[Cite as *Evans v. Summit Behavioral Healthcare*, 2015-Ohio-5570.]

Court of Claims of Ohio
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ELLEN EVANS, et al.

Plaintiffs

v.

SUMMIT BEHAVIORAL HEALTHCARE

Defendant

Case No. 2013-00627

Judge Dale A. Crawford

DECISION

{¶1} On January 2, 2015, Defendant filed four Motions for Summary Judgment pursuant to Civ.R. 56(B). The Motions were filed as to Plaintiff Ellen Evans' claim, Plaintiff Tiffany Carroll's claim, Plaintiff Judy Graham's claim, and Plaintiff Anna Whitaker's claim (collectively referred to as Plaintiffs).[1] On January 16, 2015, Plaintiffs filed a memorandum in opposition to Defendant's Motions for Summary Judgment, and on January 23, 2015, with leave of court, Plaintiffs filed a supplemental response. On January 28, 2015, Defendant filed a reply.[2] The Motions are now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Defendant argues that it is immune from liability pursuant to R.C. 4123.74 for Plaintiffs' claims of negligence and negligent and intentional infliction of emotional distress inasmuch as Plaintiffs' injuries were sustained in the course and scope of their employment. [3] Additionally, Defendant argues that Plaintiffs cannot prove that Defendant intended to cause their injuries, and thus cannot prove their claim of an employer intentional tort. Next, Defendant argues that it cannot be held liable for the

[1]Defendant did not file a Motion for Summary Judgment as to Dennis Carroll's claim for loss of consortium.

[2]Defendant's January 28, 2015 Motion for Leave to file a reply is GRANTED.

[3]Defendant did not move for Summary Judgment on this basis as to Evans' claim.

violent behavior of its patients pursuant to R.C. 2305.51 in the absence of an "explicit threat" of inflicting "imminent" serious harm and that Plaintiffs cannot demonstrate the existence of such a threat of imminent serious harm. Finally, Defendant argues that it is immune from liability in creating policies and procedures on employee protection, patient supervision, patient assignment, patient housing, unit staffing, and unit security. In support, Defendant submitted the deposition transcripts of Evans, Carroll, Graham, and Whitaker in addition to the affidavit of counsel for Defendant, Peter DeMarco.

{¶3} In their response, Plaintiffs appear to concede that Carroll, Graham, and Whitaker cannot maintain actions for negligence against Defendant inasmuch as they applied for and were awarded workers' compensation benefits arising out of their injuries. Plaintiffs maintain, however, that Evans did not receive workers' compensation benefits and that Defendant is not entitled to immunity as to her claims for negligence. Additionally, Plaintiffs argue that each of their depositions contains sufficient evidence regarding Defendant's "knowledge and ongoing disregard of the patient's violent propensities towards other patients and staff" to defeat a Motion for Summary Judgment. Plaintiffs' supplemental response, pg. 2. Finally, Plaintiffs argue that Defendant failed to follow its own policies and procedures regarding incidents of aggressive and violent behavior of patients in Defendant's care. In support, Plaintiffs submitted Evans' complaint filed in the Common Pleas Court of Hamilton County contesting the denial of her workers' compensation benefits and a document entitled "Summit Behavioral Healthcare" regarding a policy on "Incident Reporting."[4]

{¶4} Under Civ.R. 56(C), summary judgment is proper "if the pleadings, depositions, answer to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, in order to determine whether Defendant is entitled to judgment as a matter of law pursuant to Civ.R. 56(C), the Court must ascertain whether the evidentiary materials presented by Defendant show that there is no genuine issue as to any material fact involved in the case. In making this determination, it is necessary to analyze the landmark Ohio Supreme Court decision which addresses the "standards for granting summary judgment when the moving party asserts that the nonmoving party has no evidence to establish an essential element of

[4]Neither party objected to the admissibility of the supporting evidence offered.

the nonmoving party's case." *Dresher v. Burt*, 75 Ohio St.3d 280, 285 (1996); *see also Saxton v. Navistar, Inc.*, 10th Dist. Franklin No. 11AP-923, 2013-Ohio-352, ¶ 7.

{¶5} In *Dresher*, the Ohio Supreme Court held:

{¶6} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. * * * [T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * The assertion must be backed by some evidence of the type listed in Civ.R. 56(C) which affirmatively shows that the nonmoving party has no evidence to support that party's claims." *Dresher, supra*, at 292-293.

{¶7} In interpreting the United States Supreme Court decision in *Celotex v. Catrett*, 477 U.S. 317 (1986), the *Dresher* Court found no express or implied requirement in Civ.R. 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. *Dresher, supra*, at 291-292. Furthermore, the *Dresher* Court stated that it is not necessary that the nonmoving party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Id*. at 289, quoting *Celotex, supra*. In sum, the *Dresher* Court held that the burden on the moving party may be discharged by "showing"–that is, pointing out to the Court– that there is an absence of evidence to support the nonmoving party's case. *Id*.

{¶8} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id*. at 293. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden as outlined in Civ.R. 56(E):

{¶9} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶10} The undisputed evidence establishes that Evans, Carroll, Graham, and Whitaker were each employed by Defendant at Summit Behavioral Healthcare

(Summit) as therapeutic program workers. Summit houses mentally ill patients who have been committed through the criminal justice system in addition to those who have been civilly referred through other avenues. Patient H is a mental health patient who has been hospitalized and is receiving treatment at Summit.[5] Therapeutic program workers seek to prevent patients, such as Patient H, from harming themselves or others, assist the medical staff in dispensing medications, help patients with activities of daily living such as showering, preparing meals, oral hygiene, and laundry and perform other tasks in accordance with each patient's treatment plan. Treatment plans are typically prepared by the treatment team, which consists of nursing staff, psychologists, psychiatrists, counselors, and social workers. Therapeutic program workers work one of the three daily shifts and are assigned to various units, which house up to 28 patients per unit. Two to four therapeutic program workers are typically assigned to a unit in addition to medical staff, which typically consists of two nurses. Additionally, therapeutic program workers participate in annual crisis intervention training where, among other things, they are instructed on how to deal with physically aggressive and agitated patients.

{¶11} Plaintiffs testified in their depositions that as a part of the treatment plan, Patient H was allowed relatively free range of the unit despite his history of violent physical and sexual attacks on others. Such a treatment plan is known as a "least restrictive environment" designed to allow patients more freedom or the least amount of restrictions that the treatment team deems necessary. Graham asserted that the treatment team could medicate and lock patients in restraints, but that such treatment should not be done if it is not therapeutic. According to Graham, the least restrictive environment has been standard for mentally ill patients in Ohio since at least 1987.

{¶12} Plaintiffs testified in their depositions regarding Patient H's extensive history of violent sexual attacks on female staff and other patients at Summit. Evans, Carroll, Graham, and Whitaker were each physically and sexually attacked by Patient H in four separate incidents between October 2011 and March 2013. Evans testified that prior to the attack, she was not issued a "spider device" or panic button to summon emergency assistance from other staff in case of a physical attack. Such a device is to be worn around the neck and activated during a physical or medical emergency.

[5]Although Patient H is identified by name in the complaint, the parties agreed in the depositions to identify the patient as Patient H. Therefore, the Court will refer to the patient as Patient H.

Carroll and Graham had spider devices but were unable to activate the alarm during the attacks. Each attack was halted by other staff members or other patients responding to the commotion.

{¶13} There is no question that the injuries of which Plaintiffs complain occurred while they were engaged in the course and scope of their employment with Defendant. Plaintiffs testified in their depositions regarding the physical and emotional injuries they sustained as a result of Patient H's actions. Carroll, Graham and Whitaker each applied for and was awarded workers' compensation benefits for their injuries. Evans applied for such benefits, but her application was denied. Nevertheless, Evans maintains that she suffered physical and psychological injuries as a result the incident.

{¶14} R.C. 4123.74 states:

{¶15} "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter."

{¶16} Defendant has not challenged Plaintiffs' assertions that their psychological and physical injuries are a direct result of being attacked by Patient H while at work. R.C. 4123.01 provides, in pertinent part:

{¶17} "(C) 'Injury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. 'Injury' does not include:

{¶18} "(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate."

