STATE OF MICHIGAN

COURT OF APPEALS

FRANCINE CULLARI de SANCHEZ and STEVEN JASON, Co-Personal Representatives of the Estate of THOMAS A. BALTUS, deceased, Plaintiffs-Appellants,	UNPUBLISHED June 30, 2000
v	No. 214318 Court of Claims
DEPARTMENT OF MENTAL HEALTH, Defendant-Appellee.	LC No. 84-009239

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this wrongful death case.[1] We reverse.

Decedent was admitted to a medical facility owned and operated by the State of Michigan, Department of Mental Health, and was placed under the care of Dr. Aurora Genoves-Andrews after decedent attempted suicide by trying to drown himself. Decedent was diagnosed by Genoves-Andrews as having reactive depression with suicidal preoccupation and was considered to be a serious danger to himself. For the first five days during his admission, decedent had a one-to-one suicide watch placed on him to prevent him from committing suicide. On the sixth day the one-to-one suicide precaution was discontinued despite decedent's continued suicide threats. On that same day, decedent was allowed to go to the restroom by himself without any type of supervision and, while inside the restroom, decedent committed suicide by hanging himself with a cloth belt around his neck from an overhead dividing bar inside a toilet stall.

[1] This Court has previously reviewed this case in *de Sanchez v Genoves-Andrews*, 161 Mich App 245; 410 NW2d 803 (1987), remanded 430 Mich 894 (1988); in *de Sanchez v Genoves-Andrews (On Remand)*,179 Mich App 661; 446 NW2d 538 (1989); and in *de Sanchez v Genoves-Andrews*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 1994 (Docket No. 158052). The Supreme Court has previously reviewed this case in *de Sanchez v Dep't of Mental Health*, 455 Mich 83; 565 NW2d 358 (1997).

Plaintiffs first contend that the trial court erred when it concluded that plaintiffs failed to state a cause of action in this case because this Court twice previously held that plaintiffs' complaint did state a cause of action. We disagree.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). The decision of an appellate court is controlling at all subsequent stages of litigation, so long as it is unaffected by a higher court's opinion. *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). The law of the case doctrine applies to questions already presented in the same case by the same parties. *Manistee v Manistee Firefighters Ass'n*, 174 Mich App 118, 125; 435 NW2d 778 (1989). Rulings of a lower court which are unaffected by the scope of the higher court's order remain the law of the case. *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1995).

Here, the law of the case prior to the instant Court of Claims decision on appeal is that summary disposition under MCR 2.116(C)(8) was not appropriate because plaintiffs' complaint sufficiently pled a cause of action in avoidance of governmental immunity because it specifically alleged a structural defect in the building.[2] This law of the case does not conflict with the Court of Claims' most recent holding that no genuine issues as to any material facts existed and that defendant is entitled to judgment as a matter of law because, based on the undisputed evidence, there was no dangerous or defective condition in the bathroom taking into account the uses for which the room was assigned and designed. The law of the case also does not conflict with the trial court's reasoning that the purpose of the public building exception is to provide safe buildings and not safety in buildings. The decision under MCR 2.116(C)(8) only addresses whether plaintiffs pleaded sufficient facts to avoid governmental immunity conferred on defendant pursuant to MCL 691.1407; MSA 3.996(107). It did not address the question of whether the bar was in fact a dangerous or defective condition in the bathroom taking into account the uses for which it was assigned and designed. Therefore, the issues are different and the law of the case does not apply. *Manistee*, *supra* at 125.[3]

Plaintiffs next contend that summary disposition was improperly granted because there was a genuine issue of fact regarding whether the bathroom in which decedent hanged himself was dangerous and defective for its intended purposes. We agree.

Generally, governmental agencies are immune from tort liability for actions taken while performing governmental functions. *Jackson v Detroit*, 449 Mich 420, 427; 537 NW2d 151 (1995). Although broad, this immunity is subject to a limited number of narrowly drawn exceptions, *id.*, one of

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[2] Plaintiffs alleged that defendant provided a restroom with dividing bars across the top of the stalls that would allow patients to make suicide attempts by hanging themselves.

