

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF BRENT R. BOLTON, deceased, by
and through its personal representative, BEVERLY
WARNER,

Plaintiff-Appellee,

v

CENTER FOR FORENSIC PSYCHIATRY,
DAVID BARRY, A.C.S.W., and RITA GARG,
M.D.,

Defendant-Appellants.

UNPUBLISHED
February 18, 2010

No. 288979
Washtenaw Circuit Court
LC No. 06-000784-NO

Before: K. F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

This litigation action arises out of the suicide of Brent R. Bolton on July 25, 2003, when Bolton was incarcerated at the Center for Forensic Psychiatry (the Center) and was being treated by defendant Dr. Rita Garg, a psychiatrist, and defendant David Barry, a social worker. Plaintiff, the representative of the deceased's estate, brought suit alleging that defendants had violated Bolton's constitutional rights and had been grossly negligent. The lower court granted summary disposition for defendants and plaintiff now appeals as of right. We affirm.

I. Basic Facts

In December 2001, Bolton, who had a long history of mental illness and substance abuse, was incarcerated at the Center after he plead guilty by reason of insanity to a charge of fleeing and eluding a police officer. When he was admitted to the Center, he was diagnosed with bipolar disorder with psychotic features, was assessed as suffering from paranoid tendencies, and was eventually diagnosed with mixed personality disorder with dependent and borderline traits. Bolton also had suicidal thoughts and suffered from acts of self-injury. During his time at the Center, Bolton participated in both group and individual therapy sessions. Despite some improvement, Bolton told the staff that he was having suicidal thoughts in March 2002 and he

was placed on one-to-one suicide prevention, during which a staff member would be with Bolton at all times. In April 2002, Bolton tried to either injure himself or commit suicide by using a shoelace and by banging his head on a wall and was again placed on one-to-one prevention.¹

Sometime early in the summer of 2003, Bolton told Barry in an individual therapy session that he had committed acts of child sexual abuse in the past. Barry told Bolton that he was required by law to report the abuse to child protective services. Bolton reacted with sadness and was increasingly tearful, but admitted he felt guilty about the abuse and denied any suicidal thoughts. Barry reported the abuse to protective services in July 2003 and they indicated that the police would want to speak with Bolton. In a subsequent conversation with protective services, Barry requested that he be notified of when the police would interview Bolton so that a private location could be arranged.

On July 20, 2003, it was discovered that Bolton had scratched his arm with a broken cassette tape. As a result, Bolton was put on one-to-one suicide prevention. That same day, staff at the Center searched Bolton's room and surrounding area for contraband or other harmful items that he could use to harm himself or others. Garg removed Bolton from one-to-one prevention around 2 p.m. the next day, July 21, 2003, after assessing him and receiving input from staff members regarding Bolton's condition. Apparently, Bolton had been cooperative with the staff during the one-to-one prevention, had slept well throughout the night, and said that he felt better. Accordingly, Garg placed Bolton on "suicide alert," whereby staff at the Center would be particularly observant of Bolton and would check on him every 15 minutes. Garg also adjusted Bolton's medications in order to better control his symptoms. Bolton was quiet but cooperative during this time and he indicated that he would inform the staff if he wanted to injure himself. Bolton also participated in the unit's picnic, was cheerful at dinnertime, and was in a quiet but friendly mood.

The next day, July 22, 2003, Garg again assessed Bolton and noted that he was showing more control and had agreed to the changes in his medication. Thus, Garg removed Bolton from suicide alert and placed him on room restriction, the least restrictive precautionary measure. According to Garg's handwritten note, Bolton was following the staff's direction, was realistic about the impending investigation, and denied any intentions of suicide. Bolton had also indicated to Barry that Bolton would inform the staff if he had thoughts of harming himself and that he would attempt to attend group therapy, get involved in activities, and talk to the staff as a way of dealing with his sadness. On July 23, 2003, Bolton remained on room restriction. That same day, two state police officers arrived without informing hospital staff and interviewed Bolton from 5 p.m. to 6:15 p.m.

The next day, July 24, 2003, Barry spoke with Bolton about the interview. Bolton indicated that the police were nice and that he felt relieved having spoken to them. He also stated that he was worried about the consequences and being imprisoned for life. Barry assured him that there were many possible outcomes. Bolton denied any suicidal thoughts and stated that

¹ It is unclear from the record whether Bolton was removed from one-to-one prevention between March 2002 and April 2002.

he would talk to staff if he wanted to harm himself. Garg also spoke with Bolton and Bolton indicated to her that he felt better having spoken to the officers and he could now get some help with the issue. Bolton also indicated that he did not have any thoughts of hurting himself. Garg told Bolton that the room restriction would be continued and Bolton agreed.

A team treatment meeting was also held on July 24th, which both Barry and Garg attended. During the meeting, the staff discussed the fact that the police had interviewed Bolton the previous evening and that Bolton was likely to be upset about it. There was some discussion regarding whether to increase or decrease the precautionary measures and it was agreed that the room restriction remain in place. Thus, Bolton continued on room restriction. However, in the early morning of July 25, 2003, staff at the Center discovered that Bolton had passed away. He had hanged himself.

