

11-1701

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

GREGORY PAYNE, individually
and as Executor of the Estate of
CRAIG ALLEN PAYNE, and
BETTY JO PAYNE, individually,

Plaintiffs,

v.

Civil Action No. 07-C-1407
Judge Carrie Webster

DEAF EDUCATION AND
ADVOCACY FOCUS (D.E.A.F.)
OF WEST VIRGINIA, INC.,
BRALEY & THOMPSON, INC.,
THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,
THE WEST VIRGINIA OFFICE OF
BEHAVIORAL HEALTH SERVICES, THE
WEST VIRGINIA BUREAU FOR MEDICAL
SERVICES, and THE WEST VIRGINIA
OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On a previous day came the Defendants, the West Virginia Department of Health and Human Resources, the West Virginia Office of Behavioral Health Services, the West Virginia Bureau for Medical Services, and the West Virginia Office of Health Facility Licensure and Certification (hereinafter "DHHR" or "DHHR Defendants"), by and through their counsel, M. Andrew Brison, Joshua R. Martin, and the law firm of Allen, Kopet, and Associates, PLLC, and renewed Defendants' motion for summary judgment in this matter pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.¹

¹ The defendants filed their original motion for summary judgment on or about March 9, 2010.

After reviewing defendants' motion, all related filings, and pertinent legal authority, and upon viewing same in the light most favorable to the plaintiffs, the Court finds that genuine issues of material fact are in dispute. Accordingly, it is hereby **ORDERED** that Defendants' Motion for Summary be and is **DENIED**.

FINDINGS OF FACT

1. Craig Allen Payne, (hereinafter "Decedent" or "Mr. Payne") suffered from severe cerebral palsy, a physical and mental disability which requires around the clock care. As a result of his condition, the decedent's parents enrolled their son in day services at a facility operated by Deaf Education and Advocacy Focus, Inc. ("D.E.A.F.") a non-profit organization who was licensed to provide supervision and care for mentally retarded and developmentally disabled adults.

2. The Office of Health Facility Licensure and Certification ("OHFLAC"), which is under the supervisory arm of the West Virginia Department of Health and Human Resources ("DHHR"), is responsible for the licensure, regulation and oversight of behavioral health organizations that provide services and programming to severely disabled and special needs individuals.

3. DEAF received compensation from DHHR for services it was licensed to and provided to MR/DD recipients who were under DHHR's legal supervision and care.

4. In February of 2007, the decedent was attending day services at DEAF's South Charleston facility when he suddenly choked to death on a hot dog fed to him by a DEAF employee.

5. Following its investigation into the circumstances surrounding decedent's death,

OHFLAC revoked DEAF's behavioral health license on March 28, 2007.

6. West Virginia Advocates, Inc. ("WVA") conducted a separate investigation into decedent's death, and issued a report which, among other things, substantiated abuse and neglect by DEAF and by Braley & Thompson, another services contract provider.² The report was also critical of DHHR's issuance of a license to DEAF, even though DEAF had been previously cited for multiple deficiencies.³

7. On July 20, 2007, Gregory Payne, the decedent's father and executor of his son's estate, filed a civil complaint against DEAF and Braley & Thompson, alleging that improper staff training and/or failure of staff to follow certain protocols during the incident at issue herein proximately caused his son's death.

8. The plaintiffs' complaint also asserts that the combined negligence of the other named defendants- DHHR, OHFLAC and the West Virginia Bureau of Medical Services proximately caused the decedent's death: These negligent acts and omissions include:

the monitoring and enforcement of the applicable standards of care, policies, protocols and management of the subject facility; failing to ensure that the subject facility was adhering to established protocols for training employees or protocols for the medical and physical care for its clientele; failing to ensure that the non-state agency co-defendants were in compliance with state and federal law/regulations; failing to ensure that the non-state agency co-defendants had trained staff in providing for the needs of people with disabilities participating in the Medicaid Home and Community Based Waiver; failing to ensure that the non-state agency co-defendants implemented Individual Program Plans; failing to ensure direct care staff received training in CPR-First Aid, and other training and certification similar to that required by certified nursing assistants; failing to ensure that non-state agency co-defendants maintained an adequate available workforce to provide services; failing to monitor and enforce state and federal law

² According to its website, WV Advocates is a private, nonprofit agency that describes itself as "...the federally mandated protection and advocacy system for people with disabilities in West Virginia ... whose mission and purpose is to "protect() and advocate() for the human and legal rights of persons with disabilities." See wvadvocates.org.

