STATE OF MICHIGAN

COURT OF APPEALS

MARY SLOAN, Plaintiff-Appellee,	UNPUBLISHED November 10, 2011
v	No. 300653 Washtenaw Circuit Court
CHELSEA COMMUNITY HOSPITAL, Defendant-Appellant.	LC No. 09-000094-NH

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant Chelsea Community Hospital appeals as of right the judgment on the jury verdict in plaintiff Mary Sloan's favor finding Chelsea Community Hospital negligent after another patient raped Sloan. We affirm.

I. FACTS

In October 2006, Sloan was involuntarily admitted to Chelsea Community Hospital after she attempted to commit suicide. Shortly after her arrival, Sloan and her roommate, Kandi Denny, began socializing with a male patient, Kenye Stone. During the day preceding the rape, the three patients went on a walk outside and then played a card game that evening. During the game, Stone was "very flirtatious." At one point he stated "maybe I'll just have to come in your room tonight and get in bed with one of you."

After the card game, Sloan and Denny went to their room to get ready for bed. Stone came into the room and asked where Sloan and Denny each slept. Again, Stone jokingly stated that "later today I'm going to have to come to bed with one of you." Stone's comments made Sloan feel uncomfortable, but she did not feel threatened. At that point, mental health worker John Nixon came into the room and told Stone that he was not allowed to be in another patient's room and that he needed to leave. Nixon escorted Stone back to Stone's room and told him again that he should not go into anybody else's room. Nixon did not follow up with Sloan and Denny because "[it] seemed like a positive interaction," and he indicated that if Sloan was feeling threatened, she should have talk to the staff about it. Nixon testified that he "had no idea that [Sloan and Denny] felt threatened" and that "it's hard to know what's going on if people aren't communicating."

Sloan testified that later that night, after she went to bed, Stone came into her room, and got into bed with her. Stone began to digitally penetrate Sloan's vagina, and she tried to push him off and told him to stop. But Stone did not stop. Instead he penetrated Sloan's vagina with his penis. Sloan continued to tell Stone to stop, but he would not. After Stone finally did stop, he got up and left the room. Denny confirmed that she heard Stone get into bed with Sloan and that she heard Sloan tell Stone to "stop" more than once.

A rehabilitation nurse told mental health worker Curt Douglas Stephens that she observed Stone "down the hallway kind of partially in a doorway" and that he had a "startled look." Stephens checked on Sloan, Denny, and Stone, and all appeared to be sleeping. Stephens then informed Nurse Jill Brown about the report and in response, a desk was placed in the hall from which staff could monitor patients. Denny then came to the nurses' station and informed Nurse Brown that Stone had been in their room, and that Stone "knew what he was doing," but she did not directly state that Stone sexually assaulted Sloan. Nurse Brown talked to Stone and told him that she knew he had been in someone else's room, but Stone did not respond. Brown then told Stone that he was not allowed in anyone else's room. However, Brown did not ask Stone what happened.

After the incident, Sloan went to the unit's kitchen, where Nurse Brown approached her, but Sloan would not speak with her. Sloan testified that she did not tell Nurse Brown that Stone had just raped her because she was scared, and she did not feel like Nurse Brown was approachable. However, the next morning, Sloan told her psychiatrist about the rape and was sent to the emergency room where the police interviewed her. Sloan did not see Stone again until the criminal trial, at which Stone was convicted of two counts of first-degree criminal sexual conduct.[1]

In January 2009, Sloan sued Chelsea Community Hospital alleging one count of negligence.[2] At trial, Sloan's expert, Kathryn Higgins, a registered nurse with 24 years' experience as a psychiatric nurse, testified that she was familiar with the standards of care in southeastern Michigan. Nurse Higgins testified with regard to psychiatric patients in a hospital: "[psychiatric patients] are considered a vulnerable population. . . . So we have a . . . higher duty . . . to these patients to keep them safe" and "[t]he onus of what needs to be done is on the professional staff, not the patient." With regard to Nixon's actions after he discovered Stone in Sloan's room and told him to leave, Nurse Higgins testified that Nixon did not take "the next steps which would have been to separately talk to, assess, discuss with all the patients that were involved what was happening there to see if there was something else going on. There was a duty there to do that and that did not happen." Nurse Higgins opined that Chelsea Community Hospital, through its staff, violated the standard of care in this case. Nurse Higgins explained: "[s]tandard of care according to the Michigan Mental Health Code is that you keep the patients safe. The standard of care is that . . . when you have a rule violation that you don't just state a

[1] MCL 750.520b(1)(f).

[2] We note that although various aspects of the case sound in medical malpractice, Sloan actually pleaded a case of negligence.

rule that you do the things that you need to do to ensure the safety of the patient. And that was not done." Nurse Higgins opined that if the standard of care had been complied with, Sloan's rape would have been avoided. On cross-examination, Nurse Higgins testified that it was her position that every time there is a sexual assault on a psychiatric unit it is "due to not upholding the standard of care which is ensuring the safety of the patient." Nurse Higgins also agreed that it was her opinion that "every time there's a physical assault it's always due to staffing negligence."

Sloan's other expert, Wayne Watson, a registered nurse with 37 years' experience as a psychiatric nurse, testified that the standard of care was "to provide a safe environment for the clients . . . that they are treating." Nurse Watson testified that the Mental Health Code also guides the standard of care for a psychiatric nurse working in an inpatient unit. According to Nurse Watson, the Mental Health Code "pretty much outlines what should be done, how to protect a patient, what kind of treatment is allowed, what you have to be careful of, how to provide a safe environment." In Watson's opinion, Chelsea Community Hospital violated the standard of care in this case because it "failed to provide a safe environment" for Sloan and "allow[ed] her to be violated by not providing that . . . standard of care." Nurse Watson opined that if the staff had complied with the standard of care, Sloan's rape would have been avoided. Watson agreed that if a rape occurs in a hospital, it is malpractice and a violation of care. According to Nurse Watson, any time he has seen a rape occur the standard of care was not being followed. On cross-examination, Nurse Watson agreed that every time a patient is sexually assaulted on a psychiatric unit, it is due to staffing negligence. Nurse Watson clarified the "global statement[,]" however, by specifying that rape is something for which one can watch and that it is always preventable.

The jury returned a verdict in Sloan's favor, finding that Chelsea Community Hospital, through its nursing staff or mental health workers, was negligent in one or more of the ways that Sloan claimed. Accordingly, the jury awarded Sloan $100,000 in noneconomic damages and $50,000 in economic damages. Chelsea Community Hospital now appeals.

II. DIRECTED VERDICT

A. STANDARD OF REVIEW

Chelsea Community Hospital argues that the trial court erred in denying its motion for a directed verdict. We review de novo a trial court's ruling with respect to a motion for a directed verdict, viewing the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed.[3] "A directed verdict is appropriate only when no factual question exists regarding which reasonable minds may differ."[4]

[3] *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000).

[4] *Id*. at 644.

B. STRICT LIABILITY

With regard to its motion for a directed verdict on the ground of strict liability, Chelsea Community Hospital argued that both of Sloan's nursing experts, Kathryn Higgins and Wayne Watson, testified that "'each and every time a sexual assault occurs on a psychiatric unit it is always due to staffing negligence.' Thus, [Sloan's] experts' opinions, distilled to their essence, are simply this: '[s]exual assault = negligence.'" Chelsea Community Hospital argued that under *Bryant v Oakpointe Villa Nursing Centre, Inc*,[5] which held that strict liability is inapplicable to either ordinary negligence or medical malpractice, Sloan's experts failed to state a claim in support of Sloan's theories of liability.

In *Bryant*, the plaintiff, personal representative of her deceased aunt's estate, alleged that the defendant nursing center was liable for her aunt's death.[6] One of the plaintiff's distinct negligence claims was that the defendant failed to provide "an accident-free environment" for her aunt.[7] On appeal, the Michigan Supreme Court characterized the plaintiff's claim as "an assertion of strict liability that is not cognizable in either ordinary negligence *or* medical malpractice."[8] Because "strict liability is inapplicable to either ordinary negligence or medical malpractice[,]" the Supreme Court held that the plaintiff's allegation stated no claim at all.[9]

In this case, in contrast to *Bryant*, Sloan alleged a claim of negligence, the test for which "is whether the defendant breached a duty that proximately caused an injury to the plaintiff."[10] On cross-examination, defense counsel did elicit testimony from Sloan's experts that any time a sexual assault occurs, it is due to negligence. However, a thorough review of the record reveals that the primary focus of Higgins' and Watson's testimony was that Chelsea Community Hospital violated the standard of care owed to Sloan under MCL 330.1708(2), which provides that "[m]ental health services shall be provided in a safe . . . environment." Thus, although defense counsel elicited testimony on cross-examination that sounded in strict liability, a review of Sloan's experts' testimony, in its entirety, reveals their opinion that, due to Chelsea Community Hospital's staff's negligence, Chelsea Community Hospital breached its duty of care to keep Sloan safe, which proximately caused her rape.

Viewing the evidence in a light most favorable to Sloan, granting Sloan every reasonable inference, and resolving conflicts in the evidence in Sloan's favor, we conclude that questions of fact existed regarding whether Chelsea Community Hospital breached a duty of care owed to

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[5] *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 425-426; 684 NW2d 864 (2004).

[6] *Id.* at 414.

[7] *Id.*

[8] *Id.* at 425 (emphasis in original).

[9] *Id.* at 426.

[10] *Id.*

Sloan and whether that breach proximately caused Sloan's injuries.[11] Factual questions existed regarding Chelsea Community Hospital's negligence upon which reasonable minds could differ.[12] Sloan did not allege a claim or offer a standard of strict liability, and the trial court properly denied Chelsea Community Hospital's motion for a directed verdict on that basis.

C. FORESEEABILITY

In moving for a directed verdict on the basis that it owed Sloan no duty due to unforeseeability, Chelsea Community Hospital characterized Sloan's claims as asserting that it "should have (1) predicted and (2) prevented [the rape]." Chelsea Community Hospital cited *Williams v Cunningham Drug Stores, Inc*,[13] for the proposition that generally there is no duty to protect a plaintiff against a third person's acts unless there is a special relationship between the plaintiff and the defendant, and that even if a special relationship exists, the duty is not absolute and does not extend to situations where the risk cannot be anticipated. Chelsea Community Hospital argued that because the rape was unforeseeable and unpredictable, a directed verdict was proper.

In *Williams*, the Michigan Supreme Court noted that "as a general rule, there is no duty that obligates one person to aid or protect another."[14] Moreover, there is "no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party."[15] "The rationale underlying this general rule is the fact that 'criminal activity, by its deviant nature, is normally unforeseeable.'"[16] However, there is "an exception to th[e] general rule where a special relationship exists between a plaintiff and a defendant."[17] "The rationale behind imposing a duty to protect in these special relationships is based on control."[18] "In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself[,]" and "[t]he duty to protect is imposed upon the person in control because he is best able to provide a place of safety."[19]

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[11] *Thomas*, 239 Mich App at 643-644.

[12] *Id*. at 644.

[13] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988).

[14] *Id.* at 499.

[15] *Graves v Warner Bros*, 253 Mich App 486, 493; 656 NW2d 195 (2002).

[16] *Id*., quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989).

[17] *Williams*, 429 Mich at 499.

[18] *Id*.

[19] *Id.*

However, the duty to protect is not absolute; "[i]t does not extend to conditions from which an unreasonable risk cannot be anticipated[.]"[20] "[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences."[21] "In order for negligence to be the proximate cause of an injury, the injury must be the natural and probable consequence of a negligent act or omission, which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as a result of his negligent act."[22] Courts in Michigan have long recognized that a third party's criminal acts can be foreseeable.[23]

Here, in the evening preceding the rape, Sloan's assailant violated hospital protocol by entering Sloan's room, and a mental healthcare worker informed him that he could not be in another patient's room. Sloan's experts testified that the mental healthcare worker should have further investigated the situation and that if he had done so, Sloan's rape could have been prevented. Had there been the requisite inquiry, the mental healthcare worker could have learned that, on the afternoon before the rape, Sloan's assailant stated on two separate occasions that he was going to come to Sloan's room and get into bed with Sloan or her roommate.

Therefore, viewing the evidence in a light most favorable to Sloan, granting Sloan every reasonable inference, and resolving conflicts in the evidence in Sloan's favor, we conclude that questions of fact existed regarding whether Sloan's assailant's criminal acts were foreseeable.[24] That is, questions of fact existed regarding whether an ordinary prudent person ought reasonably to have foreseen that a rape might probably occur as a result of failing to further inquire or investigate after a violation of hospital protocol occurred when Sloan's assailant was discovered in her room.[25] Accordingly, the trial court properly denied Chelsea Community Hospital's motion for a directed verdict on that basis.

III. RES IPSA LOQUITUR INSTRUCTION

Chelsea Community Hospital argues that the trial court erred in instructing the jury on res ipsa loquitur.[26] Chelsea Community Hospital did not properly present this issue for review

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[20] *Id*. at 500.

[21] *Dawe v Dr Reuven Bar-Levav & Assoc, PC* (*On Remand*), 289 Mich App 380, 393; ___ NW2d ___ (2010) (quotation omitted).

[22] *Id*. at 393-394.

[23] *Id*. at 394.

[24] *Thomas*, 239 Mich App at 643-644.

[25] *Dawe*, 289 Mich App at 393-394.

