

TOWNSHIP LAW NEWS

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April 2009

DEFENDING SUITS INVOLVING INJURIES IN PUBLIC BUILDINGS - A POTENTIAL EARLY EXIT STRATEGY¹

By: **Ronald D. Richards Jr.**

It is no secret that a township that gets sued wants to get the case dismissed as quickly as possible to conserve its limited resources. For example, absent an applicable immunity exception, a township sued for negligence for conduct that occurs while performing a governmental function can often get out of the case quickly under the broad immunity granted in MCL 691.1407(1). But what if a person sues a township under one of the immunity exceptions, such as the public building exception in MCL 691.1406? Under that exception, the township faces liability if it does not repair and maintain public buildings under its control when open for use by the public. If a person sues the township for an injury sustained while visiting the township's hall or other township-owned building, is there a way for the township to get out early then?

Under some new Michigan court decisions, the answer may be "yes" in some cases. Multiple courts have issued decisions that a township sued over an injury in a public building should be aware of – because they confirm that a township that gets sued for injuries suffered through an alleged failure to repair or maintain a public building may have a basis to get out of the case early if it does not receive proper notice of the suit before the case is filed in court.

A. Summary of Public Building Exception

A township is generally immune from tort (i.e., negligence) liability when engaged in a governmental function.² But under MCL 691.1406, that immunity does not apply to cases alleging failure to maintain or repair a public building.

MCL 691.1406 provides that a governmental agency must repair and maintain public buildings under its control when open for use by the public. A plaintiff who brings a public building exception claim must prove several elements, including that the building is open to the public and had a dangerous or defective condition.³

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But before one even considers if the elements of the claim are met, a plaintiff must have first met the preliminary pre-suit notice requirement in MCL 691.1406:

- to recover for injuries under the public building exception, the injured person must serve notice on the township of the injury and defect within 120 days from when the injury occurred; and
- the pre-suit notice must be served on anyone – personally or by certified mail, return receipt requested – who may be lawfully served with civil process against the township.⁴

Michigan courts have recently considered the pre-suit notice requirement and issued decisions that may be useful to a township. As explained below, courts have left no doubt that they will carefully review whether the plaintiff has satisfied the pre-suit notice requirement – pleasant news for townships who own public buildings.⁵

B. Recent Developments Regarding the Public Building Exception

1. *Chambers v Wayne Co Airport Auth*⁶

Chambers began when the plaintiff alleged he fell in a puddle of water at an airport terminal.⁷ After the fall, an Airport Authority officer wrote up an incident report in which he noted the incident, noticed that he observed leaking ceilings that may have attributed to the puddling of water, and that he notified other Airport Authority personnel of the incident and leaking. After the plaintiff sued under the public building exception, the Airport Authority sought dismissal arguing that the first communication it received from plaintiff about the incident was 16 months after the incident – well after the 120-day notice period. The trial court denied the motion. The Michigan Court of Appeals affirmed in a split decision.⁸ The Michigan Supreme Court reversed.⁹ Essentially, the Supreme Court ruled that the internal incident report was not sufficient notice for several reasons.

First, the incident report was completed by someone who the plaintiff alleged was associated with the Airport Authority, not *by the plaintiff*. Thus, *the plaintiff* did not personally serve this written report on the Airport Authority. Second, even if the plaintiff had served the incident report on the Airport Authority employee who prepared the report, *the plaintiff* did not show that that employee could lawfully be served with civil process directed at the Authority under MCR 2.105(G)-(H), as MCL 691.1406 requires. Third, even though the report indicated that the report's preparer notified other Authority employees of the incident, the plaintiff did not show that the plaintiff served those higher-ranking employees with the notice, or that those higher-ranking employees could lawfully be served with notice directed at the Authority. For those reasons, the plaintiff's claim failed.¹⁰

2. *Ward v Michigan State University*¹¹

About a month after *Chambers*, in early 2009, the Michigan Court of Appeals dismissed a public building exception case for similar reasons – holding that an internal accident report that a public agency's

employee prepared was not sufficient to satisfy MCL 691.1406's pre-suit notice requirement. In *Ward*, the plaintiff sued Michigan State University after being struck in the head and injured by a hockey puck while a spectator during a college hockey game at Munn Ice Arena on campus. The plaintiff argued that a defect in the arena caused the incident, specifically asserting the lack of plexiglass protecting one section of spectators from the ice rink. This theory, the plaintiff claimed, allowed recovery under the public building exception. The University moved to dismiss the claim, but the trial court denied its motion. The Michigan Court of Appeals reversed, and held that the claim failed for failure to meet the pre-suit notice requirement in MCL 691.1406.

