COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1471 **Cir. Ct. No. 99-CV-1206**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MARIE CALBERT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL D. CALBERT, DECEASED, DAVARIS CALBERT, A MINOR UNDER 14 YEARS OF AGE, BY HIS GUARDIAN AD LITEM, TERRY L. CONSTANT, BRANDON CALBERT, A MINOR UNDER 14 YEARS OF AGE, BY HIS GUARDIAN AD LITEM, TERRY L. CONSTANT, AND TROY CALBERT, A MINOR UNDER 14 YEARS OF AGE, BY HIS GUARDIAN AD LITEM, TERRY L. CONSTANT,

PLAINTIFFS-APPELLANTS,

V.

ERIN BRIGGS, HOWARD L. ERICKSON, AND ROCK COUNTY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 DYKMAN, J. Plaintiffs appeal from an order dismissing on summary judgment plaintiffs' 42 U.S.C § 1983 claims against all respondents and dismissing state law negligence claims against respondent Howard Erickson, Rock County's sheriff. Plaintiffs are relatives of Paul Calbert, a pretrial detainee who committed suicide while incarcerated in the Rock County Jail. Plaintiffs argue that dismissal of the § 1983 claims was improper because their affidavits and other materials created an issue of fact whether respondents were deliberately indifferent to Calbert's serious medical needs, denying him rights given by the Eighth and Fourteenth Amendments to the United States Constitution. We disagree and affirm. We also affirm the trial court's order dismissing plaintiffs' negligence claims against Erickson, but we are precluded from considering plaintiffs' negligence claims against respondents Erin Briggs and Rock County.

BACKGROUND

¶2 Calbert was arrested for assault on December 14, 1996. He was booked into jail by a correctional officer, Erin Briggs. As part of the booking process, Calbert and Briggs completed a medical intake form. Briggs filled out the top portion of the form based on his personal observations. Calbert filled out the bottom portion which included question thirteen: "Have you attempted or are you considering suicide?" When answering this question he made a small mark in the "no" column and a larger check in the "yes" column.

¶3 In his affidavit, Briggs asserts that because question thirteen was a dual question, it was his practice to review a "yes" answer with the inmate to clarify the response. He asserts that after reviewing the question, inmates would often say that they may have considered or attempted suicide in the past, but

affirm that they did not have these thoughts presently. While Briggs has no specific memory of booking Calbert, he is sure that he followed his practice of reviewing the "yes" response and is confident that Calbert indicated that he was not presently considering suicide. Plaintiffs attached to their affidavit in opposition to summary judgment a number of medical intake forms previously completed by Briggs. On these forms where there is a "yes" to question thirteen, Briggs noted what the inmate meant by the response. There is no notation on Calbert's intake form. Plaintiffs argue that this presents sufficient evidence for a jury to infer that Briggs did not ask Calbert to clarify the response.

¶4 It is undisputed that Briggs did not tell his supervisor that Calbert might be a suicide risk and that he did not refer Calbert to Crisis Intervention. Calbert was placed in the general prison population. Six days after being booked, Calbert committed suicide.

¶5 At the time of Calbert's booking, Rock County Jail Policy 20.31, approved by Sheriff Erickson, governed medical intake screening. The policy reads in pertinent part:

> Anytime based on "yes" answers from the Medical Intake Report, that an inmate may present a risk, i.e.; suicide risk, under the influence of alcohol/drugs, drug/alcohol withdrawal, the shift supervisor or O.I.C. shall be contacted and advised of the situation. Based on information available, they will determine if Crisis Intervention should be called.

¶6 According to Briggs and Commander Barrington, Briggs's supervisor, the policy did not require that a booking officer contact his supervisor every time there was a "yes" answer to question thirteen. Instead, the policy allowed the officer to exercise discretion.

STANDARD OF REVIEW

¶7 We review summary judgment de novo. ***Cody v. Dane County***, 2001 WI App 60, 242 Wis. 2d 173, 181, 625 N.W.2d 630. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** We view the facts in the light most favorable to the non-moving party and will draw all reasonable inferences in their favor. ***Burkes v. Klauser***, 185 Wis. 2d 308, 328, 517 N.W.2d 503 (1994).

