STATE OF MICHIGAN

IN THE SUPREME COURT

DENISE L. ANDRUS,

Plaintiff-Appellee,
and

PAUL K. ANDRUS,

Plaintiff,
v

CITY OF SOUTHGATE, a
Michigan municipal corporation.
_____/

Supreme Court
Case No. 143323

Court of Appeals
Case No. 296417

Wayne Circuit Court
Case No. 09-012394-NO

BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL, AND MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL FILED BY THE CITY OF SOUTHGATE

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STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This brief amici curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Stephen K. Postema, city attorney, Ann Arbor; Randall L. Brown, city attorney, Portage; Lori Grigg Bluhm, city attorney, Troy; Eric D. Williams, city attorney, Big Rapids; Clyde J. Robinson, city attorney, Kalamazoo; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, City of Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Andrew J. Mulder, city attorney, Holland; and William C. Mathewson, general counsel, Michigan Municipal League.

The Michigan Municipal League Liability and Property Pool (Pool) is sponsored by the Michigan Municipal League. Only those municipalities that are members of the League may purchase Pool insurance. The Pool exists to serve municipalities only,

pursuant to a statutorily authorized intergovernmental contract for a municipal group self-insurance pool. MCLA 124.5; MSA 5.4085(6.5).

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,230 townships within the State of Michigan (including both general law and charter townships), joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the State of Michigan. This brief amici curiae is authorized by the Board of Directors of the Michigan Townships Association.

STATEMENT OF THE ISSUES

I. WHETHER THE LOWER COURTS ERRED BY CONCLUDING THE PLAINTIFF COULD RECOVER UNDER THE PUBLIC BUILDING EXCEPTION, MCL 691.1406, BECAUSE HER FALL WAS NOT CAUSED BY OR A RESULT OF A DEFECT "OF" THE BUILDING WHEN SHE WAS WALKING AT NIGHT ALONG THE SERVICE DRIVEWAY'S OUTSIDE/NON-DEFECTIVE EDGE, 17.5 FEET FROM THE BUILDING, TURNED AROUND, STEPPED WRONG, AND FELL INTO THE GRASS WHEN THE OUTSIDE WALL LIGHTS WERE NEITHER DESIGNED FOR NOR INTENDED TO ILLUMINATE THAT AREA AT NIGHT?

II. WHETHER PLAINTIFF FAILED TO FULFILL THE STATUTORY DUTY AND PURPOSE OF THE PRE-ACCIDENT NOTICE OF A DEFECT IN MCL 691.1406 BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHED THE CITY EMPLOYEES LEARNED OF A POTENTIAL ELECTRICAL ISSUE WITHIN DAYS OF THE INCIDENT, AND ARRANGED FOR THE PRIVATE CONTRACTOR TO REVIEW THE SITUATION, WHICH OCCURRED WITHIN DAYS OF THIS ACCIDENT DURING THE CITY'S REGULARLY SCHEDULED FALL INSPECTION?

STATEMENT OF FACTS

Amici Curiae, the Michigan Municipal League, Michigan Municipal League Liability and Property Pool, and Michigan Townships Association, rely on the Statement of Facts as set forth in the Application for Leave to Appeal filed by the Defendant-Appellant, City of Southgate.

ARGUMENT

THE PUBLIC BUILDING EXCEPTION, MCL 691.1406, DOES NOT APPLY TO AVOID THE CITY OF SOUTHGATE'S GOVERNMENTAL IMMUNITY AS TO AN ASSERTION OF LIABILITY FOR INJURIES SUSTAINED WHEN THE PLAINTIFF ENCOUNTERED A GAP BETWEEN A DRIVEWAY AND THE LAWN WHICH CAUSED HER TO FALL WHEN SHE STEPPED ON IT. [1]

The question before the Court is whether the City of Southgate is immune from the liability that plaintiff, Denise L. Andrus, seeks to impose on it premised on injuries she sustained when she tripped and fell while walking down a service driveway outside of the Southgate Civic Center. She sets forth the following factual predicate at page 16 of her answer to the City's Application for Leave to Appeal:

> It was extremely dark; the pavement and the adjacent ground were not clearly visible because of the absence of both natural and artificial light. As a result, Plaintiff could not see nor could she appreciate that there was a gap or space between the edge of the paved driveway and the adjacent ground.
> * * *
>
> As Plaintiff was walking, she turned her head to respond to a question or comment from an acquaintance who was walking behind her, and in so doing, stepped down partly on the edge of the pavement, while the other part of her foot was above the gap or space between the driveway and the ground in the drainage area. (Exhibit 2: pp. 26-33) The unevenness caused Plaintiff to lose her footing and fall, and to suffer significant and permanent injuries. (Exhibit 2: pp. 21-26), [sic] while the lack of lighting, both natural and artificial prevented her from discerning the defect which would have been within her field of peripheral vision.

There is no dispute that, unless Plaintiff can identify a viable statutory exception to the broad immunity granted to governmental agencies in MCL 691.1407, the City of

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[1] This brief amicus curiae addresses only the first of the issues raised in the Application for Leave to Appeal, regarding the proper interpretation and application of MCL 691.1406.

Southgate was entitled to summary disposition premised on that immunity. And there can be no dispute that all statutory exceptions are narrowly construed. In virtually every Michigan Supreme Court opinion interpreting the Governmental Tort Liability Act (GTLA), MCL 691. 1401, *et seq*, released since 1984, this Court has repeated the maxim expressed in *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984), that the immunity afforded by the Act is broad, while the exceptions are narrow[2]. See, *e.g., Reardon v Department of Mental Health*, 430 Mich 398, 407, 410-412; 424 NW2d 248 (1988); *Wade v Department of Corrections*, 439 Mich 158, 166; 483 NW2d 26 (1992); *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); *Fane v Detroit Library Commission*, 465 Mich 68, 74; 631 NW2d 678 (2001).[3]

In this case, and notwithstanding that her trip and fall occurred on a concrete driveway when she encountered a gap between the pavement and the ground, Plaintiff seeks to impose liability on the City of Southgate, and avoid its immunity, premised on the public building exception. That exception, set forth in MCL 691.1406, provides, in pertinent part:

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[2] The concept of immunity necessarily presupposes negligence. Accordingly, it is a truism that not all injuries sustained on public property fall within an exception; nor does all negligence that arguably contributed to those injuries avoid the statutory immunity. [See, for example, *Kerbersky v Northern Michigan University*, 458 Mich 525; 582 NW2d 828 (1998), where, in note 5, the Court cautioned against confusing the separate inquiries of immunity and negligence.] Indeed, the broad scope of immunity and the narrowness of the exceptions suggests that most, if not all, conduct that would suffice to impose liability on a private entity will not suffice to impose liability on a governmental agency.

[3] Although stated in the context of a consideration of the highway exception, MCL 691.1402, this truism was most recently recognized in *Duffy v Michigan Department of Natural Resources*, ___ Mich ___ (7/30/2011).

> 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. * * * [Emphasis added]

Justifying her reliance on the public building exception for a trip and fall that occurred on a service driveway, located 17.5 feet away from the nearest public building, Plaintiff points out that prior to her fall she had exited from that public building through its rear emergency door and into the dark. She then proceeded down the side of the service drive, avoiding some parked cars and talking to her friend, when she turned to speak to her friend and tripped on the edge of the drive. She argues that the public building exception is implicated in this case because lights affixed to the exterior of the building were not illuminated and that, even though the record demonstrates that the lights were not intended to illuminate the area where she fell, illuminated lights would have enabled her to see the gap at the edge of the drive and avoid it before she fell.

The immunity provided by MCL 691.1407 is immunity from suit, not simply immunity from liability, and the right to an immediate appeal from the denial of its assertion is provided by MCR 7.202(6)((a)(v). The City of Southgate exercised that right to appeal although the Court of Appeals affirmed the ruling of the trial court, finding that the public building exception was potentially implicated in this litigation premised on the argument that the lack of illumination resulted from a failure to repair or maintain the lights. In so ruling, it considered the lights to be the "dangerous or defective condition of

a public building" referenced in the language of §1406. It is respectfully submitted that this case, and this holding, raise significant issues that need to be resolved concerning the proper application of a narrow interpretation of the public building exception. A plaintiff's burden to avoid the immunity of a governmental agency should not depend on artful pleading. In this case, the danger confronted by the Plaintiff was not presented by a condition of a public building, but by the condition of the edge of a concrete driveway.

The critical question in this case is whether a plaintiff who has tripped and fallen while walking on a driveway used to service a public building can avoid a governmental agency's statutory governmental immunity by relying on the public building exception, and an alleged defect in the exterior lighting attached to the building, when that immunity could not be avoided by focusing on the condition of the drive itself. It is respectfully suggested that the lower courts erred when they accepted the Plaintiff's position that her focus on the lighting was appropriate and that this conclusion represents a significant expansion of the public building exception which is not supported by either the statutory language, the interpretative case precedent, or the maxim that the exceptions are to be narrowly construed.

Defining the "dangerous or defective condition" confronted by *this plaintiff* is critical to answering the inquiry posed by the case at bar. Plaintiff and the lower courts define that dangerous condition as the exterior lighting affixed to the building and, from that erroneous premise, conclude that the public building exception is relevant to this case and can avoid the immunity of the City of Southgate if the lights were not turned on because of a failure to repair and maintain them. However, case precedent does not

support this analysis. The dangerous condition confronted by *this Plaintiff* was not the exterior lighting, but the condition of the drive which she traversed in darkness during the night time hours. Had she tripped on the edge of the drive during the day, she could not have recovered for her injury. If she had tripped on the edge of the drive during a storm which darkened the area during the day when the lights were not timed to be on, she could not have recovered for her injury. If no exterior lights had been provided, and she had tripped on the edge of the drive, exactly as and when she did, she could not have recovered for her injury. And case precedent does not support her position that she can recover for her injuries in the circumstances of this case, where lights that were not even intended to illuminate the area in which she fell, or protect her from the condition she encountered, did not automatically turn on.

In *Reardon v Department of Mental Health*, 430 Mich 398; 424 NW2d 248 (1988), this Court explored the history of governmental immunity in the specific context of the public building exception and set forth several holdings pertinent to the inquiry that the City of Southgate has now brought before the Court.[4] Firstly, it held that "the Legislature intended the building exception to apply where the injury is occasioned by a physical defect or dangerous condition of the building itself, " and that "[t]he duty to repair and maintain a premises clearly relates to the physical condition of the premises." (430 Mich, at 400, 410) Focusing on the phrase "dangerous or defective condition *of* a

[4] To the extent that there is language in *Reardon, supra* and subsequent cases to the effect that allegations of design defect fall within the public building exception, this Court specifically held to the contrary in *Renny v Michigan Department of Transportation*, 478 Mich 490; 734 NW2d 519 (2007).

public building," it concluded that the exception applied only where it was the physical condition of the building that caused the injury. (430 Mich, at 411) In other words, the exception was not applicable in all instances in which an injury occurs inside of a public building, and there could be limited instances where it might apply when the injury occurrs outside of the public building. The *Reardon* Court concluded, at 415:

> * * * By today's holding, we wish to clarify that the duty imposed by the public building exception relates to dangers actually presented by the building itself. To hold otherwise would expand the exception beyond the scope intended by the Legislature when it enacted the immunity act. The Legislature intended to impose a duty to maintain safe public buildings, not necessarily safety *in* public buildings. * * *
>
> (430 Mich, at 415)

Accordingly, the critical inquiry is whether the danger encountered by the Plaintiff herein was a "danger[] actually presented by the building itself." Common sense suggests that the answer is "no." Any danger to this Plaintiff was presented by the area outside of the building, and by the activity she was engaged in when she tripped and fell.

This conclusion is further supported by the *Reardon* Court's application of its reasoning to the two cases before it. In neither case did it find that the danger to the plaintiffs came from the building itself. In *Schafer v Ethridge*, the companion case to *Reardon*, the Court noted that there was no evidence that the room (in which the plaintiff was assaulted) was, itself, unsafe, further noting that proper supervision could have offset any shortcomings in the configuration of the room. Similarly, in the case at bar, although Plaintiff may have been in danger as she walked down the drive, the danger was not presented by the lighting, but from the service drive itself, and some repair or

modification of the drive, or perhaps the installation of lights along the drive, could have compensated for the fact that persons walking on the drive at night would be in darkness. The injury in the case at bar was not the result of a dangerous condition of the building itself.

