IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andy Torres,	:	
Appellant	:	
	:	
v.	:	No. 2377 C.D. 2010
	:	Submitted: March 4, 2011
Nurse John and/or Jane Doe	:	
of the SCI-Greene Medical Dept.	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: August 2, 2011

Andy Torres appeals from the order of the Court of Common Pleas of Greene County (trial court) dismissing his medical malpractice complaint against Nurse John and/or Jane Doe of the Medical Department of the State Correctional Institution at Greene County. The trial court dismissed the complaint for the reason that it did not satisfy the medical malpractice exception to sovereign immunity. Finding that the trial court erred, we now reverse.

The complaint alleges that Torres is currently incarcerated at SCI-Greene. On March 4, 2010, he was placed in the prison's restricted housing unit (RHU). Consistent with prison policy, Torres was not permitted to take any property, including his asthma medication, with him to the RHU. As explained in the complaint, "the medical department clears any subsequent retention of medication possession or, in the alternative, in emergency situations, the medical

department may be notified and a nurse dispatched to the RHU to render treatment and/or authorize repossession of the needed medication." Complaint, ¶8.

The complaint explains that each cell in the RHU contains a medical emergency call button. Shortly after being placed in his cell, at 11:45 a.m., Torres began experiencing breathing difficulties, so he pressed the emergency button; the guard responded by contacting the prison medical department. Thirty minutes later, when no one from the medical department had arrived, Torres again informed the guard of his continued breathing problems. One hour later, Torres again reported his deteriorating condition. The guard responded that the medical department had been alerted several times. Sometime between 2:00 p.m. and 10:00 p.m., Torres suffered severe respiratory distress, chest pains, shortness of breath, and dizziness. He passed out and regained consciousness on the floor of his cell.

Along with this physical event, Torres also suffered mental anguish, caused by his fear that his death was imminent. The complaint alleges that the medical negligence of the medical department was the direct and proximate cause of his injuries.

On behalf of the defendants, the Office of Attorney General filed an answer to the complaint, denying any knowledge sufficient to admit or deny the allegations of the complaint and demanding strict proof at trial. In new matter, the Attorney General raised the defenses of sovereign immunity, improper notice, contributory negligence, intervening cause, assumption of the risk, statute of limitations, waiver, estoppel and laches.

Shortly thereafter, the trial court, *sua sponte*, issued an order dismissing the case.[1] The trial court held that Torres' action was barred by sovereign immunity; that the Attorney General had not received written notice of the complaint; and that Torres' claims were barred by contributory negligence. Torres appealed, and the trial court then issued a PA. R.A.P. 1925(a) opinion.

In its opinion, the trial court explained that it based its decision solely on sovereign immunity and not on the other reasons identified in its order. As to sovereign immunity, the trial court briefly explained that although medical professional liability is one of the exceptions to sovereign immunity, the exception can be invoked only where the injury arose directly from traditional medical services rendered to a patient. In support, the trial court cited generally to *Wareham v. Jeffes*, 564 A.2d 1314 (Pa. Cmwlth. 1989).[2] Because the complaint does not allege that medical services were rendered to Torres, the trial court held that Torres' action did not meet the medical professional exception to sovereign immunity.

In his appeal to this Court, Torres argues that his complaint should not have been dismissed, asserting that it falls within the medical professional

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[1] The trial court did not provide an explanation for dismissing the action *sua sponte*. Section 6602(e)(2) of the act commonly known as the Prison Litigation Reform Act, 42 Pa. C.S. §§6601-6608, permits a court to "dismiss prison conditions litigation at any time" where the "litigation is frivolous or malicious or fails to state a claim upon which relief may be granted or the defendant is entitled to assert a valid affirmative defense, including immunity, which, if asserted, would preclude the relief."

[2] The trial court did not provide any explanation as to why it believed *Wareham* supported the dismissal of Torres' complaint. In *Wareham*, this Court upheld a malpractice award based on the failure of the chief health care administrator of the prison infirmary to provide an inmate with treatment. Thus, *Wareham* apears to support Torres, not the Commonwealth.

exception to sovereign immunity.[3] The Attorney General does not respond to Torres' argument. Instead, he offers a one-page argument that this Court should affirm on another ground, *i.e.*, that Torres failed to comply with the Pennsylvania Rules of Civil Procedure by filing the mandatory certificate of merit. PA. R.C.P. No. 1042.3(a).[4] Torres did not file a certificate of merit "of any sort, or in any form either in, or with, his complaint, nor supply one by separate filing…." Attorney General Brief at 7. In response, Torres states that the Attorney General

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[3] Our scope of review of a trial court's dismissal of a complaint *sua sponte* for failure to state a valid cause of action is plenary. *McCool v. Department of Corrections*, 984 A.2d 565, 568 n.4 (Pa. Cmwlth. 2009), *petition for allowance of appeal denied*, 605 Pa. 677, 989 A.2d 10 (2010). When considering whether a plaintiff has failed to set forth a valid cause of action, we must consider all well-pled material facts and every inference fairly deducible from those facts as true. *Palmer v. Bartosh*, 959 A.2d 508, 512 n.2 (Pa. Cmwlth. 2008). We will sustain the trial court's determination "only in cases that clearly and without a doubt fail to state a claim upon which relief may be granted." *Id*.

[4] It provides, in relevant part:

> (a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either
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> (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
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> (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or
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> (3) *expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim*.

PA. R.C.P. No. 1042.3(a) (emphasis added).

raises a new issue that has not been preserved and, in any case, lacks merit. He notes that he did comply with Rule 1042.3(a) because the verification page of his complaint states as follows: "I further certify no expert testimony is needed." Verification, ¶ V.

Beginning with the issue raised by the Attorney General, and putting aside the question of whether that issue was preserved, we agree with Torres. A plaintiff may comply with Rule 1042.3(a)(3) by certifying that expert testimony is "unnecessary for prosecution of the claim." This is exactly what Torres did. Thus, the Attorney General's contention that Torres failed to comply with Rule 1042.3(a)(3) lacks merit.

We turn next to the issue raised by Torres, *i.e.*, whether the trial court erred in dismissing his complaint on grounds of sovereign immunity. Generally, the Commonwealth and its employees, "who are not high public officials … [when they act] within the scope of their employment and not in an intentionally malicious, wanton or reckless manner," are immune from suit in tort. *McCool,* 984 A.2d at 570. The General Assembly has waived sovereign immunity in certain limited circumstances. Torres claims that his lawsuit falls under the exception for medical malpractice as set forth in Section 8522(b)(2) of the Judicial Code, which states as follows:

> (b) The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:
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> * * *
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> (2) Medical-professional liability.-Acts of health care employees of Commonwealth agency medical facilities or institutions or by a

> Commonwealth party who is a doctor, dentist, nurse or related health care personnel.

42 Pa. C.S. §8522(b)(2). Torres has alleged negligent acts by the prison medical department, which has been held to be a "medical facility" within the meaning of Section 8522(b)(2) of the Judicial Code. *Wareham,* 564 A.2d at 1324. The trial court acknowledged this point. However, it concluded that because Torres' complaint did not allege that medical services were rendered negligently, the complaint did not satisfy the medical professional exception to sovereign immunity.

In order to state a cause of action for medical malpractice at common law the plaintiff must allege that (1) there was a duty owed to the patient; (2) the duty was breached; (3) the breach was a proximate cause of the harm suffered; and (4) the harm caused was directly related to the damages that were suffered. *Williams v. Syed*, 782 A.2d 1090, 1093-94 (Pa. Cmwlth. 2001). The trial court seems to reason that Torres failed to establish that a duty was owed because he did not receive any care. However, a failure to act can constitute medical negligence. *See Wareham*, 564 A.2d at 1321 (failure to provide reasonable medical care that the provider knew or should have known was necessary constitutes malpractice).

In *Wareham*, after an inmate was injured by other inmates, he initiated an action for damages against numerous parties and under several theories. His complaint included one count for negligent medical treatment by the chief health care administrator at the prison infirmary. After a jury verdict in the inmate's favor on the claim of inadequate medical treatment, the trial court granted a motion for judgment n.o.v., finding that the inmate failed to prove each element of his claim for negligent medical treatment. On appeal, this Court reversed, noting that the inmate had been prescribed physical therapy, which was medical treatment.

However, the prescribed treatment was not provided.[5] We concluded that it was reasonable for the jury to conclude that the chief health care administrator of the prison infirmary had a duty to provide reasonable medical care to the inmate and his failure to do so constituted medical professional negligence. *Id.*

Here, the complaint alleges that Torres was placed in the RHU without his asthma medication, *i.e.*, medically prescribed medication. Shortly thereafter, when he developed breathing difficulties, the prison medical facility was contacted, but no one responded, either by visiting Torres or authorizing the release of his asthma medication from the medical facility. At this stage in the proceeding, we must assume these facts are true. *Wareham* teaches that failing to provide a prescribed medical treatment can constitute medical professional negligence.

Likewise, in *Williams*, an inmate contended that a doctor prescribed a new medication to him and failed to monitor his condition thereafter. The inmate alleged that the medication lowered his blood pressure, causing him to faint and hit his head on the toilet in his cell. The trial court dismissed the complaint, finding that the inmate had failed to state a cause of action. On appeal, this Court concluded that a cause of action for medical malpractice had been established in the complaint because the doctor had a duty to evaluate the inmate after prescribing new medication. *Williams,*782 A.2d at 1094-95.

Here, the complaint alleges that Torres has been prescribed medication for asthma, which was taken from him and placed in the custody of the

[5] We further determined that expert testimony was not necessary to establish causation because "there are certain situations involving physical injury where it is possible for the jury to reasonably infer causation from the circumstances of an occurrence or accident." *Wareham,* 564 A.2d at 1321.

prison medical facility. Following the logic of *Williams*, if there is a duty to monitor an inmate after prescribing a new medication, there is at least arguably a duty to monitor an inmate whose prescribed medication has been removed.

The trial court's determination can only be upheld where it is clear and free from doubt that Torres has failed to state a cause of action. Giving Torres every inference fairly deducible from the facts alleged, we cannot conclude that the complaint "without a doubt" fails to state a cause of action.

Accordingly, the order of the trial court dismissing the complaint is reversed and the matter is remanded for further proceedings.[6]

MARY HANNAH LEAVITT, Judge

[6] The dissent disagrees, asserting that the conduct at issue was that of correctional officers, not health care professionals. However, this position disregards several important allegations in Torres' complaint.

To begin, the complaint states that a prisoner in RHU may not retain his medication unless "the medical department clears any subsequent retention of medication possession, or, in the alternative, in emergency situations, the medical department may be notified and a nurse dispatched to the RHU to render treatment and/or authorize repossession of the needed medication by a prisoner." Complaint, ¶8. The complaint also alleges that prison policy dictates that once the RHU corrections officer contacts the medical department, the medical department must immediately report to the RHU and render treatment. Complaint, ¶21. Thus, the complaint alleges more than conduct by corrections officers. It also alleges a negligent failure of the medical department to respond to Torres' respiratory distress, as required by the prison policy referenced in Paragraph 21 of the Complaint.

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O R D E R

AND NOW, this 2nd day of August, 2011, the order of the Court of Common Pleas of Greene County, dated September 29, 2010, is hereby REVERSED and the matter REMANDED for further proceedings.

Jurisdiction relinquished.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: August 2, 2011

Because any of inmate Andy Torres' (Torres) claimed injuries were not the result of the actions of health care individuals, I respectfully dissent from the majority's holding that the injuries fall within the medical-professional exception to sovereign immunity.[1]

[1] Section 8522(b)(2) of the act known as the Sovereign Immunity Act, 42 Pa. C.S. §8522(b)(2), provides as follows:

> (b) Acts which may impose liability.-The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:
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> ....

(Footnote continued on next page…)

In his complaint, Torres named as defendant(s) "Nurse John and/or Jane Doe" and alleged that an unknown and unnamed nurse(s) who may or may not have been at work on the day in question, failed to come to his cell in the restricted housing unit to provide him with treatment for his asthma. He alleges that when he was placed in the restricted housing unit, he was not permitted to take his asthma medication with him. He alleges that he had complained to three different corrections officers at three different times between noon and 1:40 p.m. that he was having trouble breathing, and each time he was told that the medical department was informed, but still no medical assistance arrived. Torres then alleges that at sometime between 6 p.m. and 10 p.m., he suffered a "complete respiratory failure," lost consciousness, and was "awakened off of his cell floor." This, he characterizes, as an instance of medical malpractice by the unknown nurse, falling within the exception to state sovereign immunity.

Relying primarily on *Williams v. Syed*, 782 A.2d 1090 (Pa. Cmwlth. 2001) (failure of doctor to monitor medication that caused inmate to faint and injure himself fell within the medical professional exception), the majority holds that "following the logic of *Williams*, if there is a duty to monitor an inmate after prescribing new medication, there is at least arguably a duty to monitor an inmate whose prescribed medication has been removed." (Slip Opinion at 7-8.)

(continued…)

> (2) Medical-professional liability.-Acts of health care employees of Commonwealth agency medical facilities or institutions or by a Commonwealth party who is a doctor, dentist, nurse or related health care personnel.

I disagree with the majority because all that Torres has alleged is that his medication was removed by corrections officers that caused his asthma attack. Because that conduct was not that of a health care professional engaged in professional conduct, it does not fall within the medical-professional exception. Torres' real complaint is not that the medical care he received was negligent, but that he received no medical care. Such conduct does not fall within the sovereign immunity exception because it is an institutional failure to provide care, not the negligent action of a health care professional, the only conduct that falls within the medical professional exception to immunity.

Accordingly, for the foregoing reasons, I respectfully dissent.

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DAN PELLEGRINI, JUDGE