³ It is unclear to the court whether WVA has any federal and/or state regulatory authority over DEAF and/or other licensed behavioral health providers.

and regulations that govern medical providers to people with disabilities; and failing to disclose licensing issues and/or problems with the subject facility to the clients of the non-state agency co-defendants. See ¶¶ 16-25, Plaintiffs' Amended Complaint.

9. The case was assigned to this court, and a scheduling order was eventually entered. Following a lengthy period of discovery and several trial delays, Defendant DHHR filed a motion for summary judgment on March 18, 2010, asserting the public duty doctrine and qualified immunity privilege as valid legal defenses in support thereof.⁴ DHHR further asserted that the facts developed in this matter failed to demonstrate that it was negligent in the execution of its duties.

10. The plaintiffs contend that summary judgment is improper because genuine issues of material fact are disputed, and that the determination of an existing "special relationship" is a question for the jury. See J.H v. WV Division of Rehabilitation Services, *supra*.

SUMMARY JUDGMENT STANDARD

11. A party is entitled to summary judgment when "the pleading, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c).

12. Summary judgment is only appropriate when the non-moving party has had "adequate time for discovery." Conley v. Stollings, 679 S.E.2d 594, 223 W. Va. 762 (2009).⁵

13. Even though the party moving for summary judgment has the burden to show that no genuine issue of material fact exists, the nonmoving party must present evidence of a genuine

⁴ The Defendant filed a supplemental motion for summary judgment on February 18, 2011.

⁵ The Court also notes that at the time the court heard oral argument, there were still several significant outstanding discovery issues that made any ruling premature.

issue of material fact. Petros v. Kellas, 146 W. Va. 619, 122 S.E.2d 177 (1961).

14. The mere contention by the party resisting summary judgment that issues are disputable is not sufficient to overcome summary judgment. Brady v. Reiner, 157 W. Va. 10, 198 S.E.2d 812 (1973), overruled on other grounds, Board of Church Extension v. Eads, 159 W. Va. 943, 230 S.E.2d 911 (1976). Thus, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence, and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). See also Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

CONCLUSIONS OF LAW

A. Qualified Immunity

1. The West Virginia Supreme Court of Appeals has held that “[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.” Hutchison v. City of Huntington, 198 W. Va. 139, 479 S.E.2d 649 (1996).

2. The“(u)ltimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court; therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie immunity determination, ultimate questions of statutory or qualified immunity are ripe for summary disposition.” *Id.*

3. “The doctrine of qualified official immunity bars a claim of mere negligence against a State Agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 et seq., and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary

judgments, decisions, and actions of the officer.” Syl. Pt. 6, Clark v. Dunn, 195 W. Va. 272, 465 S.E.2d 374 (1995).

4. In Parkulo v. West Virginia Bd. of Probation and Parole, the West Virginia Supreme Court of Appeals recognized:

Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in *W. Va. Code* § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy. Syl. Pt. 6, Parkulo, 199 W. Va. 161, 483 S.E.2d 507 (1996).

5. The defendants seek summary judgment on grounds of qualified immunity on basis that the negligence alleged by plaintiff involves discretionary decision making on the part of DHHR/OHFLAC. The plaintiffs counter that their negligence claim centers on the defendants’ failure to uphold and act upon certain laws and regulations they are duty bound to uphold. Plaintiffs further argue that qualified immunity is not proper because the existing evidence supports their contention that the actions/inactions of defendants’ employees/agents fall outside the scope of their normal duties and responsibilities.⁶

6. On the issue of qualified immunity, the Court finds that the plaintiffs have shown that there are disputed material facts, and have presented evidence which could allow the trier of fact to determine that the decisions made by the defendants in connection with and relating to plaintiffs’ claims were not discretionary. Accordingly, the Court concludes that summary judgment on the basis of the defense of qualified immunity should be and is hereby DENIED.

⁶ The Court also notes that inasmuch as plaintiffs’ amended complaint seeks damages only to the extent of the limits of DHHR Defendants’ insurance coverages, the *general* constitutional immunities of the State and its agencies are inapplicable in the instant matter. (emphasis added) See Syl. Pt. 2, Pittsburgh Elevator Co. v. W.Va. Bd. of Regents, 172 W.Va. 743, 310 S.E.2d 636 (1993); See also Syl. Pt. 2, J.H. v. W.Va. Div. of Rehab. Services, *supra*.

B. Public Duty Doctrine and Special Relationship Exception

7. The defendants argue they are entitled to summary judgment under the public duty doctrine because the plaintiffs have failed to prove that the defendants were negligent in execution of their (public) duties.

