty under the HCRA proximately caused the accident. Accordingly, summary disposition of this claim was proper pursuant to MCR 2.116(C)(8) and (10).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] Because Connie Rushford's claim is derivative of her husband Ronald Rushford's claim, for convenience we will use the term "plaintiff" to refer exclusively to the latter.

[2] Plaintiff, whom experienced a bout with polio as a child, was left needing crutches and leg braces to assist him in walking.