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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/14/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

BARBARA PATTERSON, on behalf of) 1 CA-CV 10-0451
herself and as the surviving)
mother and personal) DEPARTMENT C
representative of the Estate of)
AARON PATTERSON, deceased,)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
v.) (Not for Publication -
STATE OF ARIZONA, a political) Rule 28, Arizona Rules of
entity; ARIZONA DEPARTMENT OF) Civil Appellate Procedure)
CORRECTIONS, an agency of the)
State of Arizona,)
Defendants/Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-006788

The Honorable John A. Buttrick, Judge

REVERSED AND REMANDED

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K E S S L E R, Judge

¶1 Barbara Patterson appeals from the trial court's decision granting summary judgment to the State of Arizona in her negligence claim arising out of the circumstances of her son's suicide while an inmate in the custody of the Arizona Department of Corrections ("ADOC"). The court found that res judicata precluded Patterson's claims in this action after a judgment was entered in a second action she filed against the individual defendants whose conduct was the basis of the vicarious liability asserted against the State here. We find that res judicata does not preclude Patterson's action. We reverse the judgment of the trial court and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Aaron Patterson, while an inmate in the custody of the ADOC, committed suicide on May 12, 2005. Patterson, Aaron's mother, filed this action ("*Patterson I*") in Maricopa County Superior Court on May 9, 2006, against the State of Arizona, the ADOC, and John and Jane Doe correctional officers and healthcare providers. The complaint alleged that Aaron had a history of mental illness including suicidal tendencies, that during his first year of incarceration he showed symptoms of mental deterioration, and that at the time of the incident he was

supposed to be on suicide watch and checked on every thirty minutes. The complaint contended that he was not checked at all during the eighteen hours before his body was discovered at shortly after 8:00 a.m. on May 12. The complaint contended that defendants provided Aaron with inadequate supervision, treatment, and care and were deliberately indifferent to Aaron's need for those services.

¶3 The complaint asserted claims for negligence or gross negligence, and wrongful death. Patterson contended that the defendants breached their duty of care to Aaron by failing to check on him while he was on suicide watch, and that the State was liable for its employees' actions under the doctrine of respondeat superior. Patterson also contended that defendants were negligent or grossly negligent for failing to implement appropriate policies and procedures regarding mentally ill inmates, for failing to train employees that would come in contact with mentally ill inmates, and for not properly supervising those employees. On January 7, 2007, Patterson filed an amended complaint, adding as a third count a claim for discrimination under the Arizona Civil Rights Act.

¶4 On May 11, 2007, Patterson filed a second suit, *Patterson v. Shaw*, CV2007-008436, in Maricopa County Superior Court. The second suit ("*Patterson II*") asserted civil rights violations pursuant to 42 U.S.C. § 1983 against various

employees of the ADOC in their individual capacities. The complaint alleged in part that more than thirty minutes passed between the time Aaron was first found breathing and nonresponsive and when he was taken to the medical unit where he was found to be in full arrest and thereafter died. The complaint alleged violations of Aaron's rights under the Eighth and Fourteenth Amendments of the U.S. Constitution. On August 2, 2007, the defendants in *Patterson II* removed that case to federal court.

¶15 On September 22, 2009, the federal district court in *Patterson II* granted the defendants' motion for summary judgment. In a lengthy order, the court described the factual circumstances of Aaron's death, noting that Aaron had a history of mental illness, that at various times during his incarceration he was on suicide watch or mental health watch, and that in the hours before his death he was on mental health watch and was observed accordingly. In the hours before his death, at about 6:50 a.m., Aaron was observed to be lying quietly in his cell, breathing and resting quietly and not showing signs of distress. Later, officers attempted but were unsuccessful in getting Aaron's attention, but still believed he was sleeping. Staff exhausted protocol efforts to get a response from Aaron, such as calling his name, banging on the cell and spraying him with water. Medical staff was called, and

staff continued to try to get a response from Aaron. Staff was directed to wait for the Deputy Warden before attempting to extract Aaron from his cell. Staff used a water cannon on Aaron to elicit a response, without success. At 8:36 a.m., staff entered Aaron's cell and removed him, and he was taken to the Health Unit at 8:39 a.m. He was pronounced dead at 8:43 a.m.

