STATE OF MICHIGAN

COURT OF APPEALS

DEVIN D. SEWELL, Minor, and DOUGLAS B. SEWELL, Next Friend,

Plaintiffs-Appellants,

v

VINCENT BEAN and SOUTHFIELD PUBLIC SCHOOLS,

Defendants-Appellees.

UNPUBLISHED
April 24 2001

No. 216886
Oakland Circuit Court
LC No. 93-447494-NO

Before: O'Connell, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Plaintiff Devin D. Sewell, a minor, and his next friend, Douglas B. Sewell, appeal as of right a judgment of no cause of action following a jury trial in this action alleging premises liability and gross negligence. We affirm.

On November 17, 1992, Devin was a fourteen-year-old high school freshman at Southfield High School. On that date, Devin attended his regularly scheduled swimming class. Defendant Vincent Bean was the swimming instructor and Vonetta Sanders was Bean's student assistant. Devin was injured when he dove into the pool and struck his head on the bottom of the pool. Plaintiffs filed this action on January 13, 1993, alleging gross negligence against Bean and premises liability against Southfield Public Schools pursuant to the defective building exception to governmental immunity, MCL 691.1406; MSA 3.996(106).[1] The jury returned a verdict of no cause of action, finding that the Southfield High School swimming pool was not in a dangerous or defective condition on November 17, 1992, and that Bean's conduct did not amount to gross negligence. The trial court denied plaintiffs' motion for a new trial.

[1] The trial court originally granted Southfield Public Schools' motion for summary disposition on the ground that plaintiffs' suit related only to negligence in a public building and therefore plaintiffs failed to fashion a claim in avoidance of governmental immunity. This Court affirmed the trial court's ruling and the Supreme Court reversed, concluding that plaintiffs' properly alleged a defect in the pool itself.

Plaintiffs first argue that the jury's determination that the swimming pool did not represent a "dangerous or defective condition of the public building" was against the great weight of the evidence because the Supreme Court ruled in *Sewell, supra*, that if the allegations in the complaint were proven a dangerous or defective condition in the building would be established. We disagree with plaintiffs' interpretation of the Court's opinion in *Sewell* and disagree with plaintiffs' argument regarding the weight of the evidence.

The public building exception to governmental immunity is set forth in MCL 691.1406; MSA 3.996(106), which provides in 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 take action reasonably necessary to protect the public against the condition.

At issue in this case is whether the swimming pool constituted a "dangerous or defective condition." Liability can be imposed for injury due to a physical defect or dangerous condition of a building caused by improper design, faulty construction, failure to repair or maintain, or lack of safety devices. *Sewell v Southfield Pub Schools*, 456 Mich 670, 675; 576 NW2d 153 (1998). Whether a part of the building is dangerous or defective is to be determined in the context of the uses or activities for which the building is specifically designed. *DeSanchez v Dep't of Mental Health*, 455 Mich 83, 91; 565 NW2d 358 (1997). The existence of the defect or danger and its relationship to the injury is to be decided by the trier of fact. *Scamehorn v Bucks*, 167 Mich App 302, 307; 421 NW2d 918 (1988).

Plaintiffs' argument is premised on their interpretation of the Supreme Court's previous ruling in this case. Specifically, plaintiffs contend that the Supreme Court's finding that the conditions of the pool as alleged by plaintiffs stated a claim for the existence of a defect in the pool indicates that, if plaintiffs proved the allegations, they would have proved that the pool was defective. In other words, plaintiffs interpret *Sewell* as standing for the proposition that, as long as plaintiffs proved the existence of the conditions mentioned in their complaint, they had sustained their burden of proving a cognizable defect.

The public building exception is not a cause of action, but rather an exception to governmental immunity. *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 527 n 2; 582 NW2d 828 (1998). If a plaintiff's cause of action fits within a statutory exception to governmental immunity, the plaintiff must then establish the elements of the underlying cause of action. Here, in the context of a motion for summary disposition based on governmental immunity, the Court in *Sewell* determined that plaintiffs satisfied their initial burden of bringing their suit within the meaning and operation of § 1406. The Court stated that plaintiffs alleged a danger or defect in the pool sufficient to avoid the school's assertion of governmental immunity. In that manner, plaintiffs successfully avoided the Southfield Public Schools' assertion of its governmental immunity defense. However, the *Sewell* opinion does not suggest or state that

plaintiffs' pleadings sufficiently proved the existence of a defect. Plaintiffs were still obligated to prove a prima facie case with regard to the underlying premises liability/negligence claim.

At trial, Karl Greimel, the only swimming pool design expert to testify, opined that the pool was designed in conformity with applicable standards existent in 1956 when the pool was constructed and which continued to be in existence at the time of trial. Greimel testified that the floor construction of the pool, the changes in elevation, and the intersectional sloping elements of the floor were within normal limits of design and construction. Greimel also noted that eight "NO DIVING" signs were clearly marked on the side of the pool and that the pool depths were marked as required. Hence, Greimel determined that nothing about the pool rendered it dangerous or defective. In addition, evidence was presented that Oakland County inspected the pool on May 4, 1992, and no aspect of non-compliance was indicated. Devin Sewell admitted that there was a "NO DIVING" sign next to the location where he dove into the pool and that he had seen the sign before diving.

Plaintiffs did not present any expert testimony related to the existence of any defect in the pool. Although plaintiffs presented the testimony of Frederick Carter regarding the depths of the pool, Carter was not qualified as an expert in pool design. Indeed, defendant's expert testified that the measurements taken by Carter were taken by "nonscientific and unacceptable" means. Absent competent testimony that the conditions constituted a defect in the design or construction of the pool, the verdict was not against the great weight of the evidence. Accordingly, the trial court did not abuse its discretion by denying plaintiffs' motion for a new trial.

Plaintiffs next argue that statements allegedly made by Devin that are contained in two medical records were improperly admitted under MRE 803(4), the so-called medical record exception to the general inadmissiblity of hearsay. In the Southfield Fire Department EMS report, under the heading of "Primary Complaint, Mechanism of Injury, Findings, etc., was the following statement:

> Patient dove into water and hit top of head on bottom of pool. Complaint of pain in neck area only. Patient ambulated to pool office area. No loss of consciousness noted. Patient dove into 3' end of pool. No hands broke the hit, hit directly on head.

In the Providence Hospital Medical Records on a page entitled "Emergency Nurses Assessment," was the following statement:

> Pt states he dove into the shallow end of a swimming pool @ the HS and hit the top of his head. Patient denies head pain. . . .

Plaintiffs conceded at trial that the hospital records were admissible under MCR 803(6), which provides that records of regularly conducted activity are not hearsay. However, plaintiffs argued that the remarks regarding the depth of the pool where plaintiff dove in the pool were not admissible because Devin disputed making the statements and, therefore, defendants were required to produce the actual person who recorded the statements. Nonetheless, at trial the court admitted the remarks under MRE 803(4), the so-called medical record exception to the general inadmissibility of hearsay:

> Well, under 803(4), it's my understanding of the rule that the statement, even though – that's made, even though the declarant is available, is an exception to hearsay evidence. If – and this is the statement of the plaintiff being used against him as a statement he made to a doctor in contemplation of medical treatment and diagnosis, that the pool was shallow and that he hit his head is the contemplation in the statement. Whether it was three feet, four, or five feet is not relevant. The relevancy is he made the statement and he dived in three feet of water. It's relevant, it is admissible. Objection overruled. It's received.

