19-P-421 Appeals Court

MICHAEL EARIELO vs. KAYLA C. CARLO & another.[1]

No. 19-P-421.

Worcester. March 9, 2020. - July 23, 2020.

Present: Green, C.J., Hanlon, & Neyman, JJ.

Practice, Civil, Summary judgment, Civil rights. Governmental Immunity. Immunity from suit. Nurse. Civil Rights, Availability of remedy. Imprisonment. Constitutional Law, Imprisonment.

Civil action commenced in the Superior Court Department on May 6, 2013.

The case was heard by Jane E. Mulqueen, J., on a motion for summary judgment.

Andrew J. Abdella, Special Assistant Attorney General, for the defendants.
Hector E. Piñeiro for the plaintiff.

NEYMAN, J. The plaintiff, Michael Earielo, brought this action under 42 U.S.C. § 1983 (2000) seeking damages for the alleged violation of his Federal constitutional rights while he

[1] Sheila M. LaPointe.

was a pretrial detainee at the Worcester County jail and house of correction (jail). Kayla Carlo and Sheila LaPointe, licensed practical nurses (defendants or nurses), appeal from the denial of their motion for summary judgment predicated on qualified immunity.[2] We affirm.[3]

Facts. Although the defendants dispute the plaintiff's version of events, we view the facts of record in the light most favorable to the nonmoving party (i.e., the plaintiff), as required by the summary judgment standard.[4] See, e.g., Sea

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[2] This interlocutory appeal is properly before this court under the doctrine of present execution. See Maxwell v. AIG Dom. Claims, Inc., 460 Mass. 91, 98 (2011) ("[p]resent execution applies because the question of immunity is collateral to the merits of the case and because immunity from suit entitles a party to avoid not only liability but also the burden of the litigation").

[3] Various claims against the codefendant doctor and physician's assistant survived an earlier summary judgment motion. A claim against the Commonwealth under G. L. c. 258 was dismissed.

[4] In support of their motion for summary judgment, the defendants filed a statement of undisputed material facts. The plaintiff filed a response to the statement of undisputed material facts. See Rule 9A(b)(5)(ii) of the Rules of the Superior Court (2017). In addition, the plaintiff filed a thirty-eight page "statement of additional undisputed material facts in opposition to [the defendants'] motion for summary judgment" (additional statement), consisting of 272 paragraphs, as authorized by the version of Rule 9A(b)(5)(iv) of the Rules of the Superior Court (2017) then in effect. The defendants did not file a timely response to the plaintiff's additional statement, nor did they move to strike any portion thereof. Thus, pursuant to rule 9A(b)(5)(iv), the judge was entitled to deem those facts admitted for purposes of summary judgment. See rule 9A(b)(5)(iv) ("For purposes of summary judgment, the

Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 215 (2018).

In the days leading up to his arrest, the plaintiff used heroin intravenously. He arrived at the jail on June 1, 2010, complaining of "dope-sickness." He was placed in the detoxification ward of the infirmary. Upon his arrival, he had no back pain. The protocol required the nursing staff to administer certain prescribed medications and monitor him.

The next day, the plaintiff complained to a "young skinny nurse" (Carlo) about the onset of sharp back pain as well as difficulties walking and standing.[5] He also lost his appetite that day. His medical records, however, did not make any references to any of his complaints. Carlo suggested that sleeping on the cement floor of the Worcester police station the prior evening "could be the cause of the back pain." Despite a medical order that the plaintiff's vital signs be taken every shift, only one set was taken that day.

When, on the morning of June 3, the plaintiff reported that his back pain had increased, Carlo purportedly responded,

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opposing party's additional statement of a material fact shall be deemed to have been admitted unless controverted as set forth in this paragraph"); Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 399-401 (2002).

[5] Carlo was in her twenties at the time, and matched the plaintiff's description of the nurse.

"[C]ome [on] Mike, you just want pain medicine. I know your type, you come in strung out, you put [on] a couple of pounds, you leave and you're right back in." Carlo wrote in the medical records for that day that the plaintiff had no complaints.

On his fourth day in the detoxification program, the plaintiff's pain grew worse and he "couldn't even feel [his] legs." He had been "dope-sick plenty of times," and felt that he was suffering from something different. He also asked to see a doctor. In lieu of a doctor, Kathleen Titus, a physician's assistant, prescribed some medication without seeing or examining him. As his condition deteriorated, showering helped provide some relief, but the pain was severe. He experienced "so much pain and delusion," and he "wasn't sleeping" and "wasn't eating." He also defecated in his pants and lost control of his bowel movements.

At 4 A.M. on June 5, a Saturday, Christine Joudrey, the night nurse, noted that the plaintiff had been up most of the night complaining of back pain, and she believed that he needed to be evaluated by a doctor.[6] Both Carlo and LaPointe, who had

[6] Carlo worked on the morning of June 5, and saw the plaintiff at 8 A.M. She noted that he complained of pain of two days' duration, that he thought he had "pinched a nerve," and that he told her that he could not climb up to the top bunk. When Carlo saw him again that afternoon, he reported that the pain was in the center of his back, was severe, and had been ongoing for four days.

assessed the plaintiff on June 1 and 2, knew that the plaintiff was an intravenous drug user and was at higher risk for infections than the general population. When the plaintiff asked to see a doctor again, Carlo and "a female nurse who was in her [forties]" (LaPointe) told the plaintiff that he "was faking and there was nothing wrong with [him]."[7] Carlo concluded that the plaintiff's pain was worsening and that his medical baseline had changed in the past two days. Carlo indicated in the plaintiff's medical records that she would refer him to a doctor if his pain persisted all weekend.

LaPointe also saw the plaintiff on June 5, and noted that he was moved to a single cell room with a hospital bed due to vomiting and complaints of back pain.[8] She testified that if an inmate told her he was in serious pain, her usual practice was

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[7] Victor Baez, another detainee in the detoxification ward, averred in an affidavit that the nursing staff "bl[e]w . . . off" the plaintiff when he requested to "be brought to a hospital or to see a doctor." Baez also indicated that the nurses told the plaintiff that "nothing was wrong" and that he was "just try[ing] to get meds." According to Baez, the plaintiff was in constant pain, could not move, and went "to the bathroom on himself." Baez further stated that the plaintiff "[h]ad a bump on his [b]ack that looked like a [b]ig pimp[le]."

[8] In the detoxification unit, the plaintiff had unrestricted access to showers. According to the plaintiff, however, a correction officer placed him in the single cell, which lacked a shower, as punishment for taking too many showers. The plaintiff was left sitting in his own excrement for hours until he was removed to the shower.

to check vital signs and assess him; if he was "really" in pain, her practice was to call the doctor.

Over the next two days, the plaintiff continued vomiting and complaining about the severe pain and an inability to walk, eat, or sleep.[9] The nurses promised him that a doctor would see him. No doctor came. On Monday, June 7, 2010, Carlo noted that the plaintiff's vital signs were stable, and that his "complaint of back pain related to sleeping on hard floor of police station" the prior week. Despite his inability to walk and severe pain, the plaintiff was cleared from medical watch and released to the general population.

Carlo and LaPointe had no contact with the plaintiff for the next three days. The plaintiff spent that time confined to his bunk, unable to move or eat solid foods. He was unable to walk to the medication line.[10] Both the plaintiff and his cellmate submitted sick call slips that met with no response. During one evening, a concerned correction officer heard the plaintiff groaning and obtained a high-dose Tylenol pill for him in violation of protocol.

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[9] Carlo saw the plaintiff twice on June 6, 2010, the date he completed the detoxification. She noted that he continued to complain of back pain.

[10] At the plaintiff's request, his cellmate attempted to obtain the plaintiff's medications in the usual line. The request was denied.

On the morning of June 10, another inmate reported to two correction officers that the plaintiff was "feeling ill." When the officers went to the plaintiff's cell, the plaintiff reported that his back was hurting, and that he could not walk. One of the officers stated, "[F]uck these people [in the medical department]. They don't want to do shit." The officers retrieved a wheelchair and brought him to the infirmary. The officers had to lift the plaintiff onto the examining table because he "could not get up on [his] own." While the plaintiff listed his symptoms to Titus, including a sensation that his back was "on fire," loss of feeling, numbness, and a pins and needles sensation in his legs, Titus performed a brief physical examination. Titus concluded that he had a back strain. When Titus told the plaintiff that there was nothing wrong with him, he became upset and refused to return to the general population. Titus then returned the plaintiff to the detoxification unit of the infirmary for further monitoring.

Over the next day, the plaintiff's condition deteriorated. Because he could not get out of bed, he urinated and defecated on himself. The other inmates complained about the stench. He also "vomited multiple times," and "became severely dehydrated and disoriented." When Carlo approached him on the morning of June 11, he refused to get out of bed due to the pain. She insisted that he get up, and she recorded a seven out of ten on

the pain scale. At the time, she thought the plaintiff's back pain was caused by a back strain.

On June 11, at 8 P.M., LaPointe noted several episodes of incontinence and vomiting and called Dr. Geraldine Somers, the medical director. LaPointe knew incontinence was not a normal symptom of detoxification. Neither LaPointe nor Carlo recorded any vital signs that day. Dr. Somers instructed LaPointe to increase the fluids and call her back a couple of hours later.[11] Dr. Somers eventually visited the plaintiff in person and observed him lying in bed, unable to stand. She noted that he "appear[ed] yellow, dehydrated with sunken eyes," and that he had "chapped lips," a "distended, tense, diffusely tender" belly, low oxygen saturation, and an elevated heart rate. The plaintiff recalled Dr. Somers stating, "Get this man to a hospital ASAP."

When the emergency medical technicians arrived to transfer the plaintiff from his cell to the hospital, they found him lying in ammonia-scented, urine-soaked bedding and clothing. Staff confirmed that he had been unable to move for two days. The plaintiff underwent emergency surgery for an epidural abscess with sepsis. He woke up a month later, a quadriplegic.

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[11] According to LaPointe, she had the authority to send patients to the hospital without the need to wait for a doctor's order.

While the plaintiff has regained most of the use of his arms and legs since 2010, he sustained permanent scarring and disabilities.

Discussion. The plaintiff contends that the nurses acted with deliberate indifference to his serious health needs in violation of his rights under the Eighth Amendment to the United States Constitution. See Leite v. Bergeron, 911 F.3d 47, 53 (1st Cir. 2018). The nurses moved for summary judgment, contending that the evidence, at best, set forth a claim of negligence. They also claimed qualified immunity. A judge denied the motion and the nurses appealed therefrom. Their appeal centers on the issue of qualified immunity.

We review de novo the denial of the nurses' motion for summary judgment. See Carey v. Commissioner of Correction, 479 Mass. 367, 369 (2018). "To survive a motion for summary judgment, a nonmoving plaintiff must designate specific facts showing that there is a genuine issue for trial" (quotations and citations omitted). Torres v. Commissioner of Correction, 427 Mass. 611, 614, cert. denied, 525 U.S. 1017 (1998).

"The doctrine of qualified immunity shields government officials, performing discretionary tasks, from liability for civil damages . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (quotation and citation

omitted). Ahmad v. Department of Correction, 446 Mass. 479, 484 (2006). "For a right to be clearly established, the unlawfulness of the defendants' conduct must be 'apparent' based on then existing law." Id., citing Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Courts resolving qualified immunity claims at summary judgment perform a two-step inquiry, asking whether the facts adduced by the plaintiff "make out a violation of a constitutional right" and, if so, whether that right was "'clearly established' at the time of [the] defendant's alleged misconduct." Pearson v. Callahan, 555 U.S. 223, 232 (2009). See Clancy v. McCabe, 441 Mass. 311, 317 (2004). A negative answer to either query results in the application of qualified immunity in favor of the defendant official. The second prong of the analysis requires a showing that, to overcome immunity, "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" (citation omitted). Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009). The objective legal reasonableness of the defendant's actions is a question of law for the courts. Ahmad, 446 Mass. at 484. The defendants contend that the plaintiff cannot overcome their qualified immunity under either prong of the standard. We conclude that the law was clearly established for purposes of qualified immunity and that genuine issues of material fact

exist regarding the alleged violation of the plaintiff's constitutional rights, so as to preclude summary judgment.

1. Violation of a constitutional right. Under the first prong of the analysis at the summary judgment stage, "[w]e must determine . . . whether the plaintiff has introduced sufficient evidence to create a genuine issue of material fact that [the defendants] violated [his] constitutional rights." Clancy, 441 Mass. at 317. An inmate has a constitutional right under the Eighth Amendment to the United States Constitution to adequate medical care.[12] See Farmer v. Brennan, 511 U.S. 825, 832 (1994) (under Eighth Amendment, "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care"). Deliberate indifference to an inmate's serious medical needs constitutes "unnecessary and wanton infliction of pain," Estelle v. Gamble, 429 U.S. 97, 104 (1976), quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976), and is a cognizable

[12] During the relevant time periods, the plaintiff was committed to the jail as a pretrial detainee. Therefore, as the plaintiff notes, his claim arises under the Fourteenth Amendment's due process clause, not the Eighth Amendment. See Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) ("Because there had been no formal adjudication of guilt against [the plaintiff] at the time he required medical care, the Eighth Amendment has no application"). However, because a "detainee's Fourteenth Amendment due process right to medical care . . . is at least as great as the corresponding Eighth Amendment right of a prisoner," we treat the plaintiff's claim as one sounding in the Eighth Amendment. Johnson v. Summers, 411 Mass. 82, 86 (1991), cert. denied, 502 U.S. 1093 (1992).

constitutional violation actionable under § 1983,[13] Estelle, supra at 105. In this context, an official acts with deliberate indifference where "he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[14] Farmer, supra at 847.

Relevant case law provides that mere negligence does not rise to the level of a constitutional violation. See Leavitt v. Correctional Med. Servs., Inc., 645 F.3d 484, 497 (1st Cir. 2011) ("subpar care amounting to negligence or even malpractice does not give rise to a constitutional claim"). Here, however, a reasonable jury could find that the defendants were more than negligent, and that they knowingly or recklessly disregarded an excessive risk to the plaintiff's health. See Estelle, 429 U.S. at 105-106. On the plaintiff's version of the facts, Carlo concluded (and stated out loud) that the plaintiff was "faking it," failed to have the plaintiff evaluated by a doctor as needed on June 5, ignored the plaintiff's repeated requests to

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[13] The nurses do not challenge the seriousness of the plaintiff's medical needs for purposes of summary judgment.

[14] As the plaintiff notes in his brief, "it has become questionable as to whether a pretrial detainee has the burden of demonstrating a subjective element to deliberate indifference in the wake of" the United States Supreme Court's decision in Kingsley v. Hendrickson, 576 U.S. 389, 396-402 (2015). We need not address the difference between the subjective and objective standards, however, as our conclusion would be the same under either approach.

see a doctor or go to a hospital, and returned him to the general population despite his persistent, severe pain.[15] The loss of feeling in his legs and his inability to move, as reported by the plaintiff, were not consistent with a back strain. Moreover, when the plaintiff's symptoms required prompt medical evaluation and intervention, both Carlo and LaPointe, a jury could find, ignored his repeated complaints of pain and corroborative symptoms. That Carlo did not associate the plaintiff's back pain with the possibility of an abscess does not necessarily relieve her of potential liability. See Farmer, 511 U.S. at 842 (official's actual knowledge of substantial risk of harm to inmate's health may be found from fact that risk was obvious; whether official had requisite knowledge was question of fact).

Although the application of the relevant standard to LaPointe's alleged conduct is a closer question on the record before us, a jury could infer that she, too, acted with deliberate indifference by, inter alia, ignoring the plaintiff's

[15] The plaintiff submitted expert reports from a medical doctor and a registered nurse opining that both nurses grossly deviated from the standard of care by failing to recognize, evaluate, and treat the plaintiff's critical illness, and by abandoning him. Even if they are ultimately "entitled to little weight," Torres, 427 Mass. at 614, the combination of these expert reports and the other materials in the record renders summary judgment inappropriate.

multiple symptoms and delaying the call to a doctor. Given the evidence of their authority to call for a doctor or to send the plaintiff to the hospital, the nurses cannot find shelter in their adherence to a treatment regimen prescribed by the doctor and the physician's assistant. On the record before us, there was information, albeit disputed, that both nurses knew that the plaintiff faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to address it. The facts in the summary judgment record were thus sufficient to allow a jury to find that both acted with deliberate indifference. See Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011) ("subjective intent is often inferred from behavior and even in the Eighth Amendment context . . . a deliberate intent to harm is not required. . . . Rather, it is enough for the prisoner to show a wanton disregard sufficiently evidenced 'by denial, delay, or interference with prescribed health care'" [citation omitted]). Cf. Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976) ("a prisoner states a proper cause of action [under § 1983] when he alleges that prison authorities have denied reasonable requests for medical treatment in the face of an obvious need for such attention where the inmate is thereby exposed to undue suffering or the threat of tangible residual injury").

2. Clearly established law. "On a motion for summary judgment, the relevant question [at the second prong of the analysis] is whether a reasonable official could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct" (quotation omitted). Clancy, 441 Mass. at 317, quoting Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 91 (1st. Cir. 1994). Existing law need only give the defendants "fair warning that their conduct violated the plaintiff's constitutional rights." Suboh v. District Attorney's Office of the Suffolk Dist., 298 F.3d 81, 93 (1st Cir. 2002). See Maldonado, 568 F.3d at 269. In other words, "[t]o overcome a claim of immunity, it is not necessary for the courts to have previously considered a particular situation identical to the one faced by the government official." Caron v. Silvia, 32 Mass. App. Ct. 271, 273 (1992). "It is enough, rather, that there existed case law sufficient to clearly establish that, if a court were presented with such a situation, the court would find that the plaintiff's rights were violated." Id., quoting Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987). See United States v. Lanier, 520 U.S. 259, 271 (1997), quoting Anderson, 483 U.S. at 640 ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the

very action in question has [not] previously been held unlawful'").

We are not persuaded by the nurses' argument that the law was not clearly established. To the extent that the defendants challenge the clarity of the law, we agree that the unpublished decisions and those postdating 2010 relied upon by the plaintiff are inadequate by themselves to show that the law was clearly established. However, where, as here, the purported violation is so egregious and obvious, the plaintiff does not need to identify a preexisting case on point or a consensus of persuasive authority. See Lanier, 520 U.S. at 271-272; Raiche v. Pietroski, 623 F.3d 30, 38-39 (1st Cir. 2010) (if conduct clearly violates constitutional right, prior case law precisely on point unnecessary to put reasonable official on notice that conduct was unlawful). See also Ahearn v. Vose, 64 Mass. App. Ct. 403, 420 (2005) (discussion of what constitutes "clearly established" constitutional rights in context of qualified immunity analysis). Compare Krupien v. Ritcey, 94 Mass. App. Ct. 131, 136-137 (2018) (determining that alleged conduct violated clearly established right even though exact factual circumstances were unprecedented).

Since at least 1976, the Supreme Court has made clear and reaffirmed that "deliberate indifference to serious medical needs of prisoners . . . [is] proscribed by the Eighth

Amendment." Estelle, 429 U.S. at 104. See Helling v. McKinney, 509 U.S. 25, 32 (1993) ("'deliberate indifference to serious medical needs of prisoners' violates the [Eighth] Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency" [citation omitted]). See also Ziglar v. Abbasi, 137 S. Ct. 1843, 1864 (2017) ("The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner -- 'deliberate indifference to serious medical needs'" [citation omitted]). Here, viewing the facts under the summary judgment standard, as we must, the record compels a determination that the defendants should have recognized that the plaintiff was in dire need of medical help, and that they withheld such care. The line of cases cited above furnished to the defendants "fair warning" that their alleged conduct violated the plaintiff's constitutional rights. Suboh, 298 F.3d at 93.

Conclusion. To be clear, there are many factual disputes in this case. A jury, crediting the nurses' version of events, could find that the nursing care provided to the plaintiff was adequate or, at worst, amounted to simple negligence. A jury could also choose not to credit the plaintiff's version of events. These matters, however, are not amenable to resolution at this stage. In short, because the nurses have not established that their actions were protected by qualified

immunity as a matter of law, summary judgment was properly denied.

Order denying motion for summary judgment affirmed.