REVIEWABLE MATTERS

¶8 As an initial matter, we note that the trial court's order was final only as to Sheriff Erickson. WISCONSIN STAT. § 808.03(1) (2001-02),[1] provides that only final judgments and final orders may be appealed. Finality is defined: "A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties …." ***Id.*** The entire matter in litigation is not terminated as to Briggs and Rock County. Plaintiffs' negligence claims continue as to them. However, plaintiffs have briefed Briggs's and Rock County's 42 U.S.C. § 1983 liability. Respondents have replied. Rather than save these issues for a possible second appeal, we will treat plaintiffs' notice of appeal as a petition for leave to appeal as to the non-final portions of the order, § 808.03(2). We extend the time for seeking leave to appeal, WIS. STAT. RULES 809.50(1), and 809.82(2), and grant the petition. As to plaintiffs' negligence claims against Briggs and Rock County, the matter is different. In addition to finality concerns, a trial court's order or judgment must be

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

adverse to the appellant. WIS. STAT. § 809.10(4), ***State v. Treadway***, 2002 WI App 195, ¶3, n.1, 257 Wis. 2d 467, 651 N.W.2d 334, *review denied,* ____ Wis. 2d ____ (October 21, 2002). The trial court denied Briggs's and Rock County's motion for summary judgment as to plaintiffs' negligence claims against them. Therefore, the trial court's order was not adverse to plaintiffs insofar as it pertained to their negligence claims against Briggs and Rock County. We are precluded from reviewing these issues. ***Id.***

42 U.S.C. § 1983 CLAIMS

¶9 Plaintiffs argue that the trial court erred by dismissing the 42 U.S.C. § 1983 claims against Rock County, Briggs and Erickson. They argue that there is a material issue of fact whether respondents violated Calbert's constitutional rights. Plaintiffs have based their claims on both the Fourteenth and Eighth Amendments to the United States Constitution.

¶10 The Eighth Amendment protects prisoners from officials' deliberate indifference to serious medical needs. ***Estelle v. Gamble***, 429 U.S. 97 (1976). Since Calbert is a pretrial detainee, however, the Eighth Amendment does not apply to him. ***Bell v. Wolfish***, 441 U.S. 520 (1979). The Supreme Court has said that a pretrial detainee's medical needs are protected by the due process clause of the Fourteenth Amendment. ***City of Revere v. Massachusetts General Hosp.***, 463 U.S. 239, 244 (1983). The Court did not definitively define the scope of this right, holding only that a pretrial detainee's rights are "at least as great as the Eighth Amendment protections afforded a convicted prisoner." ***Id. Robinson v. City of West Allis***, 2000 WI 126, ¶63, 239 Wis. 2d 595, 619 N.W.2d 692, noted that no Wisconsin case has yet decided whether a detainee's protections under the

Fourteenth Amendment are *greater* than those provided under the Eighth Amendment for one convicted of a crime.

¶11 The Seventh Circuit has concluded that the rights of a pretrial detainee are the same as those of a prisoner. In ***Frake v. City of Chicago***, 210 F.3d 779, 781-82 (7th Cir. 2000), the court concluded:

> In this case it is Robert Frake's due process rights with which we are concerned. He was a pretrial detainee, not found guilty of a crime, and therefore he could not be "punished." For that reason, his treatment in the detention facility is analyzed under the Due Process Clause, rather than the Eighth Amendment's prohibition against cruel and unusual punishments. But like the protection afforded a convicted prisoner under the Eighth Amendment, a detainee is protected from the "deliberate indifference" of officials. Specifically, when the claim is based on a jail suicide we have determined that the protection a detainee receives is the same as that received by an inmate claiming inadequate medical attention under the Eighth Amendment.

Id. (citations omitted).

¶12 We agree with ***Frake***. "Deliberate indifference" is a term that falls between ordinary negligence and intentional conduct. In ***County of Sacramento v. Lewis***, 523 U.S. 833, 848-49 (1998), the court noted "that the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'" ***Id.*** (citation omitted).

¶13 The court concluded:

> We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state

> officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.

Id.

¶14 For a pretrial detainee's rights to be greater than the rights of a prisoner under the Eighth Amendment, the test would have to be something less than the "deliberately indifferent" test for prisoners, or something akin to negligence. While there might be gradations of negligence, it would be hair splitting to try to define them. Gross negligence, a term which has been abandoned in Wisconsin, ***Bielski v. Schulze***, 16 Wis. 2d 1, 14-19, 114 N.W.2d 105 (1962), seems to equate with the "deliberate indifference" standard used for Eighth Amendment violations. It seems inevitable, therefore, that without inventing a test that is something more than negligence and something less than deliberate indifference, we are left with the conclusion that pretrial detainees whose medical needs are unmet must meet the same "deliberate indifference" test as prisoners.

42 U.S.C. § 1983 Claims Against Officer Briggs

¶15 Section 1983 claims against state officials may be brought against the state official in his or her personal or official capacity. The two claims are very different. In ***Kentucky v. Graham***, 473 U.S. 159 (1985), the court explained the difference:

> Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Id. at 165-66 (citations omitted).

¶16 Plaintiffs' complaint alleges both official-capacity and personal-capacity claims against Briggs. But their brief, as it pertains to Briggs, does not discuss which form of 42 U.S.C. § 1983 liability they consider applicable. Instead, they contest the trial court's conclusion that Policy 20.31 gave Briggs discretion whether to contact his shift supervisor, officer in charge or Crisis Intervention. Because Fourteenth Amendment liability for both official-capacity and personal-capacity claims requires "deliberate indifference" to a prisoner's serious illness or injury, ***Santiago v. Lane***, 894 F.2d 218, 221 (7th Cir. 1990), ***Frake***, 210 F.3d at 782, we will assume that plaintiffs are asserting both claims.

¶17 Plaintiffs interpret Policy 20:31 to mandate that Briggs contact his shift supervisor, officer in charge or Crisis Intervention whenever an inmate answers question thirteen on the medical intake report "yes." The trial court disagreed, concluding that it gave Briggs discretion not to do so unless he felt the answers indicated the inmate posed a risk of suicide.

¶18 Plaintiffs' argument as to Briggs's liability consists of pointing out an apparent discrepancy in the trial court's treatment of their negligence claims and 42 U.S.C. § 1983 claims, together with their view that Briggs was required to do a ministerial act. The difficulty with this analysis is that it assumes that Policy 20.31 gives Briggs no discretion, and it confuses ministerial acts, a concept in State public officer immunity jurisprudence, with requirements of § 1983 liability. We have explained that we are precluded from addressing Briggs's liability for negligence, so we will not consider plaintiffs' claims that "Briggs may be held liable for his negligent performance of [his] ministerial act." We will therefore consider Briggs's § 1983 liability, which requires us to first determine what was required of him under Policy 20:31, and then whether he was "deliberately indifferent" to Calbert's Fourteenth Amendment rights.

¶19 In order to establish that Briggs violated Calbert's Fourteenth Amendment rights, plaintiffs needed to show: (1) that the deprivation Calbert experienced was, when viewed objectively, sufficiently serious; and (2) that Briggs was deliberately indifferent to Calbert's health and safety. ***Farmer v. Brennan***, 511 U.S. 825, 834 (1994).

¶20 To establish the first prong, plaintiffs need show only that Calbert was "incarcerated under conditions posing a substantial risk of harm." ***Id.*** A showing that Calbert had "a serious medical need" is sufficient to satisfy this test. ***Estelle***, 429 U.S. at 104-05. This prong is meant to insure that officials need not be concerned with Eighth and Fourteenth Amendment claims arising from minor ailments. *See* ***Cooper v. Casey***, 97 F.3d 914, 916 (7th Cir. 1996) (noting that the "Constitution is not a charter of protection for hypochondriacs"). Calbert committed suicide. As the Seventh Circuit noted, "It goes without saying that suicide is a serious harm" and "it would be difficult to think of a more serious deprivation." ***Sanville v. McCaughtry***, 266 F.3d 724, 733 (7th Cir. 2001). We conclude that the first prong of ***Farmer*** is satisfied.

¶21 To establish the second prong of ***Farmer***, plaintiffs must establish that Briggs was deliberately indifferent to the risk that Calbert would commit suicide. The test for deliberate indifference is subjective. ***Farmer***, 511 U.S. at 838-39. "In order to show 'deliberate indifference,' a plaintiff is required to prove that the prison official's action was deliberate or reckless in the criminal sense." ***Santiago***, 894 F.2d at 221 (citation omitted). Plaintiffs are not required to put on direct evidence of the official's subjective knowledge; instead this is "a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." ***Farmer***, 511 U.S. at 842. With this standard in mind

we consider whether the record creates a jury issue as to whether Briggs was deliberately indifferent to Calbert's possible suicidal condition.

¶22 Pertinent facts from the plaintiff's affidavits are: During booking Calbert was ask to fill out the bottom of a medical intake form. In response to the question thirteen: "Are you presently considering suicide or have you ever attempted suicide?" Calbert made a small mark in the "no" column and a large check in the "yes" column. A "yes" to question thirteen could indicate either that the inmate had previously attempted suicide or was presently considering suicide. In order to resolve this ambiguity Briggs testified at deposition that he would always ask the inmate to clarify a "yes." If the inmate said that he or she was presently contemplating suicide, he would contact his supervisor and inform the inmate about counseling options. If the inmate indicated that the response referred only to a past attempt and that he or she was not presently considering suicide, Briggs would not automatically take these actions. He had no specific memory of Calbert's booking. Briggs was confident that he followed this procedure with Calbert and that Calbert must have responded that he was not presently suicidal.