In their motion for new trial, plaintiffs argued that the remarks were not admissible under MRE 803(4) because they were not made for the purpose of medical treatment or diagnosis. The trial court disagreed:

> First, the contested statements constitute a hearsay exception under MRE 803(4). The statements were relevant to the speed and trajectory of the force inflicting injury to the plaintiff's neck and thus reasonably necessary for diagnosis and treatment.
>
> Second, even if these statements were admitted in error, the error was harmless error because two witnesses, Damone Booth and Vonetta Sanders, testified that they observed the plaintiff dive into the shallow area of the pool. Therefore, the court finds no prejudice to the plaintiffs from admission of the statements in the medical records.

On appeal, plaintiffs again challenge the admissibility of the contested portions of the medical records under MRE 803(4).

Admission of the disputed portion of the medical record implicates the concept of hearsay within hearsay. Hearsay within hearsay, in the context of a history recorded in a medical record, is explained in 2 McCormick, Evidence (4th ed.), § 293, p 279:

> Under standard practice, a trained attendant at hospitals enters upon the record a "personal history" including an identification of the patient, an account of the present injury or illness, and the events and symptoms leading up to it. This information, which may be obtained from the patient directly or from a companion, is elicited to aid in the diagnosis and treatment of the patient's injury or disease. Is this history admissible to prove assertions of fact it may contain? Two layers of hearsay are involved here, with the first being the use of the hospital record to prove that the statement was made.

Here, the first level of hearsay consists of the documents themselves found in the medical records. The second level of hearsay consists of the statements in the documents indicating that the injury occurred when Devin dove in the shallow end of the pool.

With regard to the first level of hearsay, plaintiffs do not dispute that the documents themselves were admissible under MRE 803(6), which provides an exception to the hearsay rule for the records of regularly conducted activity. With regard to the second level of hearsay, a

separate justification must exist for its admission – that is, it must qualify under an exception to the hearsay rule or be properly admissible as nonhearsay.

MRE 803(4) allows the admission of

> [s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

The medical records exception is justified by the belief this particular category of hearsay is both necessary and inherently trustworthy. See *Solomon v Shuell*, 435 Mich 104, 119; 457 NW2d 669 (1990). Specifically, the Supreme Court "has explained that the 'supporting rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.'" *Merrow v Bofferding, 458 Mich 617, 629; 581 NW2d 696 (1998).*

Both parties rely on *Merrow* to support their respective positions. In *Merrow*, the plaintiff sustained an injury to his arm when it broke through a pane of glass in an aluminum storm door at the rear of the residence that the plaintiff leased from the defendants. The plaintiff insisted that the injury occurred when he stuck out his arm to stop the door to prevent it from striking his two-year-old daughter. The defendants argued that the plaintiff's own actions caused the cut when the plaintiff punched his arm through the glass. The defendants asserted that their theory was supported by an excerpt from the "history and physical" found in the plaintiff's hospital record. The trial court admitted the record, which stated in part that:

> This is a 23-year old Caucasian male who was *involved in a fight with his girlfriend* and subsequently put his right arm through a plate glass window, suffering a large laceration across the antecubital fossa.

The plaintiff challenged the disputed statement on the ground that it constituted inadmissible hearsay. He contended that the remark was not admissible under MRE 803(4) because it had not been made for the purpose of medical treatment or diagnosis. The trial court ruled that the statement was admissible under MRE 803(6). The jury returned with a verdict finding negligence by the defendants but also determining that the negligence was not a proximate cause of the plaintiff's injury. This Court reversed and found the statement inadmissible.

The Supreme Court framed the issue as whether a medical record statement that was relevant to causation, but that the plaintiff alleged was not reasonably necessary for diagnosis and treatment, was admissible under MRE 803(4). The Court found that the statement in the document indicating that the injury occurred after the plaintiff had a fight with his girlfriend was not reasonably necessary for diagnosis and treatment:

> The statement in the medical record relating that the plaintiff's injury resulted from his arm going through a plate glass window was information reasonably

> necessary for diagnosis and treatment. This statement carried with it the inherent indicia of trustworthiness in accordance with the rationale underlying the medical record exception. However, the statement in the medical record relating what occurred before the plaintiff's arm went through the window, i.e., he had a fight with his girlfriend, was not reasonably necessary for diagnosis and treatment and, thus, falls outside the rationale underlying the exception. [*Merrow, supra* at 630.]

In a footnote, the Court stated that

> [W]hile it might sometimes be important to know the exact circumstance surrounding the injury, for example to discern the trajectory and speed of the force inflicting injury to a joint, that is not the case here. [*Merrow, supra* at 630.]

Thus, while the Court in *Merrow* opined that it was not necessary for the medical care providers to know the exact circumstances surrounding the *Merrow* plaintiff's injury, the Court acknowledged that, in some situations, the circumstances surrounding an injury may be relevant to diagnosis and treatment. In the present case, Devin's statements regarding the depth of the water where he dove and was injured are not mere recitations of events that preceded the injury. Rather, the statements involve circumstances that were part of the act that resulted in jury. As noted by the trial court, proper treatment and diagnosis are dependent upon a thorough and careful understanding of the injury involved. The depth of the water into which Devin dove is a fact that is critical to a determination of the extent of the injury involved. Indeed, the testimony presented at trial clearly demonstrated that *severe injuries* are likely to occur when one dives into shallow water, as opposed to deeper water where serious injuries are less likely to result. Hence, we conclude that the trial court did not abuse its discretion in admitting the evidence.

Last, plaintiffs maintain that the trial court erred by refusing to issue a supplemental instruction to the jury instructing the jury that "diving may be allowed in five or more feet of water. At trial and in their motion for new trial, plaintiffs requested a supplemental instruction instructing the jury that "diving may be allowed in five or more feet of water." Plaintiffs' request was premised on 1983 AACS, R 325.2132, entitled, "Water depths; depth markings; lifelines." Rule 324.2132 states in relevant part that:

> Where the water depth is less than 5.0 feet at a swimming pool other than a spa pool or wading pool, the words 'no diving" shall be placed between the depth markers on the deck. The words shall be in legible letters not less than 4 inches high and of a color contrasting with the background.

Plaintiffs contend that this language requiring "no diving" signs in water that is less than 5' deep establishes a rule of law that diving is expressly permitted in water that is greater than 5' in depth. We disagree. Although the requirement that "no diving" signs be placed at water depths of 5' or less *implies* that diving in water less than 5' deep is unsafe, nothing in the language of Rule 325.2132 purports to establish a "rule of law" for the depths at which diving is permitted. Plaintiffs' reliance on *Duckett v North Detroit Gen'l Hosp*, 84 Mich App 426; 269 NW2d 626 (1978), for the proposition that "a trial court's refusal to instruct the jury concerning applicable rules and regulations promulgated by an administrative agency is error" is misplaced. In *Duckett*, the state department of mental health had issued a rule requiring that "all persons admitted to a

hospital shall be under the continuing daily care of a physician. . .” This Court held that the fact that the decedent was not seen daily by a doctor while he was a patient violated the rule and therefore an instruction under SJI 12.07 (“Violation by Defendant of Rules or Regulations Promulgated Pursuant to Statutory Authority”) should have been given because violation of a duty is relevant in a negligence action. In the present case, as noted above, there is nothing in Rule 325.2132 that authorizes diving in 5’ of water. Rather, the rule imposes a duty to provide “no diving” markers at water depths of less than 5’. There is no dispute that such markings were in place on the Southfield High School swimming pool.

Further, the supplemental instruction was neither relevant nor pertinent in light of the evidence presented. The evidence presented revealed that diving was not permitted in either area of the pool from where Devin may have dove. Further, the swimming class rules governing the class and given to the students prohibited diving at all times and from all locations during swimming class. Hence, the supplemental instruction was not supported by the evidence, and we find no error in the trial court’s refusal to give the supplemental instruction.

Affirmed.

/s/ Peter D. O’Connell
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder