SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

An Unpersuasive Approach to the Governmental Tort Liability Act and The Push Button Automatic Door

By: Sante S. Fratarcangeli **June 23, 2015**

SECREST WARDLE NOTES

When alleging the public-building exception to the Governmental Tort Liability Act it is imperative to argue something more than *res ipsa loquitur*.

* * * *

In *Verna Demartin v. University of Michigan Regents, unpublished* (May 19, 2015) (No. 319803) the Michigan Court of Appeals reviewed whether the Court of Claims erred in denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact) by refusing to apply a statuary exception to governmental immunity. Ultimately, the appellate court reversed and remanded for entry of judgment in favor of defendant pursuant to MCR 2.116(C)(7).

In April 2012 plaintiff and her daughter went to the University of Michigan Dental School for a dental procedure. Following the procedure they exited the building through an automatic door operated by a push button device. Plaintiff's daughter proceeded a few steps ahead of plaintiff. Before plaintiff could clear the door, it began to close and struck plaintiff on her right shoulder, knocking her to the ground.

The door was repaired in February or March 2012 because of a defective hydraulic unit. Two work orders revealed that the door was slamming and nearly hit two people over the course of three days. One work order indicated that the door was fixed on March 19, 2012. A member of the "door closers" department supported the accuracy of the work order. There was no evidence that the door remained defecti when plaintiff sustained her injury.

Plaintiff's daughter testified that she detected a strong adhesive odor when passing through the door. However, Plaintiff failed to present evidence that the odor emanated from the door or its operating components, or that such an odor was indicative of failure in the hydraulic unit or other operative component of automatic or low power doors.

Plaintiff failed to present evidence establishing that the door closed abnormally fast. The police officer who responded shortly after the accident did not detect abnormal operation after observing the door's operation and testing the door pressure. Plaintiff and her daughter were the only witnesses to the incident. Neither testified to any defect in the door. The evidence only showed that the door simply closed before plaintiff cleared it.

When suing a unit of government, a plaintiff must plead in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 203 (2002). The Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., provides that "except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Exceptions to governmental immunity are narrowly tailored. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614 (2003).

The GTLA exception applicable to this case is the public-building exception, MCL 691.1406, which provides as follows:

> 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.

To come within this exception, a plaintiff must prove the following five elements:

> (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.**

The first two elements were not disputed. Whether a building or condition "is dangerous or defective is to be determined in light of the uses or activities for which it is specifically assigned." *Pierce v City of Lansing*,

265 Mich App 174, 179 (2005). A court considering the question must examine "not only whether the physical condition caused the injury incurred, but also whether the physical condition was dangerous or defective under the circumstances presented." *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 422 (1992) (opinion by BRICKLEY, J.), amended 440 Mich 1203 (1992).

As to whether the defendant's automatic door's physical condition was dangerous or defective, Plaintiff argued the doctrine of *res ipsa loquitur*, or, "the thing speaks for itself." Res ipsa loquitur allows a plaintiff to draw "a permissible inference of negligence from circumstantial evidence." *Woodard v Custer*, 473 Mich 1, 6-7 (2005). Four conditions **must** be met to invoke the doctrine:

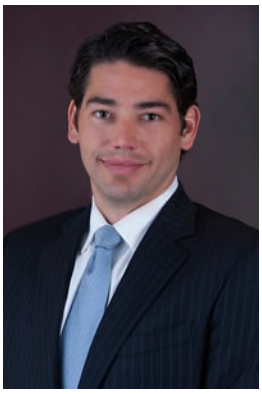
(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and

(4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

The Court was not persuaded by plaintiff's *res ipsa loquitur* argument. The Court held that plaintiff failed to establish a genuine issue of material fact whether there was a defect in the door. "When a door operates on a time delay, it will close regardless of objects in its path. Therefore, the closing of the door here is not an event that ordinarily does not occur in the absence of someone's negligence." Plaintiff also failed to show that defendant was aware of any defect or that defendant failed to repair it.



We welcome your questions -

Please contact Sante S. Fratarcangeli at

sante@secrestwardle.com

or 248-539-2856

Tweet Share Forward

Secrest Wardle Email YouTube LinkedIn Twitter

SECREST WARDLE

Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secrestwardle.com

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Linda Willemsen

This newsletter is for the purpose of providing information and does not constitute legal advice and should not be construed as such. This newsletter or any portion of the newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.