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STATEMENT OF THE BASIS OF JURISDICTION

On December 6, 2006, this Court granted Appellant's application for leave to appeal the March 21, 2006 judgment of the court of appeals. It has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF THE QUESTION INVOLVED

CAN CLAIMS AGAINST A GOVERNMENTAL AGENCY ARISING OUT OF THE IMPROPER OR DEFECTIVE DESIGN OF A PUBLIC BUILDING BE MAINTAINED UNDER THE PUBLIC BULDING EXCEPTION TO MICHIGAN'S GOVERNMENTAL TORT LIABILITY ACT WHERE THE EXCEPTION, BY ITS PLAIN TERMS, ONLY IMPOSES A DUTY TO "MAINTAIN" AND "REPAIR?"

Plaintiffs-Appellees Karen Renny and Charles Renny answer "Yes."

Defendant-Appellant the Michigan Department of Transportation answers "No."

Amicus Curiae Michigan Municipal League, Michigan Municipal League And Liability Property Pool, and Michigan Townships Association answer "No."

The Roscommon County Circuit Court answered "No."

The Court of Appeals answered "Yes."

STATEMENT OF FACTS

The Michigan Municipal League (MML), the Michigan Municipal League Liability and Property Pool (MMLLPP), and the Michigan Townships Association rely upon the statement of facts set forth in defendant-appellant Michigan Department Of Transportation's brief.

ARGUMENT

CLAIMS AGAINST A GOVERNMENTAL AGENCY ARISING OUT OF THE IMPROPER OR DEFECTIVE DESIGN OF A PUBLIC BUILDING CANNOT BE MAINTAINED UNDER THE PUBLIC BULDING EXCEPTION TO MICHIGAN'S GOVERNMENTAL TORT LIABILITY ACT WHERE MCL 691.1406, BY ITS EXPRESS TERMS, ONLY IMPOSES A DUTY TO "MAINTAIN" AND "REPAIR."

The Michigan Court of Appeals and the Michigan Supreme Court have applied the public building exception of the Michigan Governmental Tort Liability Act to permit claims against governmental agencies for design defects in public buildings. *Bush v Oscoda Area Schools*, 405 Mich 716; 275 NW2d 268 (1979); *Renny v Dep't of Transportation*, 270 Mich App 318; 716 NW2d 1 (2006). These decisions conflict with a faithful interpretation of the statutory text, are based upon erroneous past precedent, and require a reversal by this Court.

A. IN HOLDING THAT A PLAINTIFF CAN MAINTAIN A DESIGN DEFECT CLAIM UNDER THE PUBLIC BUILDING EXCEPTION, THE COURT OF APPEALS HAS DEVIATED FROM THIS COURT'S WELL-ESTABLISHED PRINCIPLES GOVERNING THE INTERPRETATION OF THE MICHIGAN GOVERNMENTAL TORT LIABILITY ACT REQUIRING THAT ITS IMMUNITY PROVISIONS BE GIVEN BROAD EFFECT TO PROTECT GOVERNMENTAL AGENCIES FROM TORT LIABILITY AND THAT ANY EXCEPTIONS MUST BE NARROWLY CONSTRUED.

The Michigan Governmental Tort Liability Act, MCL 691.1407(1) , provides, in part, that all governmental agencies are immune from tort liability in all cases where the government agency is engaged in a governmental function. Governmental immunity is available as a defense unless the action falls within one of the legislatively defined and narrowly drawn exceptions. *Mason v Wayne County Board of Comm'rs*, 447 Mich 130, 134; 521 NW2d 791 (1994). See also *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). It is well-established that exceptions to governmental immunity are to be narrowly construed. *Wade v Dep't of Corrections*, 439 Mich 158, 166; 483 NW2d 26 (1992); *Nawrocki v Macomb County*

Road Comm, 463 Mich 143; 615 NW2d 702 (2000); *Evens v Shiawassee County Road Comm*, 460 Mich 867; 598 NW2d 347 (1999); *Hanson v Board of County Road Comm'rs of the County of Mecosta*, 465 Mich 492; 638 NW2d 396 (2002).

This Court has traditionally applied a two-step inquiry when considering tort claims against governmental agencies: the Court examines whether the elements of the tort, including duty, have been met and then considers whether the governmental agency is protected with immunity. See e.g., *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000); *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997). The issues presented here just such a two-pronged inquiry.

This Court has also taken care to predicate its interpretation of the immunity statute on the wording of the text. See e.g., *Robinson*, 462 Mich at 458-460. Each word of a statute is presumed to be used for a purpose, and as far as possible, effect must be given to every word, clause, and sentence. *Robinson*, 462 Mich at 318 citing *University of Michigan Board of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911).

In *Renny v Michigan Dep't of Transportation*, 270 Mich App 318; 716 NW2d 1 (2006), the Court of Appeals deviated from these principles to interpret MCL 691.1406 to impose liability on the Department of Transportation for injury caused by improper/defective design, just as this Court held in *Bush v Oscoda Area Schools*, 405 Mich 716; 275 NW2d 268 (1979), that a plaintiff may maintain a design defect claim under MCL 691.1406 just as in MCL 691.1402. MCL 691.1406 provides:

> Sec. 6. 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. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.[1]

The *Renny* court did not analyze the statutory text of the public building exception in holding that design defect claims are actionable under the exception; instead, it relied on this Court's previous holdings that a building may be dangerous or defective because of improper design and that whether the injury arose because of improper design is irrelevant so long as the danger is presented by the physical condition of the building. *Renny, supra*, at 326, citing *Bush, supra*, at 730, and *Reardon v Dep't of Mental Health*, 430 Mich 398, 409-410; 424 NW2d 248 (1988). The *Renny* court elaborated:

> However, MDOT's claim that the public building exception dos not apply to the Rennys' claim based on defective design is without merit. The Michigan Supreme Court has held that "a building may be dangerous or defective because of improper design, faulty construction, or the absence of safety devices. Further,

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[1] To fall within the narrow confines of Michigan's public building exception, i.e., "to pierce the shield of governmental immunity", a plaintiff must bring his/her case within a five-part test set forth by the court in *Hickey v Zezulka (On Resubmission)*, 439 Mich 408; 487 NW2d 106 (1992):

> To apply the public building exception, a plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question is 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 amount of time.

439 Mich 408, 421. See also, *Kerbersky v Northern Michigan University*, 458 Mich 525, 529; 582 NW2d 828 (1998). Thus, a plaintiff proceeding against a governmental agency under the public building exception to immunity bears a multi-tiered burden of proof. *Jackson v Detroit*, 449 Mich 420, 428; 537 NW2d 151 (1995)

> the court has held that "'[a]s long as the danger of injury is presented by a physical condition of the building, it little matters that the condition arose because of improper design, faulty construction, or absence of safety devices.'" Design defects are, therefore, actionable under the public building exception to governmental immunity.

270 Mich App at 326.

Since restoring a text-based jurisprudence to statutory interpretation in Michigan, this Court has cautioned against deciding cases on the basis of common law reasoning (such as by analogy)[2] and has repeatedly insisted that statutes be interpreted in accord with their text. The cardinal principle of statutory construction is that courts must give effect to legislative intent. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). When reviewing a statute, courts necessarily must first examine the text of the statute. *Dressel v Ameribank,* 468 Mich 557, 562; 664 NW2d 151 (2003). If the Legislature's intent is clearly expressed by the language of the statute, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000).

Each word of a statute is presumed to be used for a purpose, and as far as possible, effect must be given to every word, clause, and sentence. *Robinson*, 462 Mich at 318, citing *University of Michigan Board of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). In *Robinson*, this Court reiterated the principle that it could "not assume that the Legislature inadvertently made use of one word or phrase instead of another." 462 Mich at 318, citing *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). It also emphasized that the clear language of a statute must be followed. *City of Lansing v Lansing Twp*, 356 Mich 641,

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[2] See discussion in Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997), pp 3-24 (questioning attitude of common-law judges when applied to statutory interpretation and rejecting mind-set that ries to arrive at judiciary's view of most desirable result and then distinguishes or employs precedent by analogy to get there instead of resolving the matter on the basis of the text).

649; 97 NW2d 804 (1959). See also, *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 643 NW2d 553 (2002) ("duty is to apply the language of the statute as enacted, without addition, subtraction, or modification"). 466 Mich at 101 citing *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) and *Tyler v Livonia Public Schools*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999).

A textual reading of MCL 691.1406 supports the Department of Transportation's position that the *Renny* court erred in allowing a design defect claim under the public building exception. By its plain terms, MCL 691.1406 creates a duty to "repair" and to "maintain" public buildings. Nothing in the text suggests that the government's obligation extends to "design" buildings in any manner. Nor does the ordinary meaning of the terms "repair" and "maintain" implicate a duty to safely "design." *Random House Webster's College Dictionary* defines "repair" as:

> 1. to restore to a good or sound condition after decay or damage; 2. to restore or renew. 3. to remedy; make up for; compensate for.

Random House Webster's College Dictionary, p 1119 (2001). The word "maintain" is similarly defined:

> 1. to keep in existence or continuance; preserve. 2. to keep in due condition, operation, or force. 3. to keep in a specified state, position, etc.

Id. at 801. Nowhere in these ordinary definitions of "repair" and "maintain" does the implication of "design" arise. Rather, these definitions make clear that "repair" and "maintain" do not equate with "design." To impose on governmental agencies a duty to safely design public buildings as the Rennys suggest is in direct contravention to this Court's ruling that a statute must be applied without addition. *Lesner, supra.* Absent the Legislature's express inclusion of a third duty on governmental agencies to properly "design" public buildings, any duty as to design

amounts to an expansion of the duty by imposing a judicial gloss on the words used by the Legislature.

This Court has employed this textual approach in the context of the highway exception, MCL 691.1402(1), and has held that the statutory duty to "repair" and "maintain" does not by implication impose a duty to "design." In *Hanson v Board of County Road Comm'rs of the County of Mecosta*, 465 Mich 492; 638 NW2d 396 (2002), this Court was called upon to determine whether the highway exception creates a duty to properly design. The highway exception to governmental immunity, MCL 691.1402(1), provides, in pertinent part:

> Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damage suffered by him or her from the governmental agency...

MCL 691.1402(1). After a fatal motor vehicle accident, the plaintiff, on behalf of the decedent, brought suit under the highway exception, arguing that the road was defectively designed because of limited sight distance caused by curvature of the hill. *Id.* at 494. The circuit court granted summary disposition in the defendant's favor, finding that the highway exception did not apply to a design defect claim. *Id.* at 496. The Court of Appeals initially reversed the circuit court's grant of summary disposition. *Id.* The defendant filed an application for leave to appeal, and given the Court's clarification in *Nawrocki v Macomb County Road Comm*, 463 Mich 143; 615 NW2d 702 (2000), the court granted rehearing and reversed itself on the highway exception issue. Plaintiff subsequently filed an application for leave to appeal.

In affirming summary disposition in defendant's favor, this Court first noted the principle that exceptions to governmental immunity are narrowly drawn, citing *Ross v Consumers Power*

Co (On Rehearing), 420 Mich 567; 363 NW2d 641 (1984). *Id.* at 498. The *Hanson* court then rejected the argument that a plaintiff can maintain an action under the highway exception for a design defect:

> We believe that under the statute in question, as interpreted in [*Nawrocki*], the road commission's duty does not include a duty to correct design defects. Had the Legislature intended the correction of design defects to be included, it would have included such a requirement in the statutory language, and not assumed that such a requirement would be inferred under "maintenance and repair."

Id. at 500. In so ruling, this Court found controlling the plain meaning of the terms "repair" and "maintain:"

> This latter statement is contrary to the plain language of the statute, which carves out a limited exemption from governmental immunity and imposes on the state and county road commissions a narrow duty to "repair and maintain... the improved portion of the highway designed for vehicular travel..." MCL § 691.1402(1). Nowhere in the statutory language is there a duty to install, to construct or to correct what may be perceived as a dangerous or defective "design." Moreover, it is not the province of this Court to make policy judgments or to protect against anomalous results.
>
> * * *
>
> The [highway exception] statute further provides that the specific duty of the state and county road commissions is to "repair and maintain" highways. "Maintain" and "repair" are not technical legal terms. In common usage, "maintain" means "to keep in a state or repair, efficiency, or validity: preserve from failure or decline." Webster's Third New International Dictionary, Unabridged Edition (1966), p. 1362. Similarly, "repair" means "to restore to a good or sound condition after decay or damage; mend." Random House Webster's College Dictionary (2000), p. 1119.

Id. at 500-502.

Hanson is instructive. Although the specific statutory provision in *Hanson* was the highway exception, the same analysis can be utilized in dissecting the plain language of the words "repair" and "maintain" as used in the public building exception. Given that "design" is in no way synonymous with or a logical extension of "repair" or "maintain," nothing in the text

of the public building exception allows the imposition of such a duty on the Michigan Department of Transportation in *Renny*. Only will adherence to the text of MCL 691.1406 will stop a "judicial gloss" such as that expressly disfavored in *Nawrocki v Macomb County Road Comm*, 463 Mich 143; 615 NW2d 702 (2000) (discussed in detail infra). Reversal of the Court of Appeal's May 21, 2006 opinion is therefore proper.

B. PAST PRECEDENT FROM THIS COURT SUPPORTS THIS READING OF THE PUBLIC BUILDING EXCEPTION.

The Michigan Supreme Court significantly altered governmental immunity jurisprudence by adopting a theory of broad governmental immunity with "narrowly drawn exceptions" in the seminal case of *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984)(interpreting the highway exception). The Legislature responded by adopting MCL 691.1401 *et seq.*, which created broad protection for governments. *Ross* was followed by a host of contradictory decisions misapplying the interpretation and application of the highway exception. In *Nawrocki v Macomb County Road Comm*, 463 Mich 143, 645 NW2d 702 (2000), the Court embarked upon a new approach to interpretation of the highway exception to governmental immunity. Emphasizing fidelity to the legislative language and the desire to provide a clearer standard for applying the exception, the Court narrowed the scope of the exception to more closely follow the plain language of the statute. The focus of the Court's approach was on the structure of MCL 691.1402(1), which is "critical to its meaning." That section provides, in pertinent part:

> Sec. 2. (1) Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure,

> and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [MCL 691.1402.]

Id. at 157. In *Nawrocki*, the Court analyzed the duty issue by focusing on the first two sentences of the highway exception. The first sentence "describes the basic duty imposed on all governmental agencies" and establishes the duty to keep the highway "in reasonable repair." 463 Mich at 160. According to the *Nawrocki* court, the "phrase 'so that it is reasonably safe and convenient for public travel' refers to the duty to maintain and repair." *Id.* This language is extremely significant since it substantially cuts back the duty of all governmental agencies to a duty to repair. The Court explicitly rejected any reading of this language that would also establish a "second duty to keep the highway 'reasonably safe.'" *Id.* In doing so, the Court cited former Justice Riley's dissenting opinion in *Pick v Gratiot County Road Commission*, 451 Mich 607, 635-636; 548 NW2d 603 (1996). The Court went on to explain that the second sentence merely described generally the "persons" who could recover and did not expand the duty created in the first sentence.

This language supports a reversal of *Renny* because immunity bars claims against governmental agencies for improper and/or defective design of public buildings brought under the public building exception. Recall that the first two sentences of the public building exception provide:

> Sec. 6. 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. As in *Nawrocki*, the first sentence creates a limited duty, a duty to repair and maintain, rather than a duty to design. Similarly, as in *Nawrocki*, the second sentence describes the people who may recover for breach of the duty created by the first sentence. *Id.* at 160. This language means that if the claim is based on an alleged duty to design, the public building exception is inapplicable and immunity is available.

Nawrocki supports the Department of Transportation's argument that the Rennys cannot maintain a claim under the public building exception for injuries sustained on a doorway outside the public rest area where their complaint was predicated on defective design. Although *Narwocki* analyzed the highway exception, that same analysis applies to and controls the application of the public building exception in this case, which is structurally similar to the highway exception. To reiterate, the first sentence—the "duty" sentence—creates a duty to "repair and maintain." The scope of this duty is not expanded by the second sentence. Thus, consistent with *Nawrocki*, the Rennys' claim against the Department of Transportation was limited to a danger arising out of the failure to "repair" or "maintain." This not being the case, the Department of Transportation should be afforded governmental immunity.

The decision advocated by the Department of Transportation is not a novel one. In *Berris v Michigan State University Board of Trustees*, 2006 WL 572385 (March 9, 2006) (Exhibit), decided only months before the Court's decision in *Renny*, a Michigan State University student slipped and fell on an unnatural accumulation of ice on the sidewalk adjacent to an exterior dormitory door. *Id.* at 1. He brought suit under the public building exception to governmental immunity, arguing that the icy condition was caused by water draining onto the sidewalk from an overhanging drainage pipe affixed to the dormitory. *Id.* The defendant moved for summary

disposition, arguing that the exception did not apply because the sidewalk where the student fell was not a part of the dormitory and thus not a part of the physical condition "building." *Id.* The lower court denied the motion.

On appeal, the Department of Transportation argued that the student failed to establish "a dangerous or defective condition of the public building itself," citing *Horace v Pontiac*, 456 Mich 744, 757; 575 NW2d 762 (1998). *Id.* at 2. In response, the student argued that the drainage pipe that "allegedly resulted in his fall was physically connected to and not intended to be removed from the building and that *Fane* [*v Detroit Library Co Comm*] therefore controlled the outcome of the instant case." *Id.* at 2. The Court of Appeals found in favor of the defendant, recognizing that the student did not stumble over the drainage pipe itself but on ice that had accumulated as a result of the drainage pipe. The Court continued:

> Although the allegedly dangerous ice at issue here may have resulted from water directed to its location because of an appurtenance to the building, we conclude that to extend the public building exception to the instant situation would require a "broad, rather than narrow, reading of the building exception..." *Id.* Plaintiff's fall essentially resulted from an icy sidewalk near the door of the building, and the rule of *Horace, supra*, at 757 ("[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") applies.

Id. at 2. Accordingly, the Court of Appeals reversed and remanded for entry of summary disposition in defendant's favor.

Berris, although not binding, provides a helpful illustration of how the Court of Appeals has previously analyzed a factually similar situation. In both cases, the alleged instrumentality causing injury was a rainwater dispersion mechanism (or lack thereof). In both cases, the allegedly defective water drainage systems caused water to stand and create an unnatural accumulation of ice. Employing the narrow reading of the public building exception discussed above, the court in *Berris* rejected the plaintiff's claim because the injury was caused by an icy

sidewalk near the door of the building, not a physical condition of the building itself. *Id.* Yet the *Renny* court came to the opposite conclusion. *Berris* shows the confusion regarding the scope of the public building exception, which this Court now has an opportunity to clarify, and offers an example of the correct analysis.

C. *BUSH v OSCODA AREA SCHOOLS* CANNOT BE RECONCILED WITH MCL 691.1402'S TEXT OR THIS COURT'S IMMUNITY ANALYSIS.

On appeal, the Rennys attempt to secure an affirmance by pointing to a long line of cases reiterating the principle that design defect cases may be actionable under the public building exception to governmental immunity. (Plaintiffs-Appellees' Brief on Appeal, p 9). The inaugural case stating this erroneous principle was *Bush v Oscoda Area Schools*, 405 Mich 716; 275 NW2d 268 (1979). In *Bush*, a fourteen year old girl suffered severe burns when a jug of wood alcohol exploded during a science class experiment at school. *Id.* at 724. Her mother brought suit under the public building exception to governmental immunity, arguing that the building was defective because the classroom lacked "necessary safety equipment." *Id.* at 727. The school district argued that the plaintiffs' claim did not fit within the public building exception because the duty only extends to "repair" and "maintain" public buildings. The circuit court and court of appeals agreed with defendant's position and entered summary disposition in their favor as to the school district and superintendent. However, this Court reversed, analogizing the public building exception to the highway exception:

> We construe the defective building provision as we have the defective highway provision. Governmental agencies are subject to liability for a dangerous or defective condition of a public building without regard to whether it arises out of a failure to repair and maintain. As in the highway cases, a building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices.

Id. at 730.

The *Bush* decision led to a line of cases involving potential design defect claims under the public building exception. The first post-*Bush* case was *Reardon v Dep't of Mental Health*, 430 Mich 398; 424 NW2d 248 (1988). In these consolidated cases, women were physically assaulted while residing at health centers. *Id.* at 250-51. This Court was called upon to determine whether the public building exception was applicable under these facts. *Id.* Although the Court ultimately determined that the public building exception was inapplicable because the assaults were the "result of the act of an intervening party rather than a dangerous or defective condition of the building itself," the Court reaffirmed *Bush's* extension of the public building exception to design defect claims:

> In *Bush v. Oscoda Area School*, (citation omitted), we held that this duty is not strictly limited to the repair or maintenance of public buildings. Instead, we held that "a public building may be dangerous or defective because of improper design, faulty construction or the absence of safety devices." *Id.* at 730, 275 NW2d 268. We reiterate this proposition today, as the holding in *Bush* is entirely consistent with today's conclusion that the injury must be occasioned by the dangerous or defective condition of the building itself. As long as the danger of injury is presented by a physical condition of the building, it little matters that the condition arose because of improper design, faulty construction, or absence of safety devices.

Id. at 410. The principles set forth in *Bush* and reiterated in *Reardon* have been cited in several Court of Appeals and Supreme Court cases. See *Williamson v Dep't of Mental Health*, 176 Mich App 752; 440 NW2d 97 (1989); *Hickey v Zezulka (On Resubmission)*, 440 Mich 1203; 439 Mich 408; 487 NW2d 106 (1992); *Sewell v Southfield Public Schools*, 456 Mich 670; 576 NW2d 153 (1998); *Pierce v City of Lansing*, 265 Mich App 174; 694 NW2d 65 (2005). But the notion that a plaintiff can maintain a public building exception action based on failure to properly design is contrary to the plain language of the statutory text of MCL 691.1406, which expressly limits a government agency's obligation to "repair" and "maintain." Accordingly, Bush must be overturned.

Overruling *Bush* does not offend against the dictates of stare decisis. This Court has recognized that it is duty-bound to re-examine a precedent where its reasoning is fairly called into question. *Robinson*, 462 Mich at 464. It must do so by first examining whether the earlier decision was wrongly decided. 462 Mich at 462. If so, it then evaluates whether it is appropriate to overrule the decision by examining "the effects of overruling it, including most importantly the effect on reliance interests and whether that overruling would work an undue hardship because of that reliance." 462 Mich at 466. The Court taught that an important factor in this evaluation is whether the past decision "would perpetuate an unacceptable abuse of judicial power." 462 Mich at 473. When a past decision has "usurp[ed] power properly belonging to the legislative branch," overruling it "does not threaten legitimacy.... [I]t restores legitimacy." 462 Mich at 473. When, "under the guise of statutory construction, this Court ignores the language of the statute to further its own policy views, it wrongly usurps the power of the Legislature." 462 Mich at 474. In those circumstances a reversal is warranted in order to "restore judicial legitimacy by overruling decisions that wrongly usurped the power of the Legislature." 462 Mich at 474.

In *Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), the United States Supreme Court examined a series of policy factors that comprise the doctrine of stare decisis. Those included the questions of "(1) the "workability" of a prior case or line of cases; (2) the protection of reasonable reliance interests; (3) the erosion of the doctrine's foundations by subsequent decisions; (4) changed factual circumstances; and (5) the need to preserve public impressions of judicial integrity...." Michael Stokes Paulsen, *Abrogating stare decisis by statute: May congress remove the precedential effect of Roe and Casey?*, 109 Yale L J 1535, 1551 (2000). This Court has embraced a similar analysis when evaluating past precedent.

Robinson, 462 Mich 439, 464 citing *Casey* with approval. See also *People v Kazmierczak*, 461 Mich 411, 424-425; 605 NW2d 667 (2000) and *Nawrocki v Macomb County Road Comm*, *supra*. Analysis of these factors supports the Michigan Department of Transportation's position.

The inquiry into workability is "essentially a question of whether the Court believes itself able to continue working within the framework established by a prior opinion." Michael Stokes Paulsen, 109 Yale L J at 1552. That consideration, when applied to the judicially-created expansion of the public building exception to design defects, compels the conclusion that a reversal is in order. The failure to overturn *Bush* will leave in place an unintended and expansive interpretation of the public building exception, one that effectively eliminates the narrow statutory exceptions to governmental immunity intended by the Michigan Legislature. *Ross*, *supra*, at 618. The practical workability of such an approach is more than questionable—it is impossible. *Bush* cannot be reconciled with the statutory text of MCL 691.1406. Equally important, by allowing for design defect claims based on the public building exception to the Governmental Tort Liability Act, *Bush* creates the potential for confusion because its analysis fails to give meaning to the words of the exception as a whole.

No reliance interests would support a decision retaining *Bush's* holding allowing a plaintiff to maintain a public building exception claim based on improper or defective design. *Id.* And this Court has recently taught, when considering the reliance interest, "it is to the words of the statute itself that a citizen first looks for guidance in directing his action." *Robinson*, 462 Mich at 468. A court should not "confound those legitimate citizen expectations by misreading or misconstruing a statute" because to do so will disrupt the reliance interest. If a past court has misread or misconstrued a statute, the "subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's

misconstruction." *Id.* Speaking for the Court, Justice Taylor explained that the Court's distortion of the statute amounts to a "judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives." *Id.* Because of this, an error "can gain no higher pedigree as later courts repeat the error." *Id.*

Finally, the need to preserve public impressions of judicial integrity supports a reversal. This Court has uniformly adopted and applied a text-based approach to statutory interpretation. See e.g. *Nawrocki*, *supra* , *Robinson*, *supra*, *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). It has done so consistent with its view that this approach constitutes the faithful application of well-defined legal principles - not the predisposition of individual judges. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). Having repeatedly held that a court is "most justified in overruling an earlier case if the prior court misconstrued a statute," this Court should now faithfully apply that rule here. In doing so, a reversal is required.

This Court has rejected the legislative acquiescence rule that formerly supported the maintenance of erroneous prior judicial decisions. *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998); and *Donajkowski v Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999). That rejection makes sense and it also supports the Department of Transportation's position here. Treating an erroneous statutory interpretation as binding or affording it strong stare decisis weight might make sense if the legislature were perpetual. But it is not. Today's legislature may "leave in place an interpretation of a law simply because today's coalitions are different. The failure of a different body to act hardly shows that the interpretation of what an earlier one did is

'right.'" Frank H Easterbrook, *Stability and reliability in judicial decisions*, 73 Cornell L R 422, 427 (1988). When a decision is founded upon plain error, refusing to follow it "cannot be fairly criticized as illegitimate." John Paul Stevens, *The life span of a judge-made rule*, 58 NYU L R 1, 4 (1983).

Jonathon Swift's satire of the doctrine of stare decisis, reminds us to carefully consider and correct error if there is a cogent reason for doing so:

> It is a maxim among ... lawyers, that whatever had been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of directing accordingly.

Swift, *Gulliver's Travels* (Dodd Mead ed, 1950), p 256. But this Court correctly has refused to continue to decide cases in accord with plain error based on a disregard of the language of the statute; instead, it has embarked upon a course of action directed towards restoring deference to the text of statutes that it interprets. As Justice Frankfurter said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Boys Markets v Retail Clerks*, 398 US 235, 255; 90 S Ct 1583; 26 L Ed 2d 199 (1970), quoting *Henslee v Union Planters Bank*, 335 US 595, 600; 69 S Ct 290, 293; 93 L Ed 2d 259 (1949) (Frankfurter, J, dissenting). The *Bush* court impinged upon the legislature's sphere of decision-making by expanding the applicability of a clear governmental immunity exception. Stare decisis neither commands nor supports the continued adherence to these precedents.

D. THIS COURT'S DECISION SHOULD BE GIVEN RETROACTIVE EFFECT AND BE APPLIED TO ALL PENDING AND FUTURE CASES.

At the outset, it is important to reiterate the general rule. Statutory decisions apply retroactively; that is, a judicial decision explaining the meaning of a statute applies from the effective date of the statute. That notion finds its roots in Blackstone who explains that the duty

of the court is not to "pronounce new law, but to maintain and expound the old one," *Linkletter v Walker*, 381 US 618, 622-623; 85 S Ct 1731; 14 L Ed 2d 60 (1965) (quoting 1 W Blackstone, Commentaries *69). This is consistent with the principle that a judge's function is not to legislate but to explain the meaning of legislation enacted by a legislative body. Even when overruling prior precedent, the new decision is "an application of what is, and therefore had been, the true law", *Linkletter*, 381 US at 623 (citing Shulman, Retroactive Legislation, in 13 Encyclopedia of the Social Sciences [1934], 355, 356). One state court justice explained the thinking behind the rule:

> I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the legal decision, and that the former decision was not, and never had been the law, and is overruled for that very reason.

Gelpcke v City of Dubuque, 68 US (1 Wall) 175, 211 (1863) (Miller, J., dissenting).

Former Supreme Court Justice Harlan also spoke to the need for a court to adhere to the rule of retroactivity. He explained in one early decision that picking and choosing between similarly situated litigants those who alone will receive the benefit of a "new" rule of law offends against our basic judicial tradition. *Desist v United States*, 394 US 244, 256; 89 S Ct 1030; 22 L Ed 2d (1969) (Harlan, J. dissent). In Harlan's view, matters of principle were at stake that required the retroactive application of precedent. Harlan also deplored the doctrinal confusion that, to his view, stems from creating exceptions to the retroactive doctrine. 394 US at 258.

In more recent times, Justice Scalia and others have lambasted the judiciary for usurping legislative powers by toying with retroactivity. By way of example, Justice Scalia took the position that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be," *American Trucking Ass'n v Smith*, 496 US 167, 200; 110 S Ct 2323; 110 L Ed 2d 145 (1990) (Scalia, J., concurring). According to Scalia,

applying decisions prospectively "is contrary to that understanding of 'the judicial power' which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, the very exercise of power asserted in [this case]." *Id.* at 201. See also Bradley Scott Shannon, *The retroactive and prospective application of judicial decisions*, 26 Harv J of Law & Public Policy 811 (2003).

In his concurring opinion in *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993), Justice Scalia cautioned courts against the practice of tinkering with retroactivity as such behavior may well violate significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easer to overrule prior precedent.

509 US at 105, 113 S Ct at 2522. In addition, Justice Scalia warned that the "true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice." *Id.*, citing *James B. Beam Distilling Co v Georgia* , 501 US 529, 534; 111 S Ct 2439, 2443; 115 L Ed 2d 481 (1991) and other cases.

These principles apply with equal strength under Michigan law. Each time the Court arrogates to itself the power to legislate, it harms the administration of justice. Decisions that tinker with full retroactivity of a statute, in essence, amount to the judicial rewriting of the statute's effective date. By establishing a new effective date, the Court encroaches upon the legislature's sphere of authority. Indeed, such a ruling may be seen as a violation of the Separation of Powers clause of the Michigan Constitution, which divides the powers of government into three branches and which bars one branch from exercising powers properly belonging to the other. Const 1963, art 3, § 2. If prospective application of the law might

conceivably be justified when addressing a change in the common law (an area within the judiciary's unique purview) or when dealing with vested property rights or when imposing a new duty or obligation, no such rationale applies here. Any decision limiting the retroactive effect of this decision amounts to a usurpation of legislative prerogative to establish the limitation date for bringing claims. Instead, full retroactivity should apply.

The selective application of the ruling is also barred because it violates the principle of treating similarly situated persons the same. *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). In a concurring opinion, Justice Scalia cautioned against the idea that a court can tinker with retroactivity without violating significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent.

509 US at 105; 113 S Ct at 2522. Not surprisingly in light of this backdrop, Michigan courts have traditionally given litigants who successfully obtain a reversal of prior precedent, always after much risky investment of time, energy, and expense, the benefit of the new rule. *Placek v Sterling Heights*, 405 Mich 638, 690-691; 275 NW2d 511 (1979) (Coleman, C.J. dissenting because the majority "seemingly automatically" considered the benefits of the decision "to be due the parties in the instant case."). This traditional retroactive application of judicial decisions in all civil cases on direct review stems from a proper understanding of the court's function, which is to decide litigated issues brought before them. Shannon, at 838-839. A full retroactivity approach would mean that the Court's holding would apply in any circumstance that it can be invoked under Michigan court rules.

This makes both practical and theoretical sense. According to commentators, "[p]rospective announcements of judge-made law raise both accuracy and legitimacy concerns."

Shannon, at 849 quoting Michael C. Dorf, *Dicta and article III*, 142 U Pa L R 1997, 2000 (1994). Prospective decision making is difficult to predict, potentially denies the litigants of the benefit of a decision in their favor, and often leads to ambiguous results in practice because the determination of whether events occurred before or after the date of a precedent-setting opinion can be difficult to ascertain. And prospective decisionmaking tends to undermine public confidence in the judiciary because it injects uncertainty into the process, undermines the notion that courts say what the law is, and not what it should be, and allows for a highly subjective approach.

Despite the longstanding understanding of the judiciary's limited role, as noted above, Michigan courts (as well as other state courts) have created a limited exception. This Court has occasionally restricted the effect of certain decisions that overrule past precedent. But it has done so in limited circumstances involving the overruling of uncontradicted, settled precedent whose resolution was not clearly foreshadowed (assuming a weighing of the three factors outlined above also warrants deviating from the general rule of full retroactivity). See, e.g., *Tebo v Havlik*; 418 Mich 350; 343 NW2d 181 (1984); *Sturak v Ozomaro*, 238 Mich App 549; 606 NW2d 411 (1999); *Lindsay v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997). Whatever the merits of that approach in general, it is not suitable here.

Overruling the *Bush* court's expansion of the public building exception to impose a duty to properly "design" would not constitute "clearly establishing a new rule of law." *Bush* itself represented usurpation of legislative action. This Court itself has flatly asserted that it has an obligation to correct such past abuses, an act which "restores legitimacy" to the system. *Robinson v Detroit*, 462 Mich 439, 472-473; 613 NW2d 307 (2000). And it did so without limiting the effect of its decision in *Robinson*. This central factor controls all other aspects of the

three-factor *Linkletter* test embraced by this Court in *Pohutski*. The test: (1) the purpose of the "new" rule is to conform Michigan jurisprudence to the mandates of the Michigan Legislature; (2) there can have been no proper or legitimate reliance on a judicially-created rule of law adopted in contravention of the clear and unambiguous statutory text; and (3) the effect of full retroactivity on the administration of justice will be to honor the commands and prohibitions of the Michigan legislation.

In *Pohutski*, this Court quoted *Robinson's* teaching about retroactivity in the context of the prior misreading of a statute and explained:

> In considering the reliance interest, we consider "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id.* at 466, 613 N.W.2d 307. Further, we must consider reliance in the context of erroneous statutory interpretation:
>
> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory, ... that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Id.* at 467-468; 613 NW2d 307.]
>
> Thus, while too rapid a change in the law threatens judicial legitimacy, correcting past rulings that usurp legislative power restores legitimacy.

Id. at 472-473 (CORRIGAN, J., concurring).

More recently, this Court characterized the retroactivity aspect of *Pohutski* as an extreme measure warranted only because of exigent circumstances. *County of Wayne v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004). The *Hathcock* court cautioned that there " is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions." *Hathcock, supra* at 484 n 98. *Pohutski* was sui generis since it involved a history in which the Court had allowed recovery for trespass-nuisance claims against local governments that extended back to the 1800s. At the same time, after the *Pohutski* litigation began but before the Court issued its opinion, the Michigan Legislature created a new statutory cause of action. Thus, giving its decision retroactive effect would have, in the Court's view, carved out a tiny group of litigants who alone could not recover, when everyone before and after had the right to bring their claim. Critical to the Court's analysis was its effort to be faithful to what it undoubtedly perceived as a legislative signal when a new statute creating a cause of action was given immediate effect while *Pohutski* was pending before the Court.

Whatever the merits of *Pohutski*'s decision to limit its effectiveness to prospective-only, those considerations do not apply here. To the contrary, the public building exception, which was intended to provide protection for individuals injured as a result of a governmental agency's failure to repair and maintain public buildings, should be given full effect. Doing so will be consistent with this Court's philosophy of effectuating legislative pronouncements and enactments.

In recent years, this Court has reiterated the general rule that judicial decisions are to be given full retroactive effect and must be applied to all "pending cases in which a challenge ... has been raised and preserved." *Devillers v Auto Club Insurance Ass'n*, 473 Mich 562, 586; 702

NW2d 539 (2005), quoting *Hathcock, supra*, at 484. See also *Gladych v New Family Homes*, 468 Mich 594, 606; 664 NW2d 705 (2003). Amici would suggest a broader rule that would apply to all pending cases.

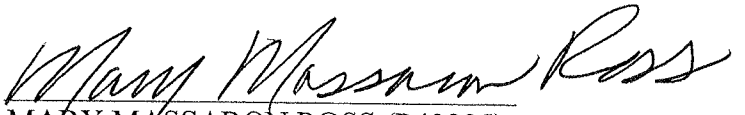
When the Court judicially decides whether to apply a principle that must be seen as a correct statement of the law to only some cases rather than to all cases, it harms the administration of justice. It results in an uneven application of law violating the basic norm of appellate law that like cases be treated alike. A directive that the holding is to have prospective application fosters the error arising from earlier courts' mishandling of MCL 691.1406, a mishandling that severely undercut the Michigan Legislature's broad grant of governmental immunity and narrow construction of governmental immunity exceptions. Limiting the effect of its holding would lend judicial endorsement to the *Bush* court's mistaken interpretation of MCL 691.1406. Sound jurisprudential principles demand adherence to the general rule of full retroactivity. Only under such an approach will the Court be vindicating the statutory provision intended to limit liability under the public building exception to injuries occasioned by a governmental agency's failure to repair and maintain public buildings under its control.

RELIEF

WHEREFORE, Amicus Curiae Michigan Municipal League, Michigan Municipal League Liability and Property Pool, and Michigan Townships Association respectfully request this Court to reverse the Court of Appeals' holding in *Renny* reversing the Roscommon County Circuit Court's previous grant of summary disposition in favor of the Michigan Department of Transportation, overrule *Bush v Oscoda Area Schools* to the extent that it allows individuals to maintain claims against government agencies for design defects under the public building exception to the Governmental Tort Liability Act, and give its decision retroactive effect.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: 

MARY MASSARON ROSS (P43885)
HILARY A. DULLINGER (P69979)
Attorneys For Michigan Municipal League, Michigan Municipal League Liability and Property Pool, And The Michigan Townships Association
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

DATED: March 28, 2007

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Michael BERRIS, Plaintiff-Appellee,
v.
MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, Defendant-Appellant.
No. 256112.

March 9, 2006.

Before: KELLY, P.J., and METER and DAVIS, JJ.

[UNPUBLISHED]
PER CURIAM.
***1** In this slip and fall case, defendant appeals as of right from an order denying its motion for summary disposition based on governmental immunity. We reverse.

Plaintiff alleged that while living in a dormitory on the Michigan State University campus, he slipped and fell on an unnatural accumulation of ice on the sidewalk adjacent to an exterior dormitory door. He alleged that the buildup of ice was caused by water draining onto the sidewalk from an overhanging drainage pipe affixed to the dormitory. Plaintiff contended that his cause of action fell under the public building exception to governmental immunity, MCL 691.1406. Defendant moved for summary disposition, arguing that the public building exception did not apply because the sidewalk where defendant fell was not a part of the dormitory, that plaintiff was not a member of the public for purposes of the exception, and that plaintiff had failed to prove the requisite causation. The court denied the motion and this appeal ensued.