[3] Indeed, in *de Sanchez v Dep't of Mental Health*, 455 Mich 83, 96; 565 NW2d 358 (1997), the Supreme Court stated in dicta that its decision did not mean that a question of fact remained regarding the existence of a true building defect or that the defendant might not be entitled to judgment as a matter of law on the question of whether a true building defect existed.

which is the "public building exception," which is set forth at MCL 691.1406; MSA 3.996(106), and in pertinent part provides:

> Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building.

"[T]he purpose of the public building exception is to promote the maintenance of safe public buildings, not necessarily safety in public buildings." *Id.* Therefore, the public building exception duty that is imposed relates to dangers actually presented by the building itself. *Id.*

A five-part test is used to determine whether the public building exception governs a particular case. *Id.* at 428. A plaintiff must prove the following to fall within the narrow confines of the exception: 1) it involves a governmental agency, 2) the public building is open for use by 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 defect, and 5) the governmental agency, after a reasonable period of time, failed to remedy the defective condition. *Id.* In this case, the issue in dispute revolves around the third factor.

Plaintiffs claim that the building was defective because it should either not have had a bar in the bathroom stall or should have had a breakaway bar that would prevent the bar from being used for hanging. In determining whether a condition of a public building is a defect within the public building exception to governmental immunity, the condition must be evaluated in light of the uses or activities for which the building is specifically assigned. *Johnson v Detroit*, 457 Mich 695, 705; 579 NW2d 895 (1998).

In *Jackson, supra,* the decedent was arrested and placed in a felony cell which had exposed overhead bars. He was later discovered standing on the sink, making a noose out of his socks and was apparently preparing to hang himself. He was taken to the crisis center for a psychiatric evaluation and was diagnosed as having an adjustment disorder with depressed mood and opiate dependence. He was returned to jail with the psychiatrist's written and oral admonition that he be kept under suicide watch. Upon his return, he was placed in another felony cell that had exposed overhead bars. That afternoon Jackson was found hanging from a noose which was tied to the exposed overhead bars of his cell. In *Jackson* the Court held that Jackson's suicide attempt did not fall within the narrow confines of the public building exception to governmental immunity because it did not relate to the maintenance of a safe public building for the specific use and purpose for which it was assigned but, rather, related to safety in public buildings. *Id.* at 429. The Court reasoned as follows.

> "To suggest that any physical feature of a jail cell, otherwise benign, that can conceivably become a part of a plan of one who is desperately driven to self destruction can become a 'dangerous or defective condition' under the public building exception statute, simply crosses the outer limits of any reasonable reading of the intent of that statute when considered in the context of its history, purpose, and wording." [*Id.*; quoting *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 426; 487 NW2d 106 (1992).]

The present case is factually distinguishable from *Jackson*. *Jackson* involved a building that was specifically designed as a holding cell for those accused of criminal offenses. The building was not designed as a cell designated for suicidal prisoners. The present case involves a mental health facility that was designed to house mentally ill patients. Indeed, decedent was involuntarily committed to the facility *as a result of a suicide attempt*. Although the bathroom within the facility was used by the general population in the locked ward, evidence was presented that the bathroom was used by patients who were diagnosed as suicidal and that it is foreseeable that mentally ill patients may attempt suicide if given the opportunity. Thus, plaintiffs presented evidence to create a genuine issue of material fact regarding whether the placement of a solid bar in the bathroom of the facility constituted a dangerous and defective condition within the meaning of MCL 691.1406 in light of the use for which the bathroom was specifically assigned; that is, for the use of potentially suicidal mentally ill patients. See, e.g., *Williamson v Dep't of Mental Health*, 176 Mich App 752; 440 NW2d 97 (1989). Accordingly, we conclude that the trial court improperly granted summary disposition in favor of defendant.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff