IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LINDA HEIM, Plaintiff vs. HOPE ENTERPRISES FOUNDATION INCORPORATE and/or HOPE ENTERPRISE, INC. and/or HOPE CORPORATION and/or RYAN BENIS, Defendants	:	NO. 15 – 00,371 CIVIL ACTION Motions for Summary Judgment

OPINION AND ORDER

Before the Court are the motions for summary judgment filed by Defendant Benis on March 15, 2018 and by the Hope Defendants on April 2, 2018.[1] Argument on the motions was heard May 17, 2018.

In her Complaint, Plaintiff seeks to recover damages for the death of her adult son, Nathan McHenry, who died as a result of choking on food while a resident of a group home owned and operated by the Hope Defendants, and while being supervised by Defendant Benis. Plaintiff has brought claims of negligence and corporate negligence.[2] In their motions for summary judgment, the Defendants contend they are immune from liability under the Mental Health Procedures Act (MHPA), 50 P.S. §§7101 *et seq*., and the Mental Health and Mental Retardation Act of 1966, (MHMRA)[3] 50 P.S. §§ 4101 *et seq*.[4]

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[1] As both motions raise the same issues, the Court will address them together, and will simply refer to "the Defendants" collectively.

[2] Plaintiff's claims for punitive damages were dismissed by Order of September 29, 2015.

[3] The title of the Act was amended on November 22, 2011 to the "Mental Health and Intellectual Disability Act of 1966". At the time of this incident, however, the Act was as previously titled and therefore it will be referred to as such herein.

[4] Although Defendant Benis did not raise this defense in his New Matter and thus it may have been waived, the Court need not address that issue at this point, as will be explained *infra*.

The Mental Health Procedures Act provides for immunity from civil and criminal liability as follows:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences.

50 P. S. § 7114(a).

Plaintiff argues that the MHPA does not apply in this instance as the group home in which Nathan McHenry lived was not providing mental health services. While Mr. McHenry had physical disabilities and intellectual and developmental disabilities, he did not have mental health issues and was not being treated for such.[5] The Court agrees with Plaintiff that since he was not being treated for mental health issues, Mr. McHenry was not being "treated under this Act". Therefore, the immunities provided by the MHPA do not apply.

The Mental Health and Mental Retardation Act provides for immunity as follows:

> No person and no governmental or recognized nonprofit health or welfare organization or agency shall be held civilly or criminally liable for any diagnosis, opinion, report or any thing done pursuant to the provisions of this act if he acted in good faith and not falsely, corruptly, maliciously or without reasonable cause; provided, however, that causes of action based upon gross negligence or

[5] There appears to be no dispute about this contention.

> incompetence shall not be affected by the immunities granted by this section.

50 P. S. § 4603.

Again, Plaintiff argues that the Act does not apply, contending that "Defendant did not diagnose, opine, report or do anything else pursuant to the provisions of the MHMRA that would trigger the immunity clause contained therein. The facility in the instant matter is merely a community home for individuals with intellectual disabilities that provides residential services."[6] In Potts v. Step By Step, Inc., 26 A.3d 1115 (Pa. Super. 2011), however, the MHMRA was held to apply to day-to-day care like that involved in the instant case. There, Potts' decedent, Julie, was a resident of a facility which provided residence and 24-hour supervision for individuals with mental retardation and disabilities. Julie became ill and staff members were instructed by medical personnel to contact them immediately if she vomited or had problems holding down fluids. Although she did develop such problems, staff did not contact medical personnel and Julie worsened and eventually died. The Court applied the MHPA's immunity provision to require a showing of gross negligence or incompetence, following the Supreme Court's decision in Rhines v. Herzel, 392 A.2d 298 (Pa. 1978), where alleged negligent supervision of a patient, although found to be part of the hospital's day-to-day care, was held to be subject to the gross negligence showing required by the Act. Pursuant to Potts, therefore, the MHMRA immunities *are* applicable in this matter, and Plaintiff will be required to show gross negligence or incompetence to support her claims.

[6] See Plaintiff's Brief in Opposition to the Hope Defendants' motion for summary judgment, at page 4-5.

Defendants additionally contend that since this Court has stricken all allegations of willful, reckless, careless, wanton, outrageous and intentional conduct from the Complaint, the remaining claims amount to only ordinary negligence, a showing of which will be insufficient as a matter of law since "gross negligence" is required. The Court does not agree that only ordinary negligence claims remain.

In striking the allegations of willful, reckless, careless, wanton, outrageous and intentional conduct, and consequently the claim for punitive damages, this Court found that Plaintiff had failed to allege facts "which show that the actor not only knew or had reason to know of facts that created a high degree of risk, but that he or she deliberately proceeded to act in conscious disregard of, or indifference to, that risk."[7] In sum, the necessary state of mind had not been alleged. *See* Hutchison ex rel. Hutchison v. Luddy, 896 A.2d 1260, 1266 (Pa. Super. 2006)("reckless indifference to the rights of others and conscious action in deliberate disregard of them … may provide the necessary state of mind to justify punitive damages").

"Gross negligence" does not require any showing of a deliberate state of mind, and falls somewhere between "reckless indifference" and "ordinary negligence." Indeed, "gross negligence" is defined in Pennsylvania's Standard Jury Instruction 13.50 as "significantly worse than ordinary negligence", but "less than reckless conduct". Pa. SSJI (Civ), § 13.50 (2013).[8] Therefore, even though allegations of recklessness were stricken, the Court did not thereby eliminate the possibility of showing gross negligence.

[7] See Order of March 31, 2015.

Apparently in the alternative, Defendants assert that "Plaintiff has failed to elicit any evidence, testimony or expert report demonstrating any acts and/or omissions attributable to moving Defendants synonymous with gross negligence or incompetence."[9] They therefore ask the Court to remove the question from the jury and enter judgment in their favor as a matter of law.

Ordinarily, whether behavior is grossly negligent is a matter for the jury. A court may take the issue from a jury, and decide the issue as a matter of law, however, "if the conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence." Albright v. Abington Memorial Hospital, 696 A.2d 1159, 1164 (Pa. 1997).

According to Nathan McHenry's Individual Support Plan, with which Mr. Benis was familiar,[10] he was to be "supervised at all times while eating at home and restaurants so he does not put too much in his mouth or drink too much liquid at a time" and "has a history of choking and dysphagia".[11] Mr. Benis testified in his deposition that he helped Nathan eat a piece of butter bread and then placed a second piece, which Nathan did not want, on top of the refrigerator while Nathan went to take a nap.[12] Mr. Benis left Nathan unsupervised while he folded laundry, and apparently Nathan accessed the bread on top of the refrigerator and began to eat it and choke without Mr. Benis knowing it. Mr. Benis discovered

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[8] In the Subcommittee Note to the Standard Jury Instruction for "Reckless Conduct", Pa. SSJI (Civ), § 13.60 (2013), reference is made to Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005), where our Supreme Court specifically held that "even gross negligence will not suffice" to establish recklessness.
[9] See Hope Defendants' motion for summary judgment, at page 9.
[10] See Exhibit "F" attached to the Hope Defendants' Brief in support of motion for summary judgment, at p. 277.
[11] See Exhibit "E" attached to the Hope Defendants' Brief in support of motion for summary judgment, at Health & Safety – Meals/Eating (there are no page numbers in this exhibit).
[12] See Exhibit "F" attached to the Hope Defendants' Brief in support of motion for summary judgment, at p. 8.

Nathan choking on the couch.[13] The Court cannot say that these circumstances do not constitute gross negligence as a matter of law. *See, e.g.,* Willett v. Evergreen Homes, Inc., 595 A.2d 164 (Pa, Super. 1991), where the Superior Court upheld the trial court's determination that a jury could infer gross negligence from the facts that Evergreen Homes, Inc. and its employees were aware of the decedent's history of seizures, knew the importance of monitoring his bathing activities, and yet left the decedent unattended resulting in his death.

Further, Plaintiff's expert, Dr. Kamerow, opines that Mr. Benis's rescue efforts were inadequate and improper. Specifically, he indicates that Mr. Benis did not give back blows but should have, that he should have continued the Heimlich maneuver until all of the bread was dislodged (apparently only part of it had been) before he began CPR, and that by trying to force breaths into Nathan's airway, he only made it worse by pushing the bread further into his airway.[14] This evidence is sufficient to go to the jury on the issue of gross negligence or incompetence.

Accordingly, Defendants are not entitled to judgment as a matter of law[15] and the Court enters the following:

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[13] Id. at page 9-10.

[14] See Exhibit "A", attached to the Hope Defendants' motion in limine to preclude certain testimony of Dr. Kamerow, filed April 16, 2018, at p. 6-7.

[15] The jury will be asked in special verdict questions whether Defendants' conduct was negligent and also whether it was grossly negligent or incompetent. Should the jury find only ordinary negligence, post-trial motions may again raise the issue of whether Defendant Benis waived the defense of the MHMRA's immunity provision by failing to include it in his New Matter.

ORDER

AND NOW, this day of May 2018, for the foregoing reasons, Defendants' motions for summary judgment are hereby DENIED.

BY THE COURT,

Eric R. Linhardt, Judge

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