

vital signs

DIAGNOSING THE CHANGING STATE OF MEDICAL MALPRACTICE & NURSING HOME LIABILITY

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Defending a Scalding Case

By Lisa Anstess

The Michigan Court of Appeals recently addressed a case involving a scald injury in an apartment building. This ruling may be applicable to nursing homes, assisted living facilities, etc. when unfortunate instances may occur, giving rise to claims of injury due to excessively hot water temperatures.

In this unpublished decision, *Price v. Hemphill Road Properties, et al*, (docket number 272808) the Court of Appeals was asked to evaluate the lower court's ruling dismissing the defendants on a summary disposition motion. This matter involved a scalding injury of a three year old in a bath tub, allegedly at the hands of Plaintiff's boyfriend. The Court of Appeals upheld the lower court's decision dismissing the defendant apartment complex and plumbing company, holding there was no admissible evidence of an unsafe condition related to the temperature of the hot bathtub water in Plaintiff's apartment. A police report indicated the water temperature was tested several hours after the incident and found to be 184 degrees. Plaintiff offered the report as proof of the water temperature, relying on Michigan Rules of Evidence (MRE) 803(8). The court held that the police report was not admissible under MRE 803(8) (A) also known as the public records exception, because that exception deals with "records and reports describing the general activities of an agency per se" and in this case, the report dealt with a single incident. *Solomon v. Shuell*, 435 Mich 104, 130: 457 NW2d 669 (1990). Further MRE 803 (B) applies only to "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Here, the temperature reading was deemed incidental to the general duty to investigate suspected criminal activity. The court further held that "a temperature reading is objective

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Nursing homes and assisted living facilities should take note of this case, despite the narrow focus. The BOCA plumbing code is treated as law and compliance suggests absence of a breach of duty. Further, if a police report is offered as evidence of the water temperature at the time of a scalding incident, careful attention should be drawn to whether the report could be challenged as inadmissible hearsay.

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only if the thermometer is properly calibrated and suitable for its purpose, and used according to reliable procedure. Plaintiff failed to establish this foundation. *Bradbury v. Ford Motor Co*, 419 Mich 550, 554; 358 NW2d 550 (1984).

The Court also held that Plaintiff failed to establish a breach of duty where the boilerplate installation was in compliance with the applicable Building Officials and Code Administrators (BOCA) plumbing code. The BOCA code has the force of law based on Michigan's statutory and regulatory scheme. Plaintiff theorized, but could not prove, that the zone valve had failed, thus permitting the water temperature to heat to excessive temperatures, and therefore defendants should have installed an anti-scald device to prevent this occurrence. The plumbing code in this case did not require installation of an anti-scald device as of the time of installation. Thus, plaintiff could not show the defendants' failure to install anti-scalding devices constituted a breach of a duty.

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