Reardon was followed in 1992 by *Wade v Department of Corrections*, 439 Mich 158; 483 NW2d 26 (1992), where the Court considered the application of the building exception to a claim of a slip and fall caused by an accumulation of grease or oil on the hallway of a prison. It held that this "transitory condition was not caused by a dangerous or defective condition of the building itself." (439 Mich, at 161) Discussing *Reardon, supra*, as controlling precedent, the Court stated, 439 Mich, at 163-164:

> * * * The duty to repair and maintain relates to the structural condition of the premises, and a government engaged in a governmental function is open to liability only where the injury results from a dangerous or defective condition *of* a building. *Id.* Although factually distinguishable from the instant case, the holding in *Reardon* delineating the public building exception is controlling.

Having introduced the issue of "transitory conditions," the *Wade* Court held that "[t]he statutory scheme does not contemplate transitory conditions because they are not related to the permanent structure or physical integrity of the building," and that plaintiff had alleged nothing more than negligent janitorial care. (439 Mich, at 168, 169) Shortly after release of its opinion in *Wade, supra*, the Court acted on the application for leave to appeal filed in *Henkey v City of Grand Rapids,* 185 Mich App 56; 460 NW2d 271 (1990), where the Court of Appeals had held the building exception applicable to a slip and fall on snow and ice on a sidewalk immediately adjacent to the entry to the public building. The Supreme Court reversed this application of the exclusion, citing *Wade, supra*.

Henkey v City of Grand Rapids, 440 Mich 867; 485 NW2d 487 (1992). As noted at footnote 3 of its subsequent opinion in *Horace v City of Pontiac*, 456 Mich 744; 575 NW2d 762 (1998), the Order in *Henkey* could be read as a finding that the public building exception was inapplicable because the condition was transitory, or because the dangerous condition was on the sidewalk and not on or in a public building. In either event, *Henkey* is further support for the proposition that the public building exception is not applicable to the circumstances presented in the case at bar where the dangerous condition was confronted on the drive outside of the building, and, to the extent that the lighting was properly deemed the dangerous condition, it presented a transitory condition not present during the day.

Concluding its 1992 consideration of the public building exception, this Court also released its opinion in *Hickey v Zezulka*, 439 Mich 408; 487 NW2d 106 (1992), when it considered the application of the exception to a suicide that occurred in a holding cell. Although the Court accepted the proposition that improper design could implicate the exception (a holding subsequently overruled in *Renny, supra*) it found that the design defect allegation did not suffice in the case before it because more effective supervision would have overcome the alleged design defect. It also cautioned that it was necessary to consider the use to which the room was assigned when deciding whether the condition was dangerous or defective for that assigned use.[5]

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[5] This consideration of "assigned use" also suggests that the exception would avoid the City's immunity in the circumstances of the case at bar, even if otherwise applicable. The assigned use of the lights was not to illuminate the length of the drive. Nor was the assigned use of the drive for pedestrian travel.

In 1995, the Court considered a similar issue in *Jackson v City of Detroit*, 449 Mich 420; 537 NW2d 151 (1995), where there was an attempted suicide in a jail. Rejecting the plaintiff's attempt to avoid the City's immunity premised on the public building exception, the Court relied on the analysis of *Hickey, supra*, and explained:

> The duty imposed by the public building exception relates to dangers actually presented by the building itself. As recognized in *Hickey*, the purpose of the public building exception is to promote the maintenance of safe public buildings, not necessarily safety in public buildings. Thus, where proper supervision would have "offset any shortcomings in the configuration of the room," the public building exception does not apply."
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> (449 Mich, at 428)

As pertinent to the inquiry presented by the case at bar, this admonition reminds us that the purpose of the public building exception is to promote the maintenance of safe public buildings, not necessarily safety either inside *or outside* of those buildings.

In 1998 this Court again returned to the subject of the public building exception in three cases decided within months of each other: *Sewell v Southfield Public Schools*, 456 Mich 670; 576 NW2d 153 (1998); *Horace v City of Pontiac*, 456 Mich 744; 575 NW2d 762 (1998); and *Kerbersky v Northern Michigan University*, 458 Mich 525; 582 NW2d 828 (1998). In *Sewell, supra*, the Court considered an alleged defect in a high school swimming pool which caused an injury when a student dove into the pool. The plaintiff complained that the floor of the pool was uneven, that there should have been signs warning against diving at the shallow end of the pool, and students should not have been allowed to dive into the shallow end. The unanimous opinion cited the Court's prior opinions and confirmed that the public building exception applied "only where the

physical condition of the building itself causes the injury," that "the government's duty is to 'maintain safe public buildings, but not necessarily safety in public buildings,'" and that "whether or not a building is dangerous or defective is to be considered in light of the uses or activities for which it is assigned." (456 Mich, at 675)[6]

The most significant of the three opinions released in 1998 to the issue presented to this Court today was *Horace, supra*, where the court granted leave in two cases to consider whether the public building exception applied to "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 part of a public building." (456 Mich, at 746) In *Horace*, the plaintiff had tripped in a hole or crack in the walkway leading up to the Pontiac Silverdome, while in the companion case of *Adams v State of Michigan*, the plaintiff fell in a hole while walking on a walkway leading to the entrance of a rest stop. The court confronted the question regarding areas that were adjacent to public buildings, reading *Reardon* as clarifying that the building exception applies to the building itself and not to its adjacent areas – even its immediately adjacent areas.

Applying its analysis to the circumstances of *Horace*, the majority noted that the plaintiff had fallen between 18 and 28 feet from the south entrance of the Silverdome, and that the exception did not apply to walkways. "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." (456 Mich, at 757) Likewise, in *Adams*, the majority found that the

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[6] To the extent that *Sewell* had recognized an alleged design defect as falling within the public building exception, it was overruled in *Renny, supra*.

public building exception did not apply, agreeing with the trial court that "the cement walk was not so much an entrance to a public building as it was a sidewalk that is in front of the restroom building, leading not only to the building, but also to a telephone, an outside map, a picnic area, and a dog run." (456 Mich, at 757) In a pertinent footnote, the majority responded to a concern expressed in the dissenting opinion and stated that "we note that an outside overhang is a danger presented by a physical condition of a building itself and that some stairs may fit the test we adopt today if they are truly part of the building itself." (456 Mich, note 9)

The dissenting Justices disagreed only with the resolution in *Horace*, posing the inquiry as to whether the sidewalk used as an entrance way to the stadium should have been considered as part of the building itself. The dissent would have held "that a structure is part of a building if the two are so intimately associated that the building would be incomplete or inaccessible without it." (456 Mich, at 760)

In *Kerbersky, supra*, the third of its 1998 opinions, this Court considered the phrase "when open for use by members of the public" and concluded that if a member of the public is injured as a result of a dangerous or defective condition of a building that is open to members of the public, the exception applies even if the injury occurred in an area of the building that is not open to members of the general public. Thus, a construction worker who fell off of an allegedly defective ladder permanently attached to the roof of a building open to the public could invoke the exception.

The question raised by the partial dissent in *Horace, supra*, was confronted in the consolidated cases considered in *Fane v Detroit Library Commission*, 465 Mich 68; 631

NW2d 678 (2001): What will be considered part of a public building? A unanimous opinion resulted. In the *Fane* case, the plaintiff fell on an elevated terrace and the question was whether the terrace was part of the library building. In the companion case of *Cox v Bd of Regents*, the plaintiff fell on a portable ramp placed at the doorstep to a public building. The Court held that "the public building exception can apply to parts of a building that extend beyond the walls" (465 Mich, at 69), and found it applicable in *Fane* but not in *Cox*.

Looking to its holding in *Horace*, the Court held that its "core holding" was that "mere sidewalks and walkways are clearly outside the scope of the public building exception." However, the Court's consideration of the phrase "of a public building" resulted in a finding that the "dangerous or defective condition" could pertain to parts of a building that were literally outside of its walls, but which were "possessed" by the building. When making the determination of whether an item outside the four walls of the building was "of a public building", it concluded that a "fixtures analysis" would be helpful when considering "items of personal property that had a possible existence independent of the realty." (465 Mich, at 77) When, however, the facts did not lend themselves to a fixtures analysis because the item causing the injury had no existence apart from the realty, the Court held that it was necessary to decide whether the item outside of the four walls is "of a public building" because it was physically connected to, and not intended to be removed from, the public building. (465 Mich, at 78)

Application of this analysis to the circumstances in *Fane*, where the plaintiff was injured on an elevated terrace next to the public library, the Court found that the fixtures

analysis did not apply because the terrace did not have an existence independent from the library, but that it was "of a public building" because it was actually physically attached and built into the building. On the other hand, in the circumstances presented in *Cox*, where the plaintiff was injured on a portable ramp placed at the doorstep to the building, the Court held that the ramp was personal property and thus subject to a fixtures analysis. It concluded, however, that the ramp was not a fixture because it was not intended to be permanent: it was not constructively annexed to the building because it could be removed without impairing the value of either the ramp or the building.

