STATE OF MICHIGAN

COURT OF APPEALS

FRANCIS XAVIER STEELE, Guardian and Conservator for FRANCIS JEROME STEELE, Legally Incapacitated Person,

Plaintiff-Appellant,

v

AFC LABELLE and YVONNE STALLWORTH, d/b/a AFC LABELLE,

Defendants,

and

COMMUNITY CASE MANAGEMENT SERVICES, INC., NORTHVILLE REGIONAL PSYCHIATRIC HOSPITAL, BILLIE KIRK, MARIA I. CHOE, M.D., and WALTER G. BROWN, Ph.D.,

Defendants-Appellees.

UNPUBLISHED
May 26, 2000

No. 209683
Wayne Circuit Court
LC No. 96-612050-NO

FRANCIS XAVIER STEELE, Guardian and Conservator for FRANCIS JEROME STEELE, Legally Incapacitated Person,,

Plaintiff-Appellant,

v

NORTHVILLE REGIONAL PSYCHIATRIC HOSPITAL, BILLIE KIRK, MARIA I. CHOE, M.D., and WALTER G. BROWN, Ph.D.

Defendants-Appellees.

No. 209944
Court of Claims
LC No. 96-016443-CM

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right separate orders of summary disposition in favor of codefendants Northville Regional Psychiatric Hospital (herein, "Northville"), Maria Choe, M.D., and Walter Brown, Ph.D., and defendant Community Case Management Services (CCMS), dismissing plaintiff's negligence claims and his claims seeking relief for civil rights violations pursuant to 42 USC 1983.[1] We affirm.

I

Plaintiff's son Francis, a patient under Northville's care for psychiatric and substance abuse treatment, was severely injured in January 1995, when he became inebriated and rode a bicycle into the path of an automobile. The accident occurred only hours after Francis "walked away" from AFC LaBelle adult foster care home, where he was placed by CCMS upon his discharge from Northville. Plaintiff alleged that Francis, who had a history of mental illness, alcohol and marijuana dependence, and treatment failures, was improperly discharged from Northville following his involuntary hospitalization, and improperly placed into an adult foster care home, and that his "escape," subsequent inebriation, and injuries were foreseeable.

Co-defendants Northville, Choe, and Brown and defendant CCMS filed separate motions for summary disposition on various grounds: lack of personal jurisdiction, MCR 2.116(C)(1); lack of subject matter jurisdiction, MCR 2.116(C)(4); governmental immunity, MCR 2.116(C)(7); failure to state a claim, MCR 2.116(C)(8); and no genuine issue of material fact, MCR 2.116(C)(10). The trial court granted summary disposition for the reasons stated in defendants' briefs without specifying any particular basis with regard to the separate defendants.[2] Plaintiff appeals the orders of summary disposition on various grounds.

II

Plaintiff contends that the court erred in granting summary disposition because the negligence claims against codefendants Northville, Choe, and Brown (Docket No. 209944) are not barred by governmental immunity. The applicability of governmental immunity is a question of law, reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

The governmental tort liability act, MCL 691.1401 *et seq*.; MSA 3.996(101) *et seq*., provides for broad immunity from tort liability for governmental agencies engaged in governmental functions. *Glancy v Roseville*, 457 Mich 580, 584; 577 NW2d 897 (1998). MCL 691.1407(1); MSA 3.996(107)(1) provides::

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the

> exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

However, governmental immunity does not apply where the alleged action constitutes gross negligence, pursuant to MCL 691.1407(2); MSA 3.996(107)(2):

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency … shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

The term "governmental function" is to be broadly construed, and the statutory exceptions thereto are to be narrowly construed. *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998).

A

Northville is a state mental hospital, operated by the Michigan Department of Mental Health. A public mental health facility is immune from tort liability when engaged in a governmental function. MCL 691.1407(4); MSA 3.996(107)(4); *Dockweiler v Wentzell*, 169 Mich App 368, 376; 425 NW2d 468 (1988). Nevertheless, plaintiff contends that Northville is not entitled to governmental immunity because Northville was grossly negligent in its care of Francis. The gross negligence exception to immunity for tort liability applies only to governmental officers, employees, members and volunteers, and not to governmental agencies themselves. *Gracey v Wayne County Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled in part on other grounds *American Transmissions, Inc v Attorney General*, 454 Mich 135, 141-143; 560 NW2d 50 (1997). Accordingly, the gross negligence exception to governmental immunity is inapplicable to defendant Northville, and Northville was entitled to summary disposition of plaintiff's negligence claim.