Plaintiff brought the instant action, asserting that defendants' actions violated the Eighth and Fourteenth Amendments, and also constituted gross negligence. Defendants moved for summary disposition and the trial court, ruling on the record, granted defendants' motion as to all of plaintiff's claims. This appeal followed.²

II. Standard of Review

We review a trial court's decision on a motion for summary disposition de novo. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 423; 766 NW2d 878 (2009). Because the trial court did not articulate which subrule it granted summary disposition under and because the trial court considered evidence outside the pleadings, we will consider the court's ruling to be based on a lack of material factual dispute. *Mitchell Corp of Owosso v Dep't of Consumer and Industry Services*, 263 Mich App 270, 275; 687 NW2d 875 (2004). A motion under MCR 2.116(C)(10) is properly granted if, after viewing all the admissible evidence submitted, including admissions, depositions, affidavits, and other documentary evidence, in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *City of Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008). A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *Amerisure Ins Co*, *supra* at 424.

III. 42 USC 1983

Plaintiff first argues that trial court erred by dismissing her § 1983 claim because defendants acted with deliberate indifference to Bolton's medical needs in violation of the Eighth Amendment. We disagree.

A § 1983 claim provides a remedy for violations of an individual's federal constitutional rights. *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). In order

² On appeal, plaintiff only raises arguments related to the Eighth Amendment and gross negligence.

to prevail on such a claim, a plaintiff must establish a violation of his or her constitutional rights caused by the complained of actions of government officials. *Id.* at 758.

Here, plaintiff's claim is premised on her allegation that defendants violated Bolton's Eighth Amendment rights. The Eighth Amendment of the federal constitution prohibits cruel and unusual punishments and provides prisoners with a right to be free from "deliberate indifference" to their serious medical needs. See *id.* To establish a violation of this right, a plaintiff must show (1) that the deprivation alleged was, objectively, sufficiently serious; and (2) the acts or omissions resulted in unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. *Farmer v Brennan*, 511 US 825, 834; 114 S Ct 1970; 128 L Ed 2d 811 (1994). With regard to this second element, it must be shown that prison officials had a culpable state of mind, one that is deliberately indifferent to inmate health. *Id.* Mere negligence does not amount to deliberate indifference. *Estelle v Gamble*, 429 US 97, 104; 97 S Ct 285; 50 L Ed 2d 251 (1976). Rather, "[d]eliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a known danger." *York, supra* at 757. In other words, to establish a violation of the Eighth Amendment, it must be shown that the "official knows of and disregards an excessive risk to inmate health or safety." *Farmer, supra* 837.

In the present matter, the trial court found that the deprivation, Bolton's death, was sufficiently serious. We take no issue with that conclusion. However, we cannot agree with plaintiff's contention that the trial court erred in finding that plaintiff failed to establish that defendants acted with deliberate indifference. It is plain from the record that defendants knew of Bolton's mental health condition and the risks associated with it, as well as his condition during the days leading up to his suicide. However, viewing the evidence in a light most favorable to plaintiff, it cannot be said that defendants disregarded the risks associated with his mental state. Rather, defendants took affirmative steps to guard against those risks. Bolton was placed on one-to-one prevention on July 20, 2003, after he injured himself with a broken cassette tape. Only after a period of observation by the Center staff and a re-assessment by Garg, was Bolton placed on suicide alert status the next day. Precautions were scaled back to room restriction on July 22, 2003, because Bolton continued to show signs of improvement. He was cooperative during this time, appeared to be in a quiet but friendly mood, consistently denied suicidal thoughts, and attended group activities. Moreover, he repeatedly indicated to staff throughout that time that he would inform them if he had thoughts of harming himself. Further, both Garg and Barry spoke with Bolton the day after the state police interview. Bolton again indicated to both Garg and Barry that he would inform the staff if he wanted to injure himself, denied any thoughts of suicide, and indicated that he felt relieved having spoken with the investigators. After Barry and Garg had made their assessments of Bolton, his condition was further discussed with staff on the same day, at a team treatment meeting, at which time defendants decided to keep Bolton on room restriction. Given the foregoing, we fail to see how defendants deliberately disregarded Bolton's medical condition. Their actions do not amount to a "conscious disregard of a known danger." *York, supra* at 757. Accordingly, plaintiff failed to establish a violation of Bolton's rights under the Eighth Amendment and the trial court properly dismissed plaintiff's § 1983 claim.

IV. Gross Negligence

Plaintiff next argues that the trial court erred by dismissing her claim for gross negligence. We disagree. Generally, government employees acting within the scope of their

employment, like defendants, are immune from tort liability. *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006). However, liability will attach if a government employee's actions constitute gross negligence that were the proximate cause of the injury. *Id.* To establish a claim of gross negligence, a plaintiff must show that the defendant's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results. *Id.* (citation and quotation marks omitted). An employee's gross negligence was the proximate cause of injury or damage if it was the "one most immediate, efficient and direct cause preceding injury." *Love v Detroit*, 270 Mich App 563, 565; 716 NW2d 604 (2006) (citation and quotation marks omitted).

Here, the evidence viewed in a light most favorable to plaintiff does not establish that defendants conduct constituted gross negligence. As already noted, defendants acted to affirmatively treat Bolton's condition. Their actions of placing Bolton on one-to-one prevention and gradually reducing the precautionary measures over the course of several days were in response to their observations of Bolton and Bolton's own statements denying suicidal thoughts. Given the foregoing, we fail to see how defendants' actions were willfully reckless and in disregard of any concern to whether an injury would result. Because plaintiff failed to establish that defendants were grossly negligent, it is not necessary for us to consider plaintiff's arguments related to proximate cause. Summary judgment on this claim was also proper.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Brian K. Zahra