[26] MI Civ JI 30.05.

because it did not raise the issue in its appellate brief's statement of questions presented.[27] Therefore, we decline to consider this issue.[28]

IV. COLLATERAL ESTOPPEL

A. STANDARD OF REVIEW

Chelsea Community Hospital argues that the trial court erred in failing to endorse its argument that Sloan was collaterally estopped from litigating the issue of Chelsea Community Hospital's negligence in the trial court. We review de novo as an issue of law whether a party's claim is collaterally estopped.[29]

B. ANALYSIS

Following Sloan's rape, a licensed master social worker conducted a recipient rights investigation. The results of the investigation were set out in a recipient rights report that included a "decision" that there was no violation of Neglect Class I.[30] The Recipient Rights Appeals Committee for Washtenaw Community Health Organization upheld the findings, and the State Office of Administrative Hearings and Rules for the Department of Community Health affirmed the investigation in a "final order[.]"

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding."[31] "The ultimate issue in the second action must be the same as that in the first."[32] "The issue must have been necessarily determined—that is, essential to the resulting judgment—in the first action."[33] "It also must have been actually litigated—that is, put into issue by the pleadings, submitted to the

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[27] *Grand Rapids Employees Indep Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

[28] *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194 (2011).

[29] *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

[30] R 330.7001(i)(*i*) defines "Neglect Class I" as "[a]cts of commission or omission by an employee, volunteer, or agent of a provider that result from noncompliance with a standard of care or treatment required by law and/or rules, policies, guidelines, written directives, procedures, or individual plan of service and causes or contributes to the death, or sexual abuse of, or serious physical harm to a recipient." 1981 AACS, R 330.7001.

[31] *Bullock v Huster*, 209 Mich App 551, 556; 532 NW2d 202 (1995), vacated on other grounds 451 Mich 884 (1996).

[32] *Id*.

[33] *Id*.

trier of fact, and determined by the trier of fact."[34] "The parties must have had a full and fair opportunity to litigate the issue in the first action."[35] Further, where a defendant seeks to preclude relitigation on the basis of an administrative decision, three additional requirements must be met: (1) the administrative determination must have been adjudicatory in nature; (2) right to appeal must have been provided; and (3) the Legislature must have intended to make the decision final absent an appeal.[36]

In this case, there was no prior cause of action between the parties: there were no adversarial proceedings and the administrative decision was not adjudicatory in nature. The recipient rights report was precisely that—a report. Further, the report "decision" that there was no violation of Neglect Class I was a different issue than whether Chelsea Community Hospital was negligent under the legal meaning of the term.[37] And although the State Office of Administrative Hearings and Rules for the Department of Community Health affirmed the Chelsea Community Hospital Office of Recipient Rights investigation in a "final order," the administrative decision was not adjudicatory in nature: Sloan was not allowed to present testimony and there was no weighing of the evidence. Accordingly, Sloan was not collaterally estopped from litigating her negligence claim in the trial court.

V. EVIDENTIARY ISSUE

A. STANDARD OF REVIEW

Chelsea Community Hospital argues that the recipient rights report and final order should have been admitted into evidence. We review for an abuse of discretion a trial court's decision to admit or exclude evidence.[38] An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes.[39]

B. RECIPIENT RIGHTS REPORT

Chelsea Community Hospital argues that the recipient rights report was admissible under MRE 803(6) as a record of regularly conducted activity. The Michigan Supreme Court has held that reports prepared under circumstances of "highly probable civil and criminal litigation" lack the trustworthiness required for admissibility under MRE 803(6).[40] Where an alleged rape occurs in a controlled hospital setting, it is "highly probable" that civil and criminal litigation

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[34] *Id*.

[35] *Id*.

[36] *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

[37] See *Bryant*, 471 Mich at 426.

[38] *Dep't of Transp v Gilling*, 289 Mich App 219, 243; 796 NW2d 476 (2010).

[39] *Id*.

[40] *Solomon v Shuell*, 435 Mich 104, 127-128; 457 NW2d 669 (1990).

will result. Thus, the recipient rights report lacked the trustworthiness required for admission under MRE 803(6), the business records exception to the hearsay rule.[41] Although the trial court excluded the evidence on other grounds, we conclude that the trial court reached the correct result, and we affirm under alternative reasoning.[42]

C. FINAL ORDER

With respect to the final order, Chelsea Community Hospital argues that it was admissible under MRE 803(8) as a public record. However, neither party moved for the admission of the final report, and the trial court never considered the issue. Further, Chelsea Community Hospital abandoned its assertion of error regarding the final order by giving the issue cursory treatment with no citation of supporting authority, and by announcing its position and leaving it to this Court to discover and rationalize the basis for his claim.[43]

We affirm.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

[41] *Id.* at 128.

[42] *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

[43] *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).