B

Defendant likewise contends that the court erred in granting summary disposition in favor of Dr. Brown and Dr. Choe, Northville employees, on the basis of governmental immunity because their actions constituted gross negligence.[3] If reasonable minds could not differ regarding whether conduct constitutes gross negligence under MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), the issue may be determined by summary disposition. *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998); *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999). "Gross negligence" is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c); *Dedes v Asch*, 446 Mich 99, 110; 521 Mich 488 (1994); *Stanton, supra* at 374-375.

1

Plaintiff alleged that Brown, the director of Northville, was grossly negligent in allowing Francis to be placed in adult foster care three days after Northville's staff petitioned to extend Francis' involuntary commitment, when Francis was known to be a threat to himself and others. We find no actions by Brown in his supervisory capacity, which reasonable minds could conclude constituted "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Brown's mere authority to override the staff decision to place Francis in adult foster care is insufficient to establish that his failure to do so was gross negligence.

2

Plaintiff likewise alleged that it was gross negligence for Dr. Choe, Francis' treating physician, to allow Francis to be placed in adult foster care three days after an order extending Francis' involuntary commitment, which was based on Dr. Choe's findings that Francis was mentally ill and the knowledge that Francis was a threat to himself and others. The basis for Francis' involuntary hospitalization was that he could reasonably be expected to injure himself or others. MCL 330.1401; MSA 14.800(401). Michigan law requires that a patient who no longer meets the criteria of a "person requiring treatment" be discharged. MCL 330.1476; MSA 14.800(476). Although Francis' hospital records indicated his previous noncompliance with his treatment plan, Dr. Choe indicated, and the record supports a conclusion, that Dr. Choe had no expectation that Francis would endanger himself or others at the time he was discharged and placed with AFC LaBelle. At the time of his discharge, Francis was generally complying with his treatment plan and had agreed to refrain from using drugs or alcohol. There was no indication that he continued to be a threat to himself or others such that reasonable minds could conclude that the decision to place Francis into adult foster care demonstrated a substantial lack of concern for whether an injury results. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c); *Jackson, supra* at 150-151.

C

Because we conclude that summary disposition of plaintiff's negligence claims was properly granted on the basis of governmental immunity and the lack of evidence of gross negligence, the resolution of the issue of proximate cause is unnecessary. However, on this point as well, evidence is

lacking. *Jackson, supra* at 151-152. "Proximate cause includes an evaluation of the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences." *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 596; 546 NW2d 690 (1996). On the evidence presented, we find that reasonable minds could not differ in concluding that defendants' actions were not the proximate cause of Francis' injuries.

III

Plaintiff also contends that the trial court erred in granting summary disposition in favor of codefendants Northville, Brown and Choe with regard to his cause of action under 42 USC 1983. "Section 1983 provides a civil remedy to persons deprived of constitutional rights by individuals acting under color of state law." *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 74; 592 NW2d 724 (1999), quoting *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 65-66, 445 NW2d 61 (1989). A claim under § 1983 requires a party to show that (1) the complained-of conduct was committed by a person acting under color of state law, and (2) the conduct deprived the party of rights, privileges, or immunities secured by the United States Constitution. *Dowerk, supra* at 74. Plaintiff's § 1983 claims against codefendants Northville, Brown, and Choe alleged that their actions with regard to Francis constituted a deliberate indifference to his needs as an involuntarily committed mentally ill person. Defendant Northville moved for summary disposition of the § 1983 claim against it on the ground that it was not a "person" subject to liability under § 1983. Co-defendants Brown and Choe sought summary disposition of the claims against them on the grounds of insufficient personal involvement to establish liability under § 1983 and qualified immunity.

A

With regard to defendant Northville, we conclude that plaintiff's § 1983 action was properly dismissed because the state is not a proper defendant under the statute.

