[Cite as *Flores v. Northcoast Behavioral Healthcare*, 2014-Ohio-5960.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

ASHLEY FLORES

Plaintiff

v.

NORTHCOAST BEHAVIORAL HEALTHCARE

Defendant

Case No. 2012-07978

Magistrate Anderson M. Renick

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brings this action alleging assault and negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issues of liability and whether Matthew Simkovich is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶2} Plaintiff was admitted as a patient at defendant Northcoast Behavioral Healthcare (NBH) on November 2, 2011 for symptoms related to post-partum depression and suicidal ideation. Plaintiff was discharged on November 9, 2011. Plaintiff testified that her daily routine consisted of waking up early in the morning, eating breakfast, and then returning to her room to wait for treatment. Plaintiff related that she was allowed approximately 30 minutes of "outside time" every other day. Plaintiff described the layout of the facility as two long hallways that were adjacent to a dining area, nurses' station, restroom, and a common area where patients could socialize. Plaintiff estimated that 30 to 40 patients were residing at the facility during her admission. During her hospitalization, plaintiff was visited several times by both her father and the father of her daughter. According to plaintiff, she did not participate in any therapy and she met with a social worker on both the day she was admitted and just prior to her discharge.

{¶3} Matthew Simkovich was employed by NBH as a therapeutic program worker (TPW). Plaintiff testified that when she first encountered Simkovich he was offering candy to patients on her floor. Plaintiff stated that she accepted candy from Simkovich and that he later offered to give her more candy if she gave him a hug. Plaintiff agreed to Simkovich's offer, however, she testified that she became disgusted when Simkovich inappropriately pulled her close, made moaning sounds, and told her she was cute. Plaintiff related that her roommate was not present during this encounter.

{¶4} Plaintiff's next interaction with Simkovich occurred while she and five or six other patients were engaged in recreation outside the facility. Plaintiff testified that Simkovich asked her personal questions and told her that he could obtain cigarettes and moonshine. Plaintiff replied that Simkovich's suggestions were inappropriate.

{¶5} According to plaintiff, on another occasion, Simkovich offered her cigarettes. Plaintiff testified that she smoked a cigarette in a bathroom while Simkovich was present. When plaintiff became afraid someone would smell smoke, she told Simkovich that she did not want to get into trouble. Simkovich then kissed plaintiff and asked her to "touch him" in exchange for the cigarettes. Plaintiff stated that she became afraid and told Simkovich to leave. After Simkovich exited the bathroom, plaintiff walked out and was confronted by a nurse who told plaintiff that she smelled smoke. Plaintiff testified that Simkovich later came to her room, asked her for a kiss, and suggested other inappropriate conduct.

{¶6} On another occasion, Simkovich appeared while plaintiff was in a bathroom. Plaintiff testified that Simkovich approached her after she refused to go toward him, told her she was cute, and assaulted her by pushing her against a sink, fondling her, and forcing her to touch him. Although there was a nurse on duty that night, no one else was in the bathroom to witness this incident.

{¶7} Plaintiff testified that she began to watch for Simkovich. During a visit with her father, plaintiff observed Simkovich approach a nurse who was sitting at a desk.

According to plaintiff, Simkovich walked behind the nurse and rubbed his genital area against the nurse's back. Plaintiff stated that her father was facing away from the nurse's desk and did not observe the incident. Plaintiff testified that she did not know the nurse's name, but she was able to provide a description of the nurse. Plaintiff explained that she did not report the incidents involving Simkovich to hospital staff because she was afraid of the possible consequences of making a report.

{¶8} Plaintiff also presented the testimony of Carrie Rodd, another patient with whom plaintiff had confided during her stay at NBH. Rodd testified that she recalled talking to both plaintiff and Simkovich. Rodd related that Simkovich at first seemed friendly; however, she later became afraid of him after he acted inappropriately on several occasions. Rodd testified that Simkovich came into her room while she was in bed and asked three to four times if he could "tuck her in." Rodd further testified that she observed Simkovich walk behind a nurse, grab her, and touch her from behind while the nurse attempted to move away from him. According to Rodd, she had been warned by plaintiff about Simkovich's behavior, including his offers to obtain cigarettes and alcohol. Rodd testified that she did not report Simkovich's behavior because she was "terrified" that she would not be released from NBH if she made such a report.

{¶9} On November 22, 2011, social worker Robyn Hatten reported to NBH's police department that two other patients had told her that they were being sexually harassed by Simkovich. (Plaintiff's Exhibit 3.) Officer Nannarone initiated an investigation, during which he was informed that Simkovich had offered candy and cigarettes for sex and talked about tucking one of the patients into bed. Nannarone conducted interviews with patients, including plaintiff. He also interviewed nurses and TPWs who worked with Simkovich, each of whom denied any knowledge of Simkovich engaging in inappropriate conduct.

{¶10} During the investigation, NBH learned that four patients, including plaintiff and Rodd, alleged that Simkovich had made sexual comments and advances during

the month of November 2011. On January 5, 2012, Simkovich was notified in writing that his employment with NBH was terminated, effective January 6, 2012, for sexual conduct or contact with patients. (Plaintiff's Exhibit 1.) Simkovich filed a grievance with his union and a settlement agreement was reached which changed the termination "to a resignation not in good standing effective 1/6/12." *Id.*

{¶11} Ohio State Highway Patrol Trooper Andre Bradford testified that he was aware of an investigation involving allegations that Simkovich had made sexual advances toward a patient in May 2011. (Plaintiff's Exhibit 2.) On June 1, 2011, Trooper Bradford was notified by email that a patient had reported to an NBH nurse that Simkovich had made inappropriate sexual remarks and touched the