IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ROGER RINGER, *Plaintiff/Appellant*,

v.

BANNER UNIVERSITY MEDICAL CENTER, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0193
FILED 2-6-2018

Appeal from the Superior Court in Pima County
No. C20163117
The Honorable Sarah R. Simmons, Judge

AFFIRMED

COUNSEL

Roger Ringer, Tucson
Plaintiff/Appellant

Slutes, Sakrison & Rogers PC, Tucson
By Kathleen M. Rogers
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kenton D. Jones and Judge James B. Morse Jr. joined.

H O W E, Judge:

¶1 Roger Ringer appeals the trial court's granting of summary judgment to Banner University Medical Center ("Banner"), Dr. Matthew Malone, and Dr. Dennis Weimer. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In June 2015, a Tucson police officer filed an Application for Involuntary Evaluation under A.R.S. § 36–520 alleging that Ringer was a danger to others, persistently or acutely disabled, unable to or unwilling to undergo a voluntary evaluation, and in need of supervision, care, and treatment. Based on this application, a physician and a Pima County attorney filed a Petition for Court-Ordered Evaluation under A.R.S. § 36–523 on June 24. Later that day, a Pima County superior court judge issued an Order for Evaluation under A.R.S. § 36–529(B), which required Ringer to be taken into custody and transported to Banner to undergo an evaluation. Ringer received a physical examination at Banner on June 26 at 10:32 p.m. and was admitted as an inpatient to the psychiatric ward.

¶3 From June 27 to June 29, multiple psychiatrists evaluated Ringer. On June 29, Ringer saw a psychiatrist, but he declined to participate in the evaluation and requested another provider. Dr. Malone, the Medical Director, received Ringer's request. Dr. Weimer subsequently became Ringer's attending psychiatrist. Dr. Malone and Dr. Weimer each conducted a Court Psychiatric Evaluation on Ringer on June 30. Drs. Malone and Weimer were both board certified in psychiatry by the American Board of Psychiatry and Neurology. In addition to working for Banner, both physicians were faculty members of the University of Arizona College of Medicine. While evaluating Ringer, both physicians were acting in the course and scope of their employment.

¶4 On July 1, Dr. Weimer and a Pima County attorney filed a Petition for Court-Ordered Treatment along with supporting affidavits from Drs. Malone and Weimer. A hearing on the petition was set for July 8, and Ringer continued to be assessed and evaluated until the date of the hearing. Drs. Malone and Weimer testified at the hearing. After the hearing, the court ruled that the evidence did not meet the clear and convincing standard to show that Ringer met the statutory standard for court-ordered treatment. Banner discharged Ringer on July 8.

¶5 A year later, Ringer filed suit on July 7, 2016, in which he alleged that Banner and Drs. Malone and Weimer violated his

constitutional rights under 42 U.S.C. § 1983 and various state laws, including false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, malicious prosecution, medical malpractice, failure to intervene, and fraudulent misrepresentation. Banner and Drs. Malone and Weimer moved for summary judgment and argued that the physicians could not be sued in their official capacities under § 1983 and that Banner could not be held vicariously liable for any claims against the physicians. They further argued that the physicians could not be held liable under § 1983 in their individual capacities because Title 36 involuntary commitments provided a reasonable degree of accuracy and no evidence was presented to show that the physicians breached the applicable standard of care. For the state law claims, they argued that they were judicially immune from suit because they were acting pursuant to a court directive, thereby making them part of the judicial process. Last, they argued that even if not judicially immune, the physicians were entitled to dismissal because Ringer did not file a notice of claim under A.R.S. § 12–821.01.

¶6 The trial court found that no genuine issue of material fact existed and that Banner and Drs. Malone and Weimer were entitled to summary judgment as a matter of law. The trial court found that Drs. Malone and Weimer could not be sued in their official capacities under § 1983. The court also found that Banner was not vicariously liable under § 1983 for the physicians and that Ringer had not shown that Banner had a custom or practice of violating § 1983. With respect to the § 1983 claims against the physicians in their individual capacities, the court found that the Arizona standards for commitment promised a reasonable degree of accuracy and that Ringer produced no evidence in the form of expert testimony to show that the physicians fell below acceptable standards in the medical profession. Thus, the court found that the physicians were entitled to qualified immunity regarding the claims brought against them individually. With respect to Ringer's claims under state law, the court found that the physicians acted within the scope of their employment and were acting under a judicial directive, and therefore, they were entitled to judicial immunity. The court further found that Ringer failed to file timely notices of claim against the physicians. Ringer timely appealed.

DISCUSSION

¶7 Ringer argues that the trial court erred by granting Banner and Drs. Malone and Weimer summary judgment on his federal and state

claims.[1] The granting of summary judgment is reviewed de novo, and the evidence and all reasonable inferences are viewed in the light most favorable to the nonmovant. *Villasenor v. Evans*, 241 Ariz. 300, 302 ¶ 9 (App. 2016).

1. Federal claims against Banner

¶8 Ringer argues that the trial court erred by dismissing his federal claims under § 1983. Section 1983 provides a right of action against a person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws[.]" 42 U.S.C. § 1983. "Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). "Unless otherwise restricted, states have concurrent jurisdiction with the federal courts to enforce rights created by federal law, including § 1983." *Baker v. Rolnick*, 210 Ariz. 321, 325 ¶ 18 (App. 2005). "Generally, federal laws control the substantive aspects of federal claims in state courts, including § 1983 claims." *Id.*

¶9 To establish liability under a § 1983 claim, a plaintiff must show (1) a deprivation of a right secured by the Constitution and laws of the United States, and (2) a person acting under color of state law committed the deprivation. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012). A private entity acting under color of state law sued for constitutional violations under § 1983 cannot be held liable based solely on a *respondeat superior* theory, and a plaintiff must show that the constitutional violation was caused by "a policy, practice, or custom of the entity[.]" *Id.* at 1138–39. In this case, Ringer did not present evidence showing that Banner had implemented a policy, practice, or custom that caused him injury. Furthermore, Banner cannot be held vicariously liable for Dr. Malone's or Dr. Weimer's actions.

¶10 Ringer counters that he demonstrated that Banner had a custom of allowing its employees to violate its patients' constitutional protections. As support for this assertion, he states that the Banner physicians acted together to unlawfully confine him. The record shows, however, that Banner and the physicians were following a court order and

[1] In his opening brief, Ringer lists as issues whether (1) a different lower court judge should be assigned if the case is reversed and remanded and (2) the award of attorneys' fees should be reversed. Because we affirm the trial court's order below, the changing judges issue is moot and the court's awarding of attorneys' fees is appropriate.

abided by the procedure set forth in Title 36. Thus, the actions that Banner and the physicians took were not performed pursuant to a custom established by Banner, and the trial court appropriately granted summary judgment for Banner.

2. Federal claims against Dr. Malone and Dr. Weimer

¶11 Next, Ringer argues that the trial court improperly gave Drs. Malone and Weimer qualified immunity on the federal claims brought against them individually.[2] Due process generally precludes the involuntary commitment of a person who is not both mentally ill and dangerous to oneself or others. *Jensen v. Lane Cty.*, 312 F.3d 1145, 1147 (9th Cir. 2002). To demonstrate a due process violation in cases of short-term involuntary commitments, however, the plaintiff must show that (1) the state's involuntary commitments are not "made in accordance with a standard that promises some reasonable degree of accuracy[]" and (2) the physicians did not follow "the standards of the medical profession in making their judgments about holding a person for evaluation." *Id.* Arizona's commitment statutes under Title 36 are presumed constitutional, and a party challenging their constitutionality must prove beyond a reasonable doubt that they are unconstitutional. *See Duarte v. State*, 193 Ariz. 167, 169 ¶ 4 (App. 1998). Because Ringer had not satisfied both prongs, the trial court appropriately found that the physicians had qualified immunity.

¶12 For the first prong, Banner and the physicians were required to abide by Arizona's commitment statutes under Title 36. Arizona Revised Statutes section 36–531(D) provides that a person being evaluated shall be released within 72 hours, excluding weekends and holidays, unless a petition for court-ordered treatment has been filed under A.R.S. § 36–531(B). Banner and the physicians admitted Ringer on Friday, June 26, at 10:32 p.m., and the 72-hour deadline would have expired at 10:32 p.m. on Wednesday. The petition for court-ordered treatment was filed with the trial court on Wednesday, July 1, during working hours. As such, the Title 36 requirements were met. As for the constitutionality of Arizona's involuntary commitment statutes, Ringer has not shown that they are

[2] The trial court ruled that Drs. Malone and Weimer could not be sued in their official capacities. Ringer did not raise this issue in his appellate brief, and it is therefore waived. *See Dawson v. Withycombe*, 216 Ariz. 84, 100 n.11 ¶ 40 (App. 2007).

facially insufficient to meet the requirements of due process. Thus, this prong has not been satisfied.

¶13 Ringer attempts to counter this finding by stating that Banner and the physicians failed to comply with A.R.S. §§ 36–524, –526, –529, –533. The application for involuntary commitment in this case was made under A.R.S. § 36–520, and A.R.S. § 36–524 simply provides a separate way a person can be involuntarily committed. *Compare* A.R.S. § 36–520 (application requiring a court order for an evaluation) *with* A.R.S. § 36–524 (application for an evaluation can be made to a hospital's admitting officer without a court order). Likewise, A.R.S. § 36–526, which discusses a different manner to obtain a court-ordered evaluation, was not implicated in this case. Instead, a court-ordered evaluation was obtained through A.R.S. § 36–520.

¶14 Regarding A.R.S. § 36–529, Ringer argues that the petition for court-ordered evaluation did not show that "probable cause" was present to screen him. The statute, however, only requires "reasonable cause," which is a lower standard than probable cause. A.R.S. § 36–529(B). After reviewing the petition, this Court finds that the facts alleged in the petition support the trial court's finding of reasonable cause. Ringer also argues that Banner and the physicians violated A.R.S. § 36–529(D) because the mental health defender's office received notice of his commitment four days after being taken to Banner. In his own briefing, however, Ringer notes that this allegation is not in the record. Arguments raised for the first time on appeal are untimely, and thus, this argument is deemed waived. *See Turtle Rock III Homeowners Ass'n v. Fisher*, 243 Ariz. 294, 296 ¶ 9 (App. 2017).

¶15 Ringer also argues that the physicians did not comply with A.R.S. § 36–533(B) because they failed to describe in detail the behavior indicating that he was a danger to himself or others or had a persistent or acute disability. Section 36–533(B) requires a petition for court-ordered treatment to be accompanied by affidavits from two physicians who participated in the evaluation, which describe in detail the behavior requiring treatment. In support of this argument, Ringer submitted in his motion for reconsideration to the trial court a partial transcript of the July 8 hearing and moved this Court to adopt the remaining part of the transcript. Section 36–533(B) concerns only the physicians' affidavits, however, and therefore, the transcript is irrelevant. The record shows that the petition was accompanied by Dr. Weimer's and Dr. Malone's affidavits stating in detail their findings concerning Ringer. As such, they complied with A.R.S. § 36–533(B).

¶16 Next, Ringer argues that A.R.S. § 36–540(A) supports his assertion that he was free to reject treatment without consequence if the evidence did not show by clear and convincing evidence that he was a danger to himself or others. Section 36–540(A) provides possible treatment options that the court may order after finding clear and convincing evidence of dangerousness. In this case, Banner immediately discharged Ringer after the court determined that clear and convincing evidence was lacking. Thus, this statute was not implicated.

¶17 The second prong in this case required evidence showing that Drs. Malone and Weimer failed to follow the standards of the medical profession. Generally, the standard of care for medical professionals must be established by expert medical testimony. *Seisinger v. Siebel*, 220 Ariz. 85, 94 ¶ 33 (2009); *see also Rasor v. Northwest Hosp., LLC*, 243 Ariz. 160, 163 ¶ 12 (2017) ("Unless malpractice is grossly apparent, the standard of care must be established by expert medical testimony."). Ringer did not present any expert testimony that the physicians fell below any generally acceptable standards of the mental health profession. Thus, Ringer failed to satisfy this prong.[3] Therefore, the trial court appropriately found that Drs. Malone and Weimer were entitled to qualified immunity with respect to the claims brought against them individually.[4]

3. State claims

¶18 Ringer argues that the trial court erred by finding that Banner and the physicians were entitled to judicial immunity and were also entitled to notices of claim that Ringer failed to timely file. Under judicial immunity,

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[3] Ringer also argues that a genuine issue of material fact existed regarding the reasonableness of the physicians' conclusions. As stated, however, Ringer needed to present expert testimony to question the physicians' acts. Because Ringer failed to do so, the trial court properly concluded that no genuine issue of material fact existed about the physicians' actions.

[4] Relying on A.R.S. § 36–530(B), which states that a person being evaluated must be released within 72 hours, Ringer also claims that Drs. Malone and Weimer could not claim immunity because they petitioned the trial court to "confine" him. Arizona Revised Statutes section 36–531(D), however, allows a person to be kept longer than 72 hours with a petition for court-ordered treatment. Furthermore, Ringer provides no analysis why the physicians' petition would deny them immunity, and therefore this argument is without merit.

judges are not liable for damages for their judicial acts. *Acevedo by Acevedo v. Pima Cty. Adult Prob. Dep't*, 142 Ariz. 319, 321 (1984). Judicial immunity has been expanded to protect mental health professionals who have been appointed by the court to assist in a judicial process. *Lavit v. Superior Court*, 173 Ariz. 96, 99 (App. 1992). In *Lavit*, the family court ordered the parties to contact a psychologist to assist in resolving child custody. *Id.* at 97. Afterwards, one of the parties brought an action against the psychologist, and the case was dismissed without comment. *Id.* at 98. On appeal, the court concluded that the psychologist was entitled to absolute immunity for his role in the child custody determination. The court reasoned that the psychologist's activities were protected because "(1) at least to some extent, his evaluations and recommendations aided the trial court in determining child custody, and (2) his services were performed pursuant to a court order." *Id.* at 101.

¶19 Here, the court's order required Banner to evaluate Ringer, and Banner's employees, Drs. Malone and Weimer, carried out the order. Their evaluations aided the court in determining whether Ringer should undergo treatment, and they acted pursuant to court order. Therefore, they were entitled to judicial immunity. Because the trial court appropriately found that judicial immunity applied and dismissed the state claims as a result, we need not address the notice of claim issue.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
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