The Court acknowledged that, at the time of the injury, one of the University's employees assisted the plaintiff. However, the plaintiff never provided the University with formal notice of the nature of the injuries and defect after the accident as MCL 691.1406 requires. Thus, dismissal was proper since the pre-suit notice requirement was not met.¹²

C. Lessons From *Chambers* and *Ward*

Chambers and *Ward* provide several important lessons to a township sued over an injury in one of its public buildings:

1. In a public building exception case, a court will carefully scrutinize the pre-suit notice requirement as a preliminary matter.
2. An internal accident report that a township's employee prepares is likely insufficient to meet the pre-suit notice requirement, particularly where the plaintiff merely verbally gave only general information about the incident to that employee who then completed an internal accident report form.
3. Likewise, where an internal report is insufficient, evidence that the township passed the information in the report up the hierarchy of the township is likely insufficient too.
4. Courts will carefully scrutinize whether *the plaintiff* gave the purported notice to the township, or if as in *Chambers* and *Ward* the plaintiff did not "give" any notice at all but merely verbally relayed the background to the accident to someone apparently affiliated with the township, who, in turn, completed an internal report form.
5. Courts will carefully scrutinize whether the plaintiff gave the notice to *the proper recipient* – for townships, that means the plaintiff must give the notice to the township supervisor.¹³
6. Finally, even if the plaintiff clears all those hurdles, a court will scrutinize whether the notice contains the required substantive content – does it "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"?¹⁴

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D. Conclusion

Public building exception cases can be complicated and costly. But *Chambers* and *Ward* seemingly arm townships with authority that may allow a township to defeat a public building exception case early, thereby minimizing costs. A sound understanding of MCL 691.1406's pre-suit notice requirement (as construed by *Chambers* and *Ward*) could mean the difference between a claim that survives in court and leads to great expense, and a claim the township can defeat early so as to conserve its limited resources.

¹This article is based on an article entitled "The Pre-Suit Notice Requirement in the Public Building Exception to Municipal Immunity": *Courts Give new Lessons on What Does – and Does Not – Meet the Requirement.* That article appears in the spring 2009 edition of the Michigan Public Law Quarterly newsletter, and is being reprinted here (albeit in a condensed and revised version) with permission from the Public Law Quarterly.

²MCL 691.1407(1).

³MCL 691.1406; *Renny v Dep't of Transp.*, 478 Mich 490, 500-501, 505, 507; 734 NW2d 518 (2007).

⁴MCL 691.1406.

⁵*Chambers v Wayne Co Airport Auth.*, unpublished opinion per curiam of the Court of Appeals (Docket No. 277900, dec'd 6/5/08), reversed in *Chambers v Wayne Co Airport Auth.*, ___ Mich ___; ___ NW2d ___ (Docket No. 136900, dec'd 12/19/08); *Ward v Michigan State University*, unpublished opinion per curiam of the Court of Appeals (Docket No. 281087, dec'd 1/27/09).

⁶*Chambers v Wayne Co Airport Auth.*, ___ Mich ___; ___ NW2d ___ (Docket No. 136900, dec'd 12/19/08).

⁷*Chambers v Wayne Co Airport Auth.*, unpublished opinion per curiam of the Court of Appeals (Docket No. 277900, dec'd 6/5/08).

⁸See *id.*

⁹*Chambers v Wayne Co Airport Auth.*, ___ Mich ___; ___ NW2d ___ (Docket No. 136900, dec'd 12/19/08).

¹⁰See *Chambers v Wayne Co Airport Auth.*, unpublished opinion per curiam of the Court of Appeals (Docket No. 277900, dec'd 6/5/08) (Murray, J., dissenting).

¹¹Unpublished opinion per curiam of the Court of Appeals (Docket No. 281087, dec'd 1/27/09).

¹²See *id.*

¹³MCL 691.1406.

¹⁴MCL 691.1406.

RED FLAG RULES REMINDER

On May 1, 2009, the FTC begins enforcing the Red Flag Rules. As you may recall, these new rules require that all municipalities or authorities that maintain customer accounts (such as utility accounts) must adopt a written policy to detect identity theft warning signs and respond thereto. If you have questions about when Red Flag Rules are required or what should be included in the Red Flag Rules policy, Foster Swift's municipal department is well-versed in the area and happy to help.

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