8. The public duty doctrine does not rest squarely on the principle of governmental immunity. It is premised on the principle that no recovery against the State shall be had based upon a governmental entity's failure to perform a duty it owes to the public *generally*, even if a member of the public is directly injured by such failure. Parkulo, 199 W. Va. at 172, 483 S.E.2d at 518 (emphasis added). Thus, as a general rule, the State of West Virginia enjoys civil immunity from civil suits arising from its negligent acts and/or omissions.

9. However, the "special duty exception" may bar such immunity if the party establishes that the defendant(s) owed the plaintiff(s) a "special duty."⁷ To meet the "special relationship" exception to W. Va. Code § 29-12-5, the following criteria must be established:

(1) An *assumption* by the state governmental entity, through promises or actions, of an *affirmative duty to act* on behalf of the party who was injured; (2) *knowledge* on the part of the state governmental entity's agents *that inaction could lead to harm*; (3) some form of *direct contact* between the state governmental entity's agents and the injured party; and (4) that *party's justifiable reliance* on the state governmental entity's affirmative undertaking. See Parkulo at Syl. Pt. 12. (Emphasis added).

10. Whether a special duty arises "... is ordinarily a question of fact for the trier of facts." Syl. Pt. 12, J.H. v. West Virginia Div. of Rehab. Services., 224 W. Va. 147, 680 S.E.2d 392 (2009), (citing Syl. Pt. 11, Parkulo).⁸

11. In their amended complaint, the plaintiffs assert that the DHHR Defendants owed certain duties to the decedent based upon a "special relationship" that existed between the parties

⁷ The "special duty" analysis applies to claims that arise under W. Va. Code § 29-12-5.

⁸ For purposes of this Order, the phrases "public duty exception" and "special relationship" are used interchangeably.

at the time of his death and created prior thereto. In support thereof, they point to specific facts and rely upon specific documents set forth and described. Plaintiffs contend they demonstrate that genuine issues of material fact are in dispute and should be resolved by a jury.

a. Defendants' business records and a strategic plan prepared by OHFLAC.

Plaintiffs contend these documents show that the DHHR Defendants were aware of the sub-standard care and existing deficiencies at DEAF, and knew they posed a substantial risk to the health and safety of the decedent and other DEAF program participants. These alleged deficiencies include but are not limited to inadequate staffing and staff training, particularly 'special needs' training relating to decedent's and other MR/DD participants' diets; failure to conduct thorough criminal background checks of prospective staff, and lack of emergency crisis procedures at DEAF.

b. OHFLAC's "Strategic Plan." Plaintiffs contend this document shows that the DHHR Defendants assumed additional duties, and undertook specific affirmative steps to correct existing deficiencies at the facility to ensure that the decedent and other MR/DD recipients under DHHR's legal care and supervision received appropriate needs-based services in a safe environment.

c. MR/DD waiver program. The decedent was enrolled in the MR/DD waiver program and participated in the DEAF's day program. Pursuant to state and federal law, DHHR is required to provide MR/DD recipients with specialized services and specially trained staff to ensure they receive the appropriate level of care to which they are entitled. The decedent was a MR/DD recipient. DHHR, the decedent justifiably relied upon

d. W.Va. Advocates, Inc. Report. WVA's investigation and report evidences that DHHR had actual knowledge and awareness of prior deficiencies and write-ups at

DEAF, and their failure to confirm full compliance before renewing DEAF's license. According to Simiryon's report and deposition testimony, DHHR Defendants were negligent in performing oversight, monitoring and licensing of the West-Sattes facility where decedent died. Plaintiffs contends this evidence shows that the Defendants had knowledge of the sub-standard care and other deficiencies present in the training, care, health, and safety at said facility, and that they failed in their duty to take appropriate actions in correcting said deficiencies.

12. The Court finds that the plaintiffs have demonstrated that genuine issues of disputed material fact exist, and therefore concludes that the determination of whether a special relationship existed is a question for the jury to decide.

13. The Court further concludes that the ultimate determination of whether the breach of such duty by defendants, if any, directly and proximately caused the decedent's death, is also a question for the jury to decide.

14. Accordingly, the Court finds that the documents, information and other evidence contained in the record herein, could lead a trier of fact to conclude or reasonably infer that a special relationship did exist and that the decedent's death was proximately caused by the defendants' negligent acts and omissions.

CONCLUSION

Based upon the facts and conclusions of law set forth above, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment be and is **DENIED**. The defendants' objections to the Court's ruling are noted and preserved.

The Clerk is directed to send certified copies of this order to all counsel of record.

Entered this 10 day of November, 2011.

Carrie Webster

Judge Carrie Webster

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10
DAY OF November, 2011
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA *et*