IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TAWNYA L. REDOS, Administrator of the Estate of SHAWN LOVETT,	:	NO. 19-00528
Plaintiff	:	
vs.	:	
	:	CIVIL ACTION
UPMC SUSQUEHANNA, et al.,	:	
Defendants	:	

OPINION AND ORDER

AND NOW, following argument on the Motion for Summary Judgement filed September 6, 2023, the Court hereby issues the following OPINION and ORDER.

I. Background:

This matter was commenced by Complaint filed March 28, 2019. After a series of preliminary objections, eventually resolved by the Order of October 18, 2019, Plaintiff filed an Amended Complaint on November 22, 2019. Defendants responded by Answer and New Matter filed December 12, 2019. The gravamen of Plaintiff's claim is her contention that the Defendants failed to exercise the required level of care for Shawn Lovett (hereinafter "Lovett") to prevent his elopement from the Williamsport Hospital on April 4, 2017, leading to a fall and injuries sustained in that fall. At the conclusion of discovery, Defendants filed a Motion for Summary Judgement on September 6, 2023, which is now before the Court.

II. The Record Evidence:

The underlying facts are substantially undisputed. On April 1, 2017, Lovett sought treatment at the Bucktail Medical Center for the loss of sight, which Defendants attribute to his use of a mix of drugs the preceding day. An emergency room physician sought to secure an inpatient psychiatric admission for Lovett at Clarian Hospital. Clarian sought a medical clearance prior to his admission. Thus, Lovett was admitted to The Williamsport Hospital (hereinafter "Williamsport") for medical evaluation and clearance.

Defendant Afzal admitted Lovett, and placed multiple consult requests. Lovett refused to participate in a neurological examination by neurologist Donald Dworek, D.O. On April 3, 3017, Lovett ran past a safety sitter to an empty hospital room, opened a window, and placed his head on the windowsill. He was returned to his room by hospital

security. He was later evaluated by Rick Davies, PA-C, who assessed that Lovett was suffering from delirium. Later on, the same day, Lovett was evaluated by both Rick Davies, PA-C and psychiatrist Jeremy Bennett, M.D. Bennett diagnosed that Lovett suffered from delirium. On April 4, 2017, Lovett exhibited bizarre behavior in his room, exited his room through the window, ran across the adjacent hospital roof, and jumped from the roof. His fall from the roof resulted in multiple injuries, for which he was treated at The Williamsport Hospital Emergency Department.

Lovett was found dead from suicide at home on February 14, 2021. His death was unrelated to the events which are the subject of this litigation.

III. The Test for Summary Judgment:

In Pennsylvania, a party may move for summary judgement "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action…" Pa.R.C.P. No. 1035.2(1). In response, the adverse party may not rest on denials but must respond to the motion. Pa.R.C.P. No. 1035.3(a). The non-moving party can avoid an adverse ruling by identifying "one or more issues of fact arising from evidence in the record…" Pa.R.C.P. No. 1035.3(a)(1).

In considering a motion for summary judgment, it is not the Court's function to decide issues of fact. Rather, is it our function to decide whether an issue of fact exists. *Fine v. Checcio,* 582 Pa. 253, 273, 870 A.2d 850, 862 (2005).

> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.
>
> *Hovis v. Sunoco, Inc.,* 2013 Pa.Super. 54, 64 A.3d 1078, 1081, quoting *Cassel-Hess v. Hoffer*, 44 A.3d 84-85 (Pa.Super. 2012); accord, *Khalil v. Williams*, 278 A.3d 859, 871 (2022), citing *Bourgeois v. Snow Time, Inc*., 242 A.3d 637, 649 (2020).

In the matter of *Accu-Weather, Inc. v. Prospect Commc'ns, Inc.*, 435 Pa. Super. 93, 644 A.2d 1251 (Pa. Super. Ct. 1994), the Court described the proper test for a grant of summary judgment as follows:

> First, the pleadings, depositions, answers to interrogatories, admissions on file, together with any affidavits, must demonstrate that there exists no genuine issue of fact. Pa.R.C.P. 1035(b). Second, the moving party must be entitled to judgment as a matter of law. *Id.* The moving party has the burden of proving that no genuine issue of material fact exists. *Overly v. Kass,* 382 Pa.Super. 108, 111, 554 A.2d 970, 972 (1989). However, the non-moving party may not rest upon averments contained in its pleadings; the non-moving party must demonstrate that there is a genuine issue for trial. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. *Stidham v. Millvale Sportsmen's Club,* 421 Pa.Super. 548, 558, 618 A.2d 945, 950 (1992), *appeal denied,* 536 Pa. 630, 637 A.2d 290 (1993) (citing *Kerns v. Methodist Hosp.,* 393 Pa.Super. 533, 536–37, 574 A.2d 1068, 1069 (1990)). Finally, an entry of summary judgment is granted only in cases where the right is clear and free of doubt. *Ducko v. Chrysler Motors Corporation,* 433 Pa.Super. 47, 48, 639 A.2d 1204, 1205 (1993) (citing *Musser v. Vilsmeier Auction Co., Inc.,* 522 Pa. 367, 370, 562 A.2d 279, 280 (1989)). We reverse an entry of summary judgment when the trial court commits an error of law or abuses its discretion. *Kelly by Kelly v. Ickes,* 427 Pa.Super. 542, 547, 629 A.2d 1002, 1004 (1993) (citing *Carns v. Yingling,* 406 Pa.Super. 279, 594 A.2d 337 (1991)).

IV. Question Presented:

Whether the fact that Plaintiff's claim is subject to the limited immunity established by § 7114(a) of the Mental Health Procedures Act, 50 P.S. § 7114(a), requires the entry of summary judgment in favor of the Defendants.

V. Response:

Despite the fact that Plaintiff's claim is subject to the limited immunity established by § 7114(a) of the Mental Health Procedures Act, 50 P.S. § 7114(a), the question of whether any Defendant's action rise to the level of willful misconduct or gross negligence is a material issue of fact, precluding the entry of summary judgment.

VI. Discussion:

The Mental Health Procedures Act

The Mental Health Procedures Act (hereinafter the "Act") "establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill patients" 50 P.S. § 7103. In *Dean v. Bowling Green-Brandywine,* 225 A.3d 859, 869 (Pa. 2020), the Pennsylvania

Supreme Court interpreted the term "mental illness" under the Act by reference to the definition of that term set forth at 55 Pa. Code § 5100.2 as "[t]hose disorders listed in the applicable APA Diagnostic and Statistical Manual; provided however, that mental retardation, alcoholism, drug dependence and senility do not, in and of themselves, constitute mental illness. The presence of these conditions however, does not preclude mental illness."

It is undisputed by the parties that Lovett suffered from a "mental illness" as defined at 55 Pa. Code § 5100.2. In fact, Plaintiff's expert, Richard E. Fischbein, M.D. confirms that Lovett "clearly did" suffer from a psychiatric illness or delirium.

Subsection 7114(a) of the Act provides limited civil and criminal immunity for those who participate in a decision that a person be examined or treated under the Act, 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.

In *Farago v. Sacred Heart General Hospital*, 522 Pa. 410, 416-418, 562 A.2d 300 (1989), the Pennsylvania Supreme Court affirmed a decision of the Superior Court and held that the immunity provided by 50 P.S. § 7114(a) extends to health care facilities. Further, the Court held that the immunity provided by 50 P.S. § 7114(a) extends well beyond the narrow range of activities specifically described in § 7114(a), relying instead upon the broad definition of "adequate treatment" set forth in 50 P.S. § 7104, as follows:

> Adequate treatment means a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his recovery from mental illness. It shall be provided to all persons in treatment who are subject to this act. It may include inpatient treatment, partial hospitalization, or outpatient treatment. Adequate inpatient treatment shall include such accommodations, diet, heat, light, sanitary facilities, clothing, recreation,

> education and medical care as are necessary to maintain decent, safe and healthful living conditions.
>
> Treatment shall include diagnosis, evaluation, therapy, or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote such recovery.

Of particular interest in this matter, the Superior Court in *Farago* specifically observed that "the decision to treat Mrs. Farago in an open ward with few restraints was a treatment decision falling within Section 7114 of the MHPA thus entitling appellee to immunity from ordinary negligence." *Farago v. Sacred Heart General Hospital*, 365 Pa. Super. 1, 528 A.2d 986, 988 (Pa. Super. Ct. 1987).

In *Appeal of Victor*, 445 Pa.Super. 233, 238-239, 665 A.2d 8 (Pa. Super. Ct. 1995), the Court observed that the Act does not require treatment decisions to be made in a vacuum, and "that such decisions are to be made in light of the full range of facts relevant to an individual's psychiatric condition, including environmental and social factors that may impact upon a patient's condition."

In *Allen v. Montgomery Hospital*, 548 Pa. 299, 696 A.2d 1175 (Pa. 1997), the Pennsylvania Supreme Court held that the immunity provided by § 7114(a) extends beyond the care provided for the mental illness, and includes "doctors and hospitals who have undertaken the treatment of the mentally ill, including treatment for physical ailments pursuant to a contract with a mental health facility to provide such treatment." 548 Pa. at 307.

The Mental Health Procedures Act does not contain any definition of "gross negligence" as that term is used within § 7114(a). In *Bloom v. Dubois Regional Medical*

Center, 409 Pa.Super. 83, 597 A.2d 671 (Pa. Super. Ct. 1991), the Pennsylvania Superior Court provided guidance on that question, as follows:

> Although there has not been universal agreement as to the meaning of the term gross negligence, it is clear that the term does not encompass wanton or reckless behavior. As the Supreme Court has explained: It must be understood, of course, that wanton misconduct is something different from negligence however gross,--different not merely in degree but in kind, and evincing a different state of mind on the part of the tortfeasor. Negligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong. *Kasanovich v. George,* 348 Pa. 199, 203, 34 A.2d 523, 525 (1943); *see also Krivijanski v. Union Railroad Co.,* 357 Pa.Super. 196, 515 A.2d 933 (1986).
>
> Having reviewed the prior case law, we are still without clear guidance as to what the legislature might have intended by its use of the term "gross negligence" in the Mental Health Procedures Act. Nowhere is the phrase defined either in the Act itself or in the generally applicable definitions in our statutory law. It appears that the legislature intended to require that liability be premised on facts indicating more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference. We hold that the legislature intended the term gross negligence to mean a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care.
>
> *Bloom v. Dubois Regional Medical Center,* 409 Pa.Super. 83, 98-99, 597 A.2d 671, 679 (Pa. Super. Ct. 1991). Accord, *Albright v. Abington Memorial Hospital,* 696 A.2d 1159, 1164 (Pa. 1997).

In *Albright v. Abington Memorial Hospital,* 696 A.2d 1159, 1164-1165 (Pa. 1997), the plaintiff appealed from a trial court order for summary judgment, based upon the court's conclusion that the record did not support the claim that the hospital's conduct rose to the level of gross negligence as set forth in 50 P.S. § 7104(a). The Pennsylvania Supreme Court affirmed the trial court, describing the issue as follows:

> While it is generally true that the issue of whether a given set of facts satisfies the definition of gross negligence is a question of fact to be determined by a jury, a court may take the issue from a jury, and decide the issue as a matter of law, 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. *See, e.g., Willett v.*

> *Evergreen Homes, Inc., et. al.*, 407 Pa.Super. 141, 595 A.2d 164 (1991), *alloc. denied,* 529 Pa. 623, 600 A.2d 539 (1991) (summary judgment affirmed as to employees of facility pursuant to Mental Health and Retardation Act of 1966, 50 P.S. § 4603, which contains a limited immunity provision similar to that found in the Act at issue and which immunizes certain treatment decisions unless such decisions rise to the level of, *inter alia,* gross negligence); 57A Am.Jur.2d § 256. Appellant's reliance upon and interpretation of *Bloom* is in error. The *Bloom* court merely restated basic summary judgment law. Never did the *Bloom* court indicate that where, as here, a plaintiff asserts gross negligence but establishes only ordinary negligence, summary judgment would be precluded. A more logical and sound reading of the proposition set forth in *Bloom* is that the determination of whether an act or failure to act constitutes *gross* negligence is for a jury, but may be removed from consideration by a jury and decided as a matter of law only where the case is entirely free from doubt and there is no possibility that a reasonable jury could find *gross* negligence.
>
> *Albright v. Abington Memorial Hospital*, 696 A.2d 1159, 1164-1165 (Pa. 1997).

Thus, the issue presented by the Defendants' Motion of Summary Judgment is whether the Court is satisfied that the Plaintiff has produced no evidence upon which a reasonable jury could find gross negligence.

In *Martin v. Holy Spirit Hospital*, 2017 Pa.Super. 11, 154 A.3d 359 (Pa. Super. Ct. 2017), the trial court sustained defendant's preliminary objections, holding that the complaint alleging the hospital's failure to properly restrain the decedent to protect her from self-harm could not allege gross negligence. The Superior Court reversed, holding that those factual allegations "could, upon further development, be found by a jury to constitute gross negligence." 154 A.3d at 370.

In *Estate of Whittling v. United States*, 99 F.Supp.2d 636 (W.D. Pa. 2000), District Judge McLaughlin, applying the Medical Health Procedure Act, found that the Veterans Administration Medical Center was grossly negligent in giving plaintiff's decedent ground privileges and failing to properly supervise him. As a result, plaintiff's decedent eloped from the facility, and rolled down an embankment to his death.

The Expert Reports:

Defendants have produced the expert reports of Elena del Busto, M.D. and Carl Dobson, M.D., and David M. Mitchell, M.D., all of whom opine that Lovett received proper care while a patient at Williamsport Hospital (now UPMC). If testimony consistent with those reports is accepted by the jury, Defendants will obviously prevail. As it occurs, this Court is not free to simply accept Defendants' proof.

Plaintiff has produced the expert report of Peter Jenei, M.D. Although Dr. Jenei has identified that "there were several deviations from the accepted standards of medical practice which fell below the standard of care by the medical staff and institution which directly resulted in the injuries sustained by Mr. Lovett," there is nothing in that report which supports a claim of gross negligence.

Plaintiff has also produced the expert report of Richard E. Fischbein, M.D. Dr. Fischbein confirms that Lovett "clearly did" suffer from a psychiatric illness or delirium. Dr. Fischbein further opined that, with regard to the care provided by the Defendants, "the standard of care was not met." If that were the full scope of the opinion, this Court could conclude that "there is no possibility that a reasonable jury could find *gross* negligence." The following sentence of the report, however, compels another conclusion: "The care was gross deviation of the standard of care for a patient suffering from a delirium."

VII. Conclusion:

In full candor, the record of evidence in support Dr. Fischbein's opinion of a gross deviation from the standard of care appears thin. For the most part, the record evidence supports the opinions offered by Elena del Busto, M.D. and Carl Dobson, M.D., and David M. Mitchell, M.D., to the effect that the Defendants did not deviate from the appropriate standard of care. In ruling on Defendant's motion, however, this Court must examine the record in the light most favorable to Plaintiff, and resolve all doubts against the Defendants. *Stidham v. Millvale Sportsmen's Club,* 421 Pa.Super. 548, 558, 618 A.2d 945, 950 (Pa. Super. Ct. 1992), *appeal denied,* 536 Pa. 630, 637 A.2d 290 (Pa. 1993) (citing *Kerns v. Methodist Hosp.,* 393 Pa.Super. 533, 536–37, 574 A.2d 1068, 1069 (Pa. Super. Ct. 1990)).

If the jury accepts the testimony of Richard E. Fischbein, M.D., and concludes that the care provided by the Defendants "was gross deviations of the standard of care," the jury might find liability, notwithstanding the limited immunity provided by 50 P.S. § 7104(a). For that reason, Defendants' Motion for Summary Judgment will be denied.

ORDER

And now, this 18th day of December, 2023, for the foregoing reasons, it is hereby Ordered and directed that Defendants' Motion for Summary Judgment is DENIED.

By the Court,

_____
William P. Carlucci, Judge

WPC/aml

CC:

Brian Bluth, Esq.
Douglas Yazinski, Esq.
Pisanchyn Law Firm
524 Biden Street
Scranton, PA 18503