¶23 Calbert's medical intake form is appended to the plaintiffs' affidavits. In addition to the bottom part, which we have described, a top part, filled out by Briggs, asks many questions. Questions pertinent to this case are: "Does the prisoner's behavior suggest a risk of suicide?" "Does the prisoner's behavior suggest the possibility of mental illness?" "Does the prisoner talk of or threaten suicide?" "Does the prisoner make references to death?" "Does the prisoner seem depressed or express helplessness?" "Does the prisoner appear agitated, anxious or upset?" "Are there any indications of self-mutilation/harm?" And "To your knowledge, is there a history of suicidal behavior?" Briggs answered these questions "no."

¶24 Plaintiffs have submitted intake forms for other inmates that were completed by Briggs. On the forms where there was an affirmative response to an inmate's question thirteen, Briggs made notations in the margin indicating the inmate's response to the follow up questions. No notation appears on Calbert's form, which was signed by Briggs. It is undisputed that Calbert was put into the general prison population without being offered counseling and with no special instructions that he be monitored for suicide attempts.

¶25 This record does not create a jury issue as to whether Briggs was deliberately indifferent to the possibility of Calbert's suicide. "Deliberate indifference" is something more than negligence, though it is something less that acts or omissions done for the very purpose of causing harm or with knowledge that harm will result. ***Farmer***, 511 U.S. at 835. A prison official cannot be found liable unless the official knows of and disregards an excessive risk to inmate safety. ***Id.*** at 837.

¶26 Plaintiffs argue that because Briggs made notations such as "Has thoughts occasionally," "Attempted—1991," "considered in past" and "has attempted suicide in past w/in yr." on other medical intake reports, a jury could infer that Briggs failed to follow up on Calbert's "yes" on question thirteen. This, they argue, constitutes deliberate indifference. But question thirteen is not the only question on the medical intake form. We have quoted the other questions on the form, and Briggs's negative answers to those questions. Briggs affirmatively noted that Calbert would have given no indication of an interest in suicide. Question thirteen is in the disjunctive. Since Briggs cannot recall, and Calbert is deceased, there is no way to conclude that Calbert indicated that he was considering suicide rather than he had attempted suicide in the past.

¶27 With all of Briggs's observations negating a possibility of suicide, and no question definitively asking whether Calbert was considering suicide, together with the remoteness of Calbert's suicide to Briggs's questions, a reasonable jury could not conclude that Briggs failed to make a notation on the medical intake form because he was deliberately indifferent to Calbert's condition.[2]

¶28 In ***Merco Distributing Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 459-60, 267 N.W.2d 652 (1978), the court explained that when there is no credible evidence upon which a trier of fact can base a reasoned choice between two possible inferences, any finding of causation would be in the realm of speculation and conjecture. That is the case here. To find that Briggs was deliberately indifferent to the possibility of Calbert's suicide, a jury would have to infer from the lack of a notation explaining Calbert's "yes" answer to question thirteen, that Calbert told Briggs that Calbert was considering suicide, and that Briggs failed to note that information because he did not care about Calbert's problem. That Briggs was negligent in failing to so note would not be enough. The other inference is that Briggs did inquire about Calbert's answer to question thirteen, and was given an answer which was insignificant to Calbert's suicide six days later. As in ***Merco***, there is no credible evidence from which a jury could base a reasoned choice between these two inferences. And we have given plaintiffs the benefit of the doubt in concluding that a reasonable jury could infer deliberate indifference from a lack of explanatory information to question thirteen,

[2] The dissent concludes that a reasonable jury could conclude that Briggs would have discovered that Calbert was considering suicide had he asked, and that his failure to ask caused Calbert's suicide six days later. The speculation necessary to reach this conclusion is too great for it to constitute a reasonable basis for a jury verdict.

though Briggs gave an explanation on other medical intake forms. We therefore conclude that the trial court properly granted summary judgment to Briggs.

42 U.S.C. § 1983 Claims Against Sheriff Erickson

¶29 Plaintiffs use the terms "supervisory-capacity" or "supervisory liability," to describe the basis of Sheriff Erickson's 42 U.S.C. § 1983 liability. It is well settled that a claim brought under § 1983 cannot be founded upon *respondeat superior.* ***Monell v. Dep't of Social Servs. of City of New York***, 436 U.S. 658, 689 (1978). However, courts have found officials liable in § 1983 actions in their individual capacity based upon the principle of supervisory liability. ***Jones v. City of Chicago***, 856 F.2d 985, 992 (7th Cir. 1988); ***Lanigan v. Village of East Hazel Crest, Ill.***, 110 F.3d 467 (7th Cir. 1997). Supervisory liability avoids the respondeat superior prohibition because it requires that the defendant official be personally involved in the subordinate's conduct responsible for violating the plaintiff's constitutional rights. ***Lanigan***, 110 F.3d at 477. Thus § 1983 individual liability will extend to supervisors when they "know about the conduct and facilitate it, approve it, condone it or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." ***Id***. (citation omitted).

¶30 Although plaintiffs have alleged "supervisory liability," we will assume that this action is brought against Sheriff Erickson in his official capacity.[3]

[3] The distinction is far from immaterial, as whether a 42 U.S.C. § 1983 action is against a defendant in his official or individual capacity "determines both the source and nature of the damages award." ***Hill v. Shelander***, 924 F.2d 1370, 1372 (7th Cir. 1991). A plaintiff is generally barred from recovering punitive damages in an official capacity suit, but a governmental official acting in his individual capacity and in bad faith may be held liable for punitive damages. ***Id***. at 1373.

First, in their brief, plaintiffs assert that "It is well settled that supervisory liability under § 1983 properly lies against Erickson in his official capacity …." Second, plaintiffs claim constitutional violations arising from the use of a shadow policy, endorsed by Sheriff Erickson. An official capacity suit may be presumed when "the indicia of an official policy or custom are present in the complaint." ***Hill v. Shelander***, 924 F.2d 1370, 1373 (7th Cir. 1991).

¶31 For Erickson to be liable in his official capacity, plaintiffs must show that he, as the sheriff of Rock County, was the final decisionmaker in matters involving the Rock County Jail and that he followed or instituted an unconstitutional practice, policy or custom that resulted in the deprivation of Calbert's constitutional rights. ***Monell***, 436 U.S. at 689; ***Luck v. Rovenstine***, 168 F.3d 323, 325-26 (7th Cir. 1999). In ***Luck***, a state trooper arrested Luck, and took him to Sheriff Rovenstine's jail, where Luck remained for eight days without a probable cause hearing before a judge or magistrate. The Seventh Circuit found that Rovenstine could be liable for the unlawful detention of Luck because as sheriff, "it is he who is answerable for the legality of [custody of jail inmates]," ***Luck***, 168 F.3d at 326, and the facts supported the conclusion that Rovenstine's chosen course of action was the cause of Luck's unlawful detention. The court stated:

> Sheriff Rovenstine's own deposition testimony supports the conclusion that two different monitoring policies existed: one for detainees his own officers brought in, and another for detainees brought in by outside agencies…. On the basis of this record, a jury could conclude that Sheriff Rovenstine did not merely overlook Luck, but instead chose to pursue a deliberate course of action that gave greater weight to avoiding conflict with other agencies than it did to the preservation of detainees' constitutional rights. A policy under which the sheriff holds onto a suspect until the arresting agency tells him to release the person is in terms a violation of the Fourth Amendment. Luck's

> contention that this was Sheriff Rovenstine's policy is therefore sufficient to support an official capacity claim against the sheriff.

Id. at 327.

¶32 Plaintiffs cannot meet the requisite showing for official capacity liability under 42 U.S.C. § 1983. They argue that Erickson should be liable for Calbert's suicide because he knew of and tolerated a "shadow policy" which allowed booking officers to use discretion when an inmate indicated a possibility of suicide by answering "yes" to question thirteen on the intake form. There are two answers to plaintiffs' assertions. First, the plaintiffs cite to their appendix, A-19, pp. 2-3, a deposition of Barbara Barrington, the commander of the Rock County Jail, for their assertion that Sheriff Erickson knew of the "shadow practice," and gave it his approval. That assertion is false. Nowhere in the cited material does Barrington even mention Sheriff Erickson.[4] Since Erickson's action, here the asserted approval of a "shadow policy," must have caused the violation of Calbert's Fourteenth Amendment rights, ***Luck***, 168 F.3d at 326, the plaintiffs' failure to show that Erickson knew of the "shadow policy" and ratified it is fatal to any official capacity claims against Erickson.

¶33 Second, there is little, if any, difference between Policy 20.31 and the "shadow policy." Policy 20.31 reads in pertinent part: "Anytime based on "yes" answers from Medical Intake Report, …."

[4] We have not searched the eighty-four pages of the affidavits and other material to which plaintiffs have referred us by citing to "R21-23; A19:2-3"as showing somewhere that Erickson knew of the "shadow policy" or of Calbert's allegedly suicidal condition when booked. We do not search voluminous records to find a sentence supporting plaintiffs' assertion. *See*, ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 120, 334 N.W.2d 580 (Ct. App. 1984).

¶34 The use of the plural "answers" in the policy makes it clear that the focus of the policy is not only on question thirteen.[5] We have quoted the questions Briggs answered "no" to on the medical intake report. Policy 20.31 and the "shadow policy" are the same. If the answers to the medical intake report convince the booking officer that an inmate poses a suicide risk, the officer should call a shift supervisor or the officer in charge. Based on all available information, they may call Crisis Intervention. Even if Sheriff Erickson knew of the "shadow policy," Briggs's failure to call his shift supervisor or Crisis Intervention was not a violation of Policy 20.31. Plaintiffs' assertions that Erickson's tacit approval of the "shadow policy" as an exception to Policy 20.31 results in 42 U.S.C. § 1983 official capacity liability therefore fail.

42 U.S.C. § 1983 Claims Against Rock County

¶35 Plaintiffs' claims against Rock County are the same as claims against Sheriff Erickson in his official capacity. ***Hafer v. Melo***, 502 U.S. 21, 25 (1991). And unless Sheriff Erickson instituted a policy which itself violated a constitutional right, the county, as Erickson's employer, is not liable. ***Canton v. Harris***, 489 U.S. 378, 427 (1989). Plaintiffs have failed to establish that the alleged "shadow policy" was condoned by Sheriff Erickson or that it was the cause of a constitutional deprivation. Therefore, as to this assertion of Rock County's liability, the answer is the same—Rock County is not liable for Sheriff Erickson's actions taken in his official capacity.

[5] Plaintiffs would have us interpret question thirteen of Policy 20.31 to read: "Anytime, based upon an inmate's 'yes' answer to question thirteen, the booking officer must contact the shift supervisor or O.I.C."

State Law Negligence Claim Against Sheriff Erickson

¶36 Last, we consider plaintiffs' state law negligence claim against Sheriff Erickson. Plaintiffs assert that we must accept all the facts of their complaint as true because the trial court granted defendants' motion to dismiss. But defendants' motion to dismiss was accompanied by affidavits and other material, thus converting the motion to dismiss into a motion for summary judgment. *See* WIS. STAT. § 802.06(3). We therefore follow summary judgment methodology, which by now is well known.

¶37 The trial court concluded that Sheriff Erickson was entitled to immunity from suit pursuant to WIS. STAT. § 893.80(4). We agree. Section 893.80(4) provides that no suit may be brought against a political corporation or its officers, officials, agents or employees for acts done in the exercise of their legislative, quasi-legislative, judicial or quasi-judicial functions. This has been interpreted to mean "discretionary functions." ***Johnson v. City of Edgerton***, 207 Wis. 2d 343, 353, 558 N.W.2d 653 (Ct. App. 1996). An act is quasi-legislative or quasi-judicial if it involves the exercise of discretion and judgment. ***Kimps v. Hill***, 200 Wis. 2d 1, 23-24, 546 N.W.2d 151 (1996).

¶38 In ***Kimps***, a physical education professor permitted his students to teach a volleyball class during which one of the students was injured. The court concluded that the professor was immune from suit, and rejected the injured student's assertion that the professor had a ministerial duty to assure that the equipment was safe. ***Kimps***, 200 Wis. 2d at 13-14. Plaintiffs contend that Sheriff Erickson's duty was ministerial because Policy 20.31 mandated that Briggs call a shift supervisor when Calbert answered question thirteen "yes." But that is not how we have interpreted Policy 20.31. We have concluded that it permits a

booking officer to exercise discretion. Thus, as the court held in ***Kimps***, the duty was discretionary, not ministerial. Even if we were to accept the plaintiffs' assertion that Sheriff Erickson is liable for negligent acts of jail booking officers, Sheriff Erickson is entitled to WIS. STAT. § 893.80(4) immunity.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶39 ROGGENSACK, J. (*concurring*). While I agree with the majority opinion, that the plaintiffs' 42 U.S.C. § 1983 (1994) claims against all respondents were appropriately dismissed; that the negligence claims against Erickson were properly dismissed and that the negligence claims against Aaron Briggs and Rock County were not before us on this appeal, I write in concurrence because I do not agree with the analysis of the dismissal of the individual capacity claims against Briggs under § 1983[6].

¶40 Section 1983, in and of itself, does not create substantive rights; rather, it provides a remedy for the deprivation of rights that are established elsewhere. ***Chapman v. Houston Welfare Rights Org.***, 441 U.S. 600, 617-18 (1979). In a § 1983 claim that alleges a violation of either procedural or substantive due process, a plaintiff must show a deprivation of an interest in life, liberty or property that is protected by the Constitution. ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 473, 565 N.W.2d 521, 530 (1997).