¶16 The court noted that to succeed on an Eighth Amendment claim, the plaintiff had to prove that the individual defendant caused acts or omissions sufficiently harmful to show deliberate indifference to serious medical needs and that the deliberate indifference was the legal cause of the violation of the inmate's Eighth Amendment rights. The court further explained that deliberate indifference was viewed from the defendant's subjective viewpoint, and required that the defendant know of and disregard an excessive risk to the inmate's health. The court found that the plaintiff had not demonstrated deliberate indifference in part because of the testimony of the defendants that they believed Aaron was breathing when he was observed and they did not recognize the existence of a medical emergency. The court granted summary judgment in favor of the defendants. Judgment was entered November 3, 2009.

¶17 In *this case*, the State moved for summary judgment on issue and claim preclusion based on the *Patterson II* judgment.

The State argued that the judgment rendered by the federal court in *Patterson II* precluded this action. The State argued that the claims in *Patterson I* and *Patterson II* were identical because they shared the same "nucleus of facts" and that the State was in privity with its employees who were the successful defendants in *Patterson II*.

¶18 Alternatively, the State argued that issue preclusion applied, resulting in the factual issues being resolved in favor of the State. The State noted that the *Patterson II* judgment stated that Aaron had been placed on a mental health watch requiring checks every thirty minutes, that he was in fact timely checked in the hours before his death and appeared to be quiet and sleeping, that no one observed Aaron placing anything in his mouth or observed any signs that he had been choking or struggling for breath, and the medical examiner determined that the toilet paper Aaron had pushed down his own throat would not have been visible without a tool such as a laryngoscope. The State argued that Patterson's claim was that the State's employees had breached their duty of care to Aaron by failing to check on him during the period preceding discovery of his body at approximately 8:12 a.m. on May 12, 2005, but the District Court judgment found no evidence that anyone had observed Aaron in distress at any time, despite having checked on him. The State also asserted that it enjoyed absolute immunity from any

claim that its policies for the treatment and care of mentally ill inmates were inadequate because such policies were enacted as a fundamental governmental policy.

¶19 Patterson argued that she was not precluded from maintaining her state law negligence claim by the federal court decision. She contended that the issue in the federal court case was the violation of constitutional rights, involving a standard of "deliberate indifference" viewed from the perspective of the defendant; it was not concerned with general negligence as was claimed in *Patterson I*. She further argued that the State, the defendant in *Patterson I*, was not a defendant or in privity with the individual defendants in *Patterson II*. She noted that in its order the federal court distinguished between claims against the individual defendants and those pertaining to policy matters to be addressed against the State. Patterson conceded that the judgment in *Patterson II* precluded her from proceeding with any claims against the State or its employees based on deliberate indifference or intentional conduct, but maintained that she was not precluded from pursuing claims for ordinary negligence or gross negligence. The court granted the State's motion for summary judgment on the grounds of res judicata, and entered judgment in favor of the State. Patterson timely appealed.

DISCUSSION

¶10 Summary judgment may be granted when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

I. Res Judicata Does Not Bar the Claim.

¶11 Res judicata does not bar Patterson’s claim because the State was not in privity with the individual defendants. Because the prior judgment was issued by a federal court, federal law dictates the preclusive effect of that judgment. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, 69, ¶ 13, 127 P.3d 882, 887 (2006). Res judicata applies when the earlier suit “(1) involved the same ‘claim’ or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies.” *Howell v. Hodap*, 221 Ariz. 543, 546, ¶ 17, 212 P.3d 881, 884 (App. 2009) (quoting *Mpoyo v. Litton Electro-*

Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005)). "Privity" with respect to claim preclusion "is a legal conclusion 'designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.'" *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997).

¶12 The defendants in *Patterson II*, although employees of the State, were named in their individual capacities. Federal courts have repeatedly found that government employees sued in federal court in their individual capacities are not in privity with their government employer. See *Conner v. Reinhard*, 847 F.2d 384, 394-95 (7th Cir. 1988) (prior federal suit against government entity did not preclude suit against entity's officials in their personal capacities because they are not in privity); *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987) (holding that federal Title VII judgment against government entity did not bar § 1983 claim against officials in their individual capacities because officials lack privity with government); *Willner v. Budig*, 848 F.2d 1032, 1034 n.2 (10th Cir. 1988) (same).

¶13 Moreover, the State was not subject to liability in the § 1983 case. It could not have been made liable directly, see *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) nor could it have been found vicariously liable based on

any § 1983 violations by the defendants, see *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). The State therefore did not share an identity of interest with the individual defendants. Because the State lacked privity with the individual defendants in *Patterson II*, we find that claim preclusion does not bar the current action.¹

¶14 The State contends that it is in privity with its officials because they share the relationship of principal and agent, relying on *Spector v. El Rancho, Inc.*, 263 F.2d 143 (1959). *Spector*, by its terms, applies only when the judgment in favor of one party is rendered in terms equally applicable to both. *Id.* at 145. This rule only applies when the legal interests of each party will be similarly affected by the outcome of a proceeding. *Rucker v. Schmidt*, 794 N.W.2d 114, 120 (Minn. 2011) (declining to rely on *Spector* to establish privity). As we discussed, *supra*, ¶ 12, the State could not possibly have been liable in *Patterson I*. Therefore, we reject the State's contention that its agency relationship with its officers creates privity in this context.

¹ Patterson also argues that the State had acquiesced in Patterson's filing the second suit by not agreeing to consolidate the two actions and by removing *Patterson II* to federal court. Because we find that claim preclusion is inapplicable based on lack of privity, we do not address Patterson's "acquiescence" argument.

II. Collateral Estoppel Does Not Completely Bar the Claim.

¶15 The State argues that even if claim preclusion does not apply, summary judgment was properly granted because, under the defensive use of issue preclusion all material issues have been determined by the judgment in *Patterson II* and the State is therefore entitled to judgment in *Patterson I*.

¶16 Federal law determines whether issue preclusion applies based on the federal judgment. *Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson*, 211 Ariz. 485, 491, ¶ 37, 123 P.3d 1122, 1128 (2005). Under defensive issue preclusion, a defendant attempts to preclude a plaintiff from relitigating an issue that the plaintiff has previously unsuccessfully litigated against another defendant. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). The party asserting the bar must show that "(1) the issue was litigated to a conclusion in a prior action, (2) the issue of fact or law was necessary to the prior judgment, and (3) the party against whom preclusion is raised was a party or privy to a party to the first case." *Robertson*, 211 Ariz. at 491-92, ¶ 39, 123 P.3d at 1128-29 (citing *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980)).

¶17 The issue before the district court was whether the individual defendants had violated Aaron's Eighth Amendment right against cruel and unusual punishment and his Fourteenth Amendment right to due process. To show such violations, a

plaintiff must demonstrate that the defendants each acted with deliberate indifference to the inmate's medical needs. *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1187 (9th Cir. 2002). The plaintiff must show that the defendants actually knew of and disregarded an excessive risk to the inmate's health and safety. *Id.* It is not enough that the defendants should have known of a risk. Moreover, the state of mind of the defendant is viewed from the defendant's subjective viewpoint. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

¶18 Deliberate indifference is a more stringent standard than negligence or gross negligence. *Borello v. Allison*, 446 F.3d 742, 749 (7th Cir. 2006). The negligence or gross negligence of the defendants was not litigated. The district court did not make any findings or rulings regarding the negligence or gross negligence of any of the defendants. The district court in *Patterson II* concluded that Patterson had not demonstrated that any of the individual defendants had acted with deliberate indifference. Consequently, the court found no violation of either the Eighth Amendment or the Fourteenth Amendment.²

² A due process violation requires a showing that the conduct "shocks the conscience," which is a higher standard than "deliberate indifference." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008) Having concluded that Patterson failed to demonstrate deliberate indifference, the district court concluded as a matter of law that she failed to show that the

¶19 The State argues that the district court case demonstrated that Aaron was observed in accordance with the mental health watch imposed and that no one observed Aaron in any distress. The court's finding, that the defendants believed Aaron was not in distress, however, was based on the subjective standard of deliberate indifference. It does not establish that the defendants were not negligent in that belief and therefore in their conduct. The State further argues that the district court recounted that, in an earlier class action suit, the district court had found that the mental health policies in place did not violate the Eighth Amendment. Despite the district court's recounting of the earlier ruling, the propriety of the mental health policies in place was not litigated in *Patterson II*. *Patterson II* concerned only whether the individual defendants violated Aaron's Eighth and Fourteenth Amendment rights. The ruling in *Patterson II* does not bar Patterson from pursuing her negligence and gross negligence claims in superior court.

conduct complained of "shocked the conscious" and so failed to show a Fourteenth Amendment violation.

CONCLUSION

¶20 For the foregoing reasons, we reverse the judgment of the superior court and remand for further proceedings consistent with this decision.³

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

MICHAEL J. BROWN, Judge

³ The State has also argued that partial summary judgment would have been proper on the issue of the absolute immunity of its policy making process. While we affirm on any basis supported by the record, we decline to consider this claim because it would not completely dispose of the claim regardless of its merit.