In the case at bar, it was under a "fixtures analysis" that the lower court held the exterior lights to be part of the public building because lights do have an existence independent of the building to which they are attached. Thus, consistent with both *Horace, supra* and *Fane, supra*, had the lights fallen off of the building, injuring someone standing on the loading dock, the public building exception could well have been implicated. Likewise, had the lights exploded, leaving shattered glass in the area which caused the injury, the public building exception might be relevant. In both of these circumstances, however, someone would have confronted a dangerous or defective condition of a public building and been injured by it. But this analysis does not go far enough to support a finding that the public building exception is implicated when someone trips 17.5 feet away from the public building and its exterior lights, even when it is alleged that the injury was caused by the failure of those lights to illuminate the area on the drive on which the plaintiff tripped.

In 2002 this Court again returned to the question of a suicide within a public building in *de Sanchez v State of Michigan*, 467 Mich 231; 651 NW2d 59 (2002). Considering the uses for which the restroom was specifically assigned, the Court found no evidence that the support bar used by a psychiatric patient to kill herself had either defectively supported the toilet stall partition or presented a danger to the general psychiatric patients for whom it was designed. There was nothing wrong with the bathroom and the public building exception did not provide a means to avoid the agency's immunity.

Most recently, this Court considered the public building exception in *Renny v Michigan Department of Transportation*, 478 Mich 490; 734 NW2d 519 (2007), where it overruled *Sewell, supra* and held that a design defect claim was not cognizable under the public building exception. In so ruling, the Court held that the language of the building exception only imposes a duty to repair and maintain, and it disavowed any dicta from prior opinions to the contrary. In *Renny* the plaintiff had slipped and fallen on a patch of snow and ice on the sidewalk in front of the entrance to a rest area. She complained, *inter alia*, that the snow and ice had accumulated as a result of the defendant's failure to install and maintain gutters that would have diverted melted snow and ice from the roof away from the sidewalks. The question presented was whether this allegation sufficed to allege an injury by a dangerous and defective condition of the rest area building. To the extent that these allegations were construed as alleging a design defect, they failed to implicate the exception. However, to the extent that plaintiff had alleged a failure to maintain a

building which had once been equipped with gutters and downspouts, the case was remanded to the court of claims and allowed to proceed.[7]

The allegations in the case at bar are not analogous to those which were allowed to proceed in *Renny.* In *Renny*, where the plaintiff slipped on ice and snow, she complained that the failure to maintain the building had been the cause of the accumulation of ice and snow. In other words, had the gutters and downpours been maintained, no dangerous condition on the walk would have been created or confronted by her. In the case at bar, however, Plaintiff slipped and fell on a gap between the driveway and the ground, and the creation of the gap had nothing whatsoever to do with any alleged failure to repair or maintain the building 17.5 feet away.

In sum, although not all injuries that occur within a public building fall within the public building exception, and some injuries which occur outside of the public building will fall within the exception, it is always important to define the dangerous or defective condition that resulted in the injury, and determine whether that condition is "of the building." Consider, for example, the unpublished Michigan Court of Appeals opinion in

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[7] On remand, the court of claims granted summary disposition to the defendant, and this order was affirmed by the Court of Appeals. *Renny v Michigan Department of Transportation*, CA #285039 (9/29/2009), *lv denied*, 485 Mich 1102; 778 NW2d 240 (2010), attached hereto as Exhibit A. The Court of Appeals detailed the history of the drainage system associated with the rest stop building and the various changes made to that system, but rejected the position that once a building has been designed in a particular fashion, the government has a duty to repair and maintain the building as originally designed, regardless of any problems that had become apparent. As the changes to the system were more significant than a mere removal of a gutter or a failure to repair one, there had, effectively, been a redesign. It thus affirmed the trial court's determination that "to the extent Renny's injury was caused by a defect in the rest stop, it was due to a design defect when a new roof system was not equipped with standalone gutters and downspouts."

Nappier v Lansing School District, CA #240570 (11/13/2003), attached hereto as Exhibit B. In that case, as in the case at bar, the defect was in the walkway leading to the building, and was not a defect of the building itself. The *Nappier* court held that fixing the defect in the walkway would have resolved everything, and thus there was no building defect. In other words, it was the condition of the walkway, and not of the building, that created the dangerous condition. So, too, in the case at bar, fixing the walk would have resolved everything and there was no building defect.