42 USC § 1983 provides:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [Emphasis added.]

"[T]he state and its officials, sued in their official capacities, are not persons under 42 USC § 1983." *Smith v Dep't of Public Health*, 428 Mich 540, 544, 581-582; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45

(1989); see also *Jones v Powell*, 227 Mich App 662, 668-669; 577 NW2d 130 (1998); *de Sanchez v Genoves-Andrews (On Remand)*, 179 Mich App 661, 670; 446 NW2d 538 (1989). Although plaintiff argues that the state consented to suit when it established the Court of Claims, the courts have implicitly rejected this argument. *Smith, supra*, at 551, 581-582; *de Sanchez, supra* at 665, 670.

B

With regard to codefendants Brown and Choe, we conclude that summary disposition of plaintiff's § 1983 claims was properly granted on the ground that plaintiff failed to show any conduct by defendants that violated Francis' constitutional rights, giving rise to a cause of action under § 1983. Deliberate indifference to a committed person's medical needs may give rise to a cause of action under § 1983. *Tobias v Phelps*, 144 Mich App 272, 277; 375 NW2d 365 (1985). To establish deliberate indifference, a plaintiff must show that defendants "either intentionally denied or unreasonably delayed treatment of a discomfort-causing ailment or wilfully failed to provide prescribed treatment without medical justification." *Id*. at 278. Mere negligence or medical malpractice is insufficient to establish deliberate indifference. *Id*. at 277. A claim of deliberate indifference necessarily implies that the defendant knew or should have known that the action was "wrong" or "unconstitutional." *Dampier v Wayne Co*, 233 Mich App 714, 739; 592 NW2d 809 (1999).

For the same reasons that we earlier found no gross negligence on the part of defendants Brown and Choe, we likewise conclude that plaintiff has failed to show any conduct to establish deliberate indifference to Francis' medical needs. Defendants provided medical treatment in accordance with Francis' diagnosis, and his discharge to an adult foster care home was legally required when Francis' treatment team determined that treatment was no longer required at Northville.

Moreover, a government official performing discretionary functions is entitled to qualified or good faith immunity if the action at issue does not violate clearly established statutory or constitutional rights, known to a reasonable person. *Guider v Smith*, 431 Mich 559, 565; 431 NW2d 810 (1988); see also *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000); *Gordon v Sadasivan*, 144 Mich App 113, 120-121; 373 NW2d 258 (1985). We conclude that to the extent that plaintiff's § 1983 claim is based on the allegation that Francis was improperly discharged, codefendants Brown and Choe are entitled to qualified immunity. The decision to discharge a person involuntarily committed to a mental health hospital is a discretionary decision, within the professional judgment of those charged with treatment. *Teasel v Dep't of Mental Health*, 419 Mich 390, 406-407; 355 NW2d 75 (1984). Plaintiff has shown no evidence to support a conclusion that the discharge violated clearly established statutory or constitutional rights of which a reasonable person would have known.

IV

Plaintiff contends that the trial court erred in granting summary disposition for defendant CCMS with regard to plaintiff's negligence claim (Docket No. 209683). We find that summary disposition was proper because plaintiff failed to establish that CCMS owed Francis any duty. "Where there is no duty, there can be no actionable negligence." *Ritter v Wayne Co General Hospital*, 174 Mich App 490, 493; 436 NW2d 673 (1988). Whether a relationship may give rise to a duty is a question of law to be decided by the court. *Id*. at 493-494.

Generally, there is no duty obligating one person to aid or protect another unless there is a special relationship between them or some special circumstance, *Murdock v Higgins*, 454 Mich 46,

54; 559 NW2d 639 (1997); *Hammack v Lutheran Social Services*, 211 Mich App 1, 4; 535 NW2d 215 (1995); *Bell & Hudson, PC v Buhl Realty Co*, 185 Mich App 714, 717; 462 NW2d 851 (1990), and the protected party is foreseeably endangered, *Murdock v Higgins*, 208 Mich App 210, 214-215; 527 NW2d 1 (1994), aff'd 454 Mich 46 (1997). With respect to the establishment of a special relationship between a victim and a governmental agency, some contact between the two and justifiable reliance by the victim on the promises or actions of the agency is required. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 459; 487 NW2d 799 (1992).