{¶19} In *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486 (1991), the Supreme Court of Ohio held that an employee who suffers a purely psychological injury in the course of her employment may pursue a statutory or common law remedy based upon the concern that employees with purely psychological injuries would end up with

minimal provable economic damages if such claims were pursued through the workers' compensation program. *Id*. at 489.

{¶20} However, the Tenth District Court of Appeals distinguished claims involving purely psychological injuries, such as in *Kerans*, with those that were related to a physical injury. *Harrison v. Franklin Co. Sheriff's Dept.*, 10th Dist. Franklin No. 00AP-240, 2000 Ohio App. LEXIS 5754 (Dec. 12, 2000). The Court of Appeals noted that the psychological injuries in *Kerans* "were not connected to a physical injury and therefore there was no possible relief available under the workers' compensation statutes even though the origin of psychological claims were acts that occurred in the course of employment." *Id*.

{¶21} Harrison was a deputy sheriff who was attacked and overpowered by a prisoner, who then escaped. Harrison claimed she suffered physical and psychological injuries, including "distinct psychological injury due to the fact that her gun, taken in the attack, was used to kill [another victim] later that day." *Id*. The court of appeals found that although Harrison's psychological injuries manifested after the attack, her injuries "were all a direct consequence of the attack on her," and consequently, her injuries were compensable through the workers' compensation program. *Id*. The court further noted that "[p]sychological injuries often arise later; yet, if related to the work-connected injury, they are compensable. To hold otherwise would mean that, in many instances, there would be no recovery under workers' compensation, and no alternate source of recovery." *Id*.

{¶22} There is no question that Plaintiffs' physical and psychological injures are all a direct consequence of Patient H's actions. Consequently, Defendant is immune from claims of negligence for Plaintiffs' physical and psychological injuries sustained during the course of their employment, whether or not Plaintiffs received workers' compensation benefits for such injuries.

{¶23} However, employer immunity does not extend to employer intentional torts. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027.

{¶24} R.C. 2745.01 provides:

{¶25} "(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the

tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

{¶26} "(B) As used in this section, 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

{¶27} "(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

{¶28} "(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation."

{¶29} "[T]he General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D)." *Kaminski* at ¶ 56. With respect to their claims of an intentional tort, Plaintiffs do not argue that this case implicates R.C. 2745.01(C) or (D). Therefore, Plaintiffs must demonstrate a genuine issue of material fact regarding whether Defendant specifically intended to cause Plaintiffs' injuries.

{¶30} Construing all the evidence in a light most favorable to Plaintiffs, nothing in the depositions or other supporting materials demonstrates that Plaintiffs can prove that Defendant committed a tortious act with the intent to injure or that Defendant acted with the deliberate intent to cause Plaintiffs to suffer an injury. Indeed, Plaintiffs argue that Defendant was aware of Patient H's history of physical and sexual attacks on other patients and staff and that it failed to implement a treatment plan or enact other policies, procedures or precautions that would protect Plaintiffs from injury. "However, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent." *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100 (1988), paragraph six of the syllabus. Furthermore, although the enactment of additional precautions may have protected Plaintiffs' from harm, such evidence does

not demonstrate that Defendant deliberately intended to cause Plaintiffs' injuries. *See Houdek v. Thyssenkrupp Materials N.A.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 28.

{¶31} Even if the Court were to find a genuine issue of material fact as to Plaintiffs' negligence claims or claims of employer intentional tort, Defendant is entitled to civil immunity for injuries caused by a mental health patient unless Plaintiffs establish liability under R.C. 2305.51.

{¶32} R.C. 2305.51(B) provides in relevant part:

> "A mental health professional or mental health organization may be held liable in damages in a civil action * * * for serious physical harm or death resulting from failing to predict, warn of, or take precautions to provide protection from the violent behavior of a mental health client or patient, only if the client or patient or a knowledgeable person has communicated to the professional organization an explicit threat of inflicting imminent and serious physical harm to or causing the death of one or more clearly identifiable potential victims, the professional or organization has reason to believe that the client or patient has the intent and ability to carry out the threat * * *" and fails to take one of several enumerated items.[6]

{¶33} Plaintiffs have not presented the Court with any evidence that an explicit threat of an imminent attack upon Plaintiffs was communicated to Defendant. Indeed, each Plaintiff acknowledged that Patient H attacked without warning. While Evans testified that Patient H had previously threatened to kill her, kill everyone, and rape everyone, there is no evidence before the Court of an *explicit threat* of inflicting *imminent* serious harm or death or that such a threat was communicated to Defendant.

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[6] R.C. 2305.51 further provides that a mental health organization may be liable to a plaintiff for injuries if it fails to "(1) Exercise any authority the professional organization possesses to hospitalize the client or patient on an emergency basis pursuant to section 5122.10 of the Revised Code; (2) Exercise any authority the professional or organization possesses to have the client or patient involuntarily or voluntarily hospitalized under Chapter 5122. of the Revised Code; (3) Establish and undertake a documented treatment plan that is reasonably calculated, according to appropriate standards of professional practice, to eliminate the possibility that the client or patient will carry out the threat, and, concurrent with establishing and undertaking the treatment plan, initiate arrangements for a second opinion risk assessment through a management consultation about the treatment plan with, in the case of a mental health organization, the clinical director of the organization, or, in the case of a mental health professional who is not acting as part of a mental health organization, any mental health professional who is licensed to engage in independent practice; (4) Communicate to a law enforcement agency with jurisdiction in the area where each potential victim resides, where a structure threatened by a mental health client or patient is located, or where the mental health client or patient resides, and if feasible, communicate to each potential victim or a potential victim's parent or guardian if the potential victim is a minor or has been adjudicated incompetent, all of the following information: (a) The nature of the threat; (b) The identity of the mental health client or patient making the threat; (c) The identity of each potential victim of the threat."

Additionally, there is no question that Patient H was hospitalized and was receiving treatment by mental health professionals pursuant to a treatment plan as contemplated by R.C. 2305.51(B) at the time of the attacks. Moreover, Plaintiffs have not identified which actions, if any, Defendant failed to undertake in a timely manner pursuant to R.C. 2305.51. Such a lack of evidence is fatal to Plaintiffs' claims. *See Campbell v. Ohio State Univ. Med. Ctr.*, 108 Ohio St.3d 376, 2006-Ohio-1192, (holding that when a patient of a mental-health institution is assaulted or battered by another patient, the institution may be held liable for harm that results only if the injured patient establishes liability under R.C. 2305.51.); *see also Campbell v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 04AP-96, 2004-Ohio-6072, ¶ 23, (finding that all claims that arise from an assault by a mental health patient are subject to R.C. 2305.51.). Thus, Plaintiffs cannot maintain their claims of negligence, employer intentional tort, and intentional and negligent infliction of emotional distress. Finally, to the extent that Plaintiffs argue that Defendant's policies and procedures were inadequate to protect them from attacks by patients at Summit, Defendant is immune from liability in creating policies and procedures regarding employee protection. *Reynolds v. State Div. of Parole and Cmty. Servs.*, 14 Ohio St.3d 68, 74 (1984). Given that Plaintiffs cannot prevail on their claims, Plaintiff Dennis Carroll's derivative claim for loss of consortium must fail as well. *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93 (1992).

{¶34} Based upon the foregoing, the Court finds that there are no genuine issues of material fact and that Defendant is entitled to judgment as a matter of law. Accordingly, Defendant's Motions for Summary Judgment shall be granted.

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DALE A. CRAWFORD
Judge

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SUMMIT BEHAVIORAL HEALTHCARE

Defendant

Case No. 2013-00627

Judge Dale A. Crawford

JUDGMENT ENTRY

{¶35} A non-oral hearing was conducted in this case upon Defendant's Motions for Summary Judgment. For the reasons set forth in the decision filed concurrently herewith, Defendant's Motions for Summary Judgment are GRANTED and judgment is rendered in favor of Defendant. Accordingly, all previously scheduled events are VACATED. All pending motions are DENIED as moot. Court costs are assessed against Plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DALE A. CRAWFORD
Judge

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