Similarly, in *Berris v Michigan State University Bd of Trustees*, CA #256112 (3/9/2006), a copy of which is attached hereto as Exhibit C, the plaintiff slipped on ice and snow which had accumulated on the sidewalk adjacent to a dormitory door. The plaintiff claimed that the buildup of ice had been caused by water draining onto the sidewalk from an overhanging drainage pipe affixed to the dorm. Relying on *Fane*, the plaintiff claimed that the pipe was physically connected to, and not intended to be removed from, the building. But, citing *Horace, supra*, the Court noted that the plaintiff had not stumbled on the pipe, "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 'are to be narrowly construed.'"

Finally, in *Lance v Lansing Community College Foundation*, CA #201201 (1/8/99), a copy of which is attached hereto as Exhibit D, the Court considered the question of outside lighting. In that case the plaintiff slipped and fell on ice on the tarmac next to the aviation center building. She claimed not to have seen the ice because an employee had turned off the outside lighting. Citing both *Horace, supra,* and *Henkey,*

supra, the Court noted that the public building exception is limited to dangers actually presented by defects in the building itself, and did not apply to areas outside of the building, such as sidewalks. And citing *Reardon, supra*, it stated that "the negligent supervision of those responsible for the activation of the outside lighting does not give rise to a claim under the public building exception." Of note, the Court also rejected the plaintiff's complaint that she had not been allowed to amend her complaint to include an allegation that fell within the exception, finding that an amendment would have been futile: "Plaintiff has already testified that she did not fall within a public building, but approximately fifteen to twenty-five steps away on the tarmac. As we have said, the public building exception applies only to defects in the building itself."

The opinion of the Michigan Court of Appeals which is the subject of the pending application would, if undisturbed, present a significant departure and expansion from this Court's precedent, discussed above. It would also constitute an invitation to those who are injured outside of a public building to consider some aspect of the building which could conceivably be argued to have contributed to the injury, and then contend that their position regarding the relationship of the building to the injury presented only a question of causation which successfully avoided immunity. Such a result would serve both to conflate the immunity and liability considerations, and be contrary to the understanding that the immunity provided by the GTLA is immunity from suit, not merely immunity from liability. The issue presented in the case at bar is not whether the alleged negligence of the City of Southgate was causally related to the Plaintiff's injury, but whether the City has immunity from the alleged liability. This Court should grant leave to appeal to make

clear that the alleged relationship of a building to an injury does not suffice to allow a case to proceed to trial. Rather, the injury must result from *the dangerous or defective condition of the building*. The circumstances of the case at bar do not qualify.

RELIEF REQUESTED

Amici Curiae, Michigan Municipal League, Michigan Municipal League Liability and Property Pool, and Michigan Townships Association, respectfully request that this Court grant the pending Application for Leave to Appeal filed by the City of Southgate and reversed the Opinion of the Michigan Court of Appeals which is the subject of that Application.

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Michigan Municipal League Liability
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Dated: September 1, 2011.
970963.1

LIST OF EXHIBITS

Exhibit A *Renny v Michigan Department of Transportation*, CA #285039 (9/29/2009), *lv denied*, 485 Mich 1102; 778 NW2d 240 (2010)

Exhibit B *Nappier v Lansing School District*, CA #240570 (11/13/2003)

Exhibit C *Berris v Michigan State University Bd of Trustees*, CA #256112 (3/9/2006)

Exhibit D *Lance v Lansing Community College Foundation*, CA #201201 (1/8/99)

STATE OF MICHIGAN

IN THE SUPREME COURT

DENISE L. ANDRUS,

Plaintiff-Appellee,
and

PAUL K. ANDRUS,

Plaintiff,
v

CITY OF SOUTHGATE, a
Michigan municipal corporation.
_____/

Supreme Court
Case No. 143323

Court of Appeals
Case No. 296417

Wayne Circuit Court
Case No. 09-012394-NO

PROOF OF SERVICE

Proof of Service: I certify that a copy of **BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL, AND MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL FILED BY THE CITY OF SOUTHGATE** and this **PROOF OF SERVICE** were served on the following attorneys of record or pro per parties by ■ regular mail or ☐ personal service at the addresses shown below.

Date of Service: September 1, 2011

Signature: _____
Enis J. Blizman

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