"We review de novo a trial court's ruling on a motion for summary disposition." *Maskery v Univ of Michigan Bd of Regents*, 468 Mich. 609, 613; 664 NW2d 165 (2003). " 'MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." ' *Id.*, quoting *Glancy v. Roseville*, 457 Mich. 580, 583; 577 NW2d 897 (1998).

Defendant argues that plaintiff has failed to plead in avoidance of the governmental immunity statute, MCL 691.1407(1), by stating a claim under the public building exception. MCL 691.1406 states, in pertinent part:
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. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place.

Our Supreme Court has identified five factors to consider when determining whether the public building exception applies in a given circumstance:
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).]

*2 Defendant argues that plaintiff failed to establish that "a dangerous or defective condition of the public building itself exist[ed]." See *id.* We agree. Indeed, the Supreme Court has held that "[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." *Horace v. Pontiac*, 456 Mich. 744, 757; 575 NW2d 762 (1998).

Plaintiff contends that *Horace* does not bar his claim because the Supreme Court later indicated, when considering a claim brought for an injury occurring on a terrace connecting a sidewalk to a public building entrance, that *Horace* does not provide a bright-line rule restricting the public building exception to building interiors. *Fane v. Detroit Library Comm'n*, 465 Mich. 68, 79; 631 NW2d 678 (2001). *Fane* reversed this Court's grant of summary disposition to the defendant and held that "the public building exception can apply to parts of a building that extend beyond the walls." *Id.* at 70. The *Fane* Court reasoned as follows:

> The appeals court decision mistakenly portrays *Horace* as stating a bright-line rule precluding liability for injuries occurring from dangerous or defective conditions of building parts outside an entrance or exit. By imposing an absolute bar on liability for injuries arising from something outside the four walls of a building, the opinion precludes the possibility that an external part might be "truly part of the building itself." [*Id.* at 77.]

The Court further stated, "[i]n determining whether an item or area outside the four walls of a building is 'of a public building,' the courts should consider whether the item or area where the injury occurred is physically connected to and not intended to be removed from the building." *Id.* at 78.

Plaintiff contends that the drainage pipe that allegedly resulted in his fall was physically connected to and not intended to be removed from the building and that *Fane* therefore controls the outcome of the instant case. However, plaintiff did not stumble over the drainage pipe itself; instead, he allegedly fell on *ice* that had accumulated as a result of the drainage pipe. This is a key distinction, given that the statutory exceptions to governmental immunity "are to be narrowly construed." *Horace, supra* at 749. We hold that "the Legislature did not intend [the public building] exception to the broad grant of governmental immunity to apply in [the present] circumstances because it is inconsistent with a narrow reading of the exception." *Id.* at 746.

As noted in *Horace, supra* at 754, "[i]t requires a broad, rather than narrow, reading of the building exception to find that the building exception applies to anything but the building itself." Although the allegedly dangerous ice at issue here may have resulted from water directed to its location because of an appurtenance to the building, we conclude that to extend the public building exception to the instant situation would require a "broad, rather than narrow, reading of the building exception...." *Id.* Plaintiff's fall essentially resulted from an icy sidewalk near the door of the building, and the rule of *Horace, supra* at 757 ("[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") applies. Therefore, because plaintiff did not sufficiently plead a case in avoidance of governmental immunity, see *Mack v. Detroit*, 467 Mich. 186, 198; 649 NW2d 47 (2002), the trial court should have granted summary disposition to defendant.[FN1]

> FN1. We note that, in contrast to plaintiff's argument, further discovery is not warranted because it would not change the outcome of the case. See *State Treasurer v. Sheko*, 218 Mich.App 185, 190; 553 NW2d 654 (1996). Also, the dissent states that we construe *Horace* "as an absolute bar [to an application of the public building exception] where an injury happens to take place on the sidewalk outside a building." We do not agree with this interpretation of our opinion. Instead, we hold today that, *under the particular facts of this case*-involving ice resulting from water directed to its location because of an appurtenance to a building-the statement from *Horace* that "[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" applies. *Horace, supra* at 757. Plaintiff's fall essentially resulted from an icy sidewalk, and we hold that to extend the public building exception to the instant situation would require a "broad, rather than narrow, reading of the building exception...." *Id.* at 754. A broad reading such as this is inappropriate. See, generally, *id.* at 746.

*3 Given our resolution of this case, we need not

address the additional issues raised by defendant.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

DAVIS, J. (dissenting).DAVIS, J.
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.

***4** 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.

***5** I would affirm the trial court.

Mich.App.,2006.
Berris v. Michigan State University Bd. of Trustees
Not Reported in N.W.2d, 2006 WL 572385 (Mich.App.)

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STATE OF MICHIGAN

IN THE SUPREME COURT

KAREN RENNY & CHARLES RENNY,

Plaintiffs-Appellants,

-vs-

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee,

_____/

Supreme Court No. 131086

Court of Appeals No. 257018

Court of Claims
No. 03-000042-MT

PROOF OF SERVICE

CHRISTINE M. WARNEZ, states that on March 28, 2007, a the Brief Of Amicus Curiae Michigan Municipal League, Michigan Municipal League Liability And Property Pool, And The Michigan Townships Association, was served on ROBERT C. DAVIS, Attorney for Plaintiffs, 20383 Hall Road, Suite B, Macomb, MI 48044; and HAROLD J. MARTIN, Department of Attorney General, State of Michigan, 110 State Office Building, Escanaba, MI 49829, by depositing same in the United States Mail with postage fully prepaid.

CHRISTINE M. WARNEZ

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