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[6] 42 U.S.C. § 1983 (1994) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

¶41 As instructed by the United States Supreme Court, the analysis of Calbert's claims must begin with consideration of Briggs's claim of qualified immunity.[7] ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987). Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have had knowledge. ***Id.*** at 640; ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982); ***Penterman***, 211 Wis. 2d at 469, 565 N.W.2d at 528. The privilege of immunity is more than a defense to liability; it is an immunity from suit that can be lost if a case is wrongfully permitted to proceed. ***Saucier v. Katz***, 533 U.S. 194, 200-01 (2001). Additionally, whether Calbert has shown the existence and deprivation of a clearly established right by citing "closely analogous" cases that would give a reasonable public official notice that his or her actions clearly violated a right protected by the United States Constitution or by a federal statute is a question of law. *See* ***Hunter v. Bryant***, 502 U.S. 224, 227-28 (1991) (per curiam); ***Burkes v. Klauser***, 185 Wis. 2d 308, 327-32, 338-39, 517 N.W.2d 503, 511-13, 516 (1994).

¶42 The first inquiry under a claim of qualified immunity must be whether a constitutional right of Calbert's was violated, given the facts alleged. ***Saucier***, 533 U.S. at 200. If so, then we must determine whether that right, in light of the context in which it was alleged to have been violated, was clearly established at the time of the violation. ***Id.*** Calbert asserts that Briggs violated his

[7] Discretionary act immunity, a state defense, is also raised by Briggs. We do not address discretionary act immunity because it does not bar a federal claim such as that made by Calbert under 42 U.S.C § 1983. *See* ***Kara B. v. Dane County***, 198 Wis. 2d 24, 34-35, 54, 542 N.W.2d 777, 782, 790 (Ct. App. 1995).

Eighth Amendment and Fourteenth Amendment rights by failing to provide an environment where he could not harm himself.

¶43 Because Eighth Amendment rights arise only after conviction, no Eighth Amendment right was violated. ***Bell v. Wolfish***, 441 U.S. 520, 535 n.16 (1979). Therefore, if a constitutional right exists, it is one that is established under the Due Process Clause of the Fourteenth Amendment. The Due Process Clause has both procedural and substantive components. *See generally* ***Wolff v. McDonnell***, 418 U.S. 539 (1974). Calbert has not identified whether a substantive or procedural interest is impacted by the failures he attributes to Briggs, but a substantive right to an environment where he could not commit suicide appears to be at the bottom of Calbert's argument. Therefore, I conclude Calbert claims a violation of substantive due process.

¶44 Calbert offers no case that recognizes a constitutional right to an environment where an inmate could not harm himself and we could find none. However, the provision of necessary medical treatment to an inmate has been held to be a right protected by substantive due process. ***City of Revere v. Massachusetts Gen. Hosp.***, 463 U.S. 239, 244 (1983). Accordingly, we are uncertain whether such a right exists as an absolute right or whether it depends on the circumstances apparent to the officer in charge. Under the analysis set out in ***Saucier***, it appears that even if we were to assume that such a right exists, we must examine whether it was "clearly established" given the particularized circumstances in each given case. ***Saucier***, 533 U.S. at 201. As the Supreme Court explained,

> This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of

> the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

Id.

¶45 Here, it is important to note that the complained of conduct was Briggs's failure to report a possible suicide ideation to his supervisor. Calbert then complains that this failure to report amounted to deliberate indifference, that posed a substantial risk of serious harm. This claim is based solely on Calbert's checking the "yes" box on question thirteen of the intake report and Briggs's failure to add any notations to that section of the report or to notify his supervisor of the "yes" answer. However, Calbert's claim ignores Briggs's assessment earlier on the same form that Calbert's behavior did not suggest a risk of suicide. It also ignores the policy of the sheriff's office that Briggs could make his own assessment of an inmate's risk of suicide and if he concluded there was not a risk of suicide, he could exercise his discretion to not call his supervisor. There is nothing in the record that would show that Briggs's belief that suicide was not a risk was undertaken in deliberate disregard of Calbert. Nothing has been pled or provided in the record that in any way implies that a person in Briggs's position would have reasonably believed that Calbert was a suicide risk but deliberately ignored that risk. As has been repeatedly stated, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." ***Malley v. Briggs***, 475 U.S. 335, 341 (1986). Furthermore, liability for harm that may have been negligently inflicted does not meet the due process threshold. ***Daniels v. Williams***, 474 U.S. 327, 328, 332 (1986).

¶46 Accordingly, based on the record before me, while I may conclude there are circumstances in which an inmate has a constitutional right to an environment where he could not harm himself, I cannot conclude that the law

clearly established that Briggs's conduct violated such a right in the circumstances of this case. Therefore, I conclude that the § 1983 claim against Briggs is barred by qualified immunity.

¶47 VERGERONT, P.J. (*dissenting*). I agree with the lead opinion regarding Rock County and Sheriff Erickson. However, with respect to Briggs, I conclude there are disputed issues of fact entitling the plaintiffs to a trial on their claim that he violated Calbert's right under the Fourteenth Amendment to be protected from deliberate indifference to his serious medical needs. As the lead opinion correctly recognizes, suicide satisfies the first element of the test established in ***Farmer v. Brennan***, 511 U.S. 825, 834 (1994)—that the deprivation Calbert experienced was, when viewed objectively, sufficiently serious. *See* ***Sanville v. McCaughtry***, 266 F.3d 724, 734-35 (7th Cir. 2001). I part company with the lead opinion in its analysis of the second element—deliberate indifference to Calbert's health and safety.

¶48 A prison official is deliberately indifferent if he or she "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and [the official] must also draw the inference." ***Farmer***, 511 U.S. at 837.

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence … and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Id. at 842. In the context of summary judgment, the question is: viewing the evidence, and drawing all reasonable inferences from the evidence, in the plaintiffs' favor, is there is a genuine issue of material fact regarding whether Briggs was deliberately indifferent to Calbert's health and safety?

¶49 I conclude the evidence, viewed in the plaintiffs' favor, gives rise to the following reasonable inferences. Based on portions of Briggs's deposition testimony, it is reasonable to infer that he saw Calbert's "yes" answer to question thirteen, "[h]ave you attempted or are you considering suicide?" Based on portions of Briggs's deposition testimony and the medical intake forms of other inmates in the record, it is reasonable to infer that when inmates answered "yes" to question thirteen, it was Briggs's practice to question them further to determine the basis for the "yes" answer, to make a notation of their response on the form, and to take some further action if the answer indicated an inmate was a suicide risk. Based on evidence that Briggs did not remember conducting an intake interview of Calbert only a week after doing so, and on the lack of notation on Calbert's form regarding question thirteen, it is reasonable to infer that Briggs did not ask Calbert about the "yes" answer to question thirteen. Finally, based on portions of Briggs's deposition testimony, the medical intake reports of other inmates, and evidence of the department policy, it is reasonable to infer that Briggs understood that a "yes" answer to question thirteen indicated there was a risk of suicide and follow-up questions were necessary to determine the degree of risk and the appropriate response.

¶50 If a jury were to choose to draw all these reasonable inferences, I conclude it could reasonably find that Briggs was aware that Calbert was a substantial suicide risk and that Briggs was deliberately indifferent to that risk. I do not agree with the lead opinion's view that, since question thirteen asks in the

disjunctive whether the person "[has] attempted [suicide]" or "[is] considering suicide," it is unreasonable to infer a substantial risk of suicide from a "yes" answer. *See* ***Viero v. Bufano***, 925 F. Supp. 1374, 1385 n.23 (N.D. Ill. 1996) (fact that an inmate's answers on a suicide screening questionnaire can leave an objective reader with the view that more should have been asked may constitute evidence that the inmate's suicide risk and medical needs were obvious).

¶51 There are, it is true, other reasonable inferences that could be drawn that would support a jury finding in favor of Briggs. For example, it is also reasonable to infer that Briggs did not see the "yes" answer to question thirteen; and the view of the evidence presented in the lead opinion is also reasonable—that Briggs saw the "yes" answer and did ask Calbert questions and make observations that led him to believe Calbert did not present a substantial suicide risk. However, it is the role of the jury, not the court, to decide which of the reasonable inferences to draw from the evidence.

¶52 I do not join in the concurring opinion affirming on the grounds of qualified immunity for two reasons. First, it has been clearly established since at least 1986 that officials violate the Fourteenth Amendment due process right of a pretrial detainee if they are deliberately indifferent to a detainee's need of medical attention because of mental illness or a substantial suicide risk. ***Hall v. Ryan***, 957 F.2d 402, 404-05 (7th Cir. 1992). Second, the concurring opinion, like the lead opinion, does not, in my view, draw all reasonable inferences from the evidence in Calbert's favor, which is required at the summary judgment stage on the qualified immunity issue as well as on the issue decided by the lead opinion.

¶53 Accordingly, I respectfully dissent.