In the instant case, plaintiff contends that CCMS had a duty to review plaintiff's record and to intervene in the plan to discharge him to an adult foster care home. However, as CCMS notes, the decision to discharge a patient from a mental hospital is within the complete discretion of the patient's treating psychiatrist, here, Dr. Choe:

> Clinical psychiatric decisions regarding the admission, treatment and discharge of psychiatric patients in state mental hospitals *shall* be made by qualified state hospital physicians or appropriately credentialed psychiatrists granted state hospital staff privileges pursuant to section 245 [MCL 330.1245; MSA 14.800(245)]. [MCL 330.1104(3); MSA 14.800(104)(3) (emphasis added).]

CCMS was under no legal duty giving rise to a negligence cause of action where the ultimate decision to discharge plaintiff rested solely with Dr. Choe. Plaintiff has provided no evidence that CCMS had a duty to evaluate whether placement in AFC LaBelle was inappropriate or whether an alternative placement was more appropriate.

Moreover, on the facts of this case, we are convinced that summary disposition of plaintiff's negligence claim was proper on the ground that plaintiff failed to show that CCMS' acts were the proximate cause of plaintiff's injuries. As discussed, *supra*, the decision regarding plaintiff's placement was a discretionary one, vested in Northville's treatment team. In this case, several, unforeseeable intervening causes led to Francis' injury. Francis left AFC LaBelle despite his agreement to comply with treatment. He consumed alcohol despite his agreement not to do so. He went to his father's house in an inebriated condition, where he spoke with his father, took a bicycle, left, and was subsequently injured. These forces were not foreseeable, and, thus, summary disposition was proper as well, on the element of causation.

V

Plaintiff contends that the trial court erred in granting summary disposition for CCMS with regard to plaintiff's claim under 42 USC 1983. Because plaintiff failed to meet the prerequisites for a § 1983 action against CCMS, summary disposition of this claim was properly granted.

State action is a prerequisite to a cause of action under § 1983. *Lugar v Edmondson Oil Co*, 457 US 922, 929-935; 102 S Ct 2744; 73 L Ed 2d 482 (1982); *Ritter, supra* at 497. To determine whether state action is involved, an assessment is made regarding whether the party's actions were "fairly attributable to the state." *Lugar, supra* at 937; *Wolotsky v Huhn*, 960 F2d 1331, 1334-1335 (CA 6, 1992).

Plaintiff contends that because CCMS had a contract for Wayne County to perform a public service in conjunction with Northville, it was a state actor. CCMS is a private entity. "The actions of a private entity do not become state action merely because the government provides substantial funding to the private party or because the entity is subject to extensive state regulation." *Ritter, supra* at 497-498. CCMS had a contract to supervise placements such as plaintiff's. CCMS' social worker, Terry Gardner, testified that CCMS provided a recommended placement once Northville classified the level of care. In this case, although Francis was involuntarily committed to Northville, he waived his right to attend a hearing extending his commitment, shortly before his discharge. Plaintiff, his family, and his health care providers had complete discretion to agree or disagree with the placement, or seek their own facility. Under these circumstances, plaintiff has failed to show that CCMS was a state actor for purposes of maintaining an action against it pursuant to 42 USC 1983.

Even were we to find the requisite state action, we find no misconduct on the part of CCMS, which rises to the level of a clear violation Francis' constitutional rights to support a cause of action under § 1983, where, as discussed above, CCMS had no duty to intervene in Northville's discharge decision.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] Plaintiff filed separate actions in the Court of Claims and the Wayne Circuit Court. These actions were joined and heard in the circuit court.

[2] The parties stipulated to a dismissal of defendant Billie Kirk. A default judgment was entered February 6, 1998, against defendants AFC LaBelle and Yvonne Stallworth.

[3] To the extent that plaintiff argues a distinction between discretionary and ministerial actions of governmental officials, this argument is without merit. This distinction is no longer valid; the question is whether the employee's conduct constitutes "gross negligence." MCL 691.1407(2); MSA 3.996(107)(2); *Jackson, supra* at n 11; *Green v Berrien General Hosp Auxiliary, Inc*, 437 Mich 1, n 2; 464 NW2d 703 (1990).