STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM RAUE, D.O., and KATHERINE RAUE,

Plaintiffs-Appellants,

v

COUNTY OF OAKLAND, OAKLAND COUNTY SHERIFF, and OFFICER JAMES GREGORY,

Defendants-Appellees.

UNPUBLISHED
December 20, 2005

No. 255434
Oakland Circuit Court
LC No. 03-048925-NO

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's grant of summary disposition to defendants under MCR 2.116(C)(7), (8), and (10). We affirm. This case is being decided without oral argument, pursuant to MCR 7.214(E).

Oakland County Deputy Sheriff James Gregory and another officer took a prisoner to a medical facility for treatment and counseling. Pursuant to longstanding department policy, the officers escorting the prisoner required that the door to the office where the prisoner was being treated remain open, and the prisoner visible to them at all times. After a few minutes, Dr. Raue was summoned to give medical treatment. When he closed, or attempted to close, the door to the treatment room, Deputy Gregory forced the door open. In opening the door, Deputy Gregory struck Dr. Raue with some force. Dr. Raue sustained serious injuries to his back and left foot and filed suit against defendants. After some discovery, defendants moved for summary disposition. After briefing by the parties, the circuit judge granted the defense motion and the case was dismissed.

This Court reviews a trial court order for summary disposition de novo. *Maiden v Rosewood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When deciding a motion for summary disposition, all documentary evidence, depositions and the like are viewed by the court in the light most favorable to the nonmoving party. This Court reviews the entire record to determine whether the moving party is entitled to judgment as a matter of law. We give all reasonable inferences in the evidence reviewed to the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

Plaintiffs first argue that it was error for the trial court to grant summary disposition on their claims under 42 USC 1983 alleging a failure to train. Federal civil rights law embodied in that statute provides for liability where a person "under color of state law" subjects another person to the deprivation of a federally protected constitutional or statutory right. Plaintiffs' basic claim is that 42 USC 1320d-6, a part of the Health Insurance Portability and Accountability Act of 1996, accords Dr. Raue a federally protected right to privacy. Because Dr. Raue asserted that right when he closed the treatment room door, and because the Oakland County Sheriff's Department failed to adequately train Deputy Gregory concerning that federally protected right, plaintiffs urge that the County and Sheriff's Department are liable.

Our review of the language in 42 USC 1320d-6 convinces us that the Congress never intended a penalty provision in a comprehensive health insurance scheme to grant these plaintiffs a federally protected right to privacy upon which they could base a § 1983 suit. Indeed, the plain language of § 1320d-6 provides very heavy penalties for disclosure of "individually identifiable health information." The beneficiaries of the statutory language are patients in the health scheme, not doctors.

There is no general federal constitutional right to privacy. *Doe v Sundquist*, 106 F3d 702, 706 (CA 6, 1997); *J P v Desanti*, 653 F2d 1080, 1085-1086 (CA 6, 1981). With neither a federally recognized constitutional privacy right, nor a statutory right, as a foundation for the plaintiff's claim of relief under 42 USC 1983, summary disposition was proper for failure to state a claim. MCR 2.2116(C)(8). *Blessing v Freestone*, 520 US 329, 340-341; 117 S Ct 1353; 137 L Ed 2d 569 (1997).

Even if a cognizable "failure to train" claim had been presented, that claim would fail. The Sheriff Department's policy of having guards observe their prisoners outside the jail at all times was not the "moving force" behind the injury to Dr. Raue, nor did that policy amount to "deliberate indifference" regarding the outcome of the policy. Where the proofs at the time of summary disposition showed that this incident was the first instance in which the department's policy was challenged, and where employees at the very same facility had followed the policy in treating the same prisoner, summary disposition was proper. *City of Canton v Harris*, 489 US 378, 388-389; 109 S Ct 1197; 103 L Ed 2d 412 (1989). Summary disposition was proper on these facts. MCR 2.116 (C)(10).

We also reject plaintiff's claim that the conduct of Deputy Gregory amounted to "gross negligence," subjecting him to liability under an exception in the Governmental Liability Act, MCL 691.1407(2)(c). We conclude that, while it might be argued that Deputy Gregory's act of opening the door was careless, and maybe negligent, reasonable persons could not find this conduct "so reckless as to demonstrate a substantial lack of concern for whether injury results." *Stanton v City of Battle Creek*, 466 Mich 611, 620; 647 NW2d 508 (2002); *Poppen v Tovey*, 256 Mich App 351, 356-357; 664 NW2d 269 (2003). Summary disposition was proper. MCR 2.116(C)(10).

Finally, we find that plaintiffs' claims under 42 USC 1983 were barred by qualified immunity. Deputy Gregory was clearly acting within the scope of his duties while guarding a prisoner. We have found no violation of any federally protected right, "clearly established" or not. *Saucier v Katz*, 533 US 194, 201; 121 S Ct 2151; 150 L Ed 2d 272 (2001); *Paul v Davis*,

424 US 693, 713; 96 S Ct 1155; 47 L Ed 2d 405(1976) Summary disposition was proper. MCR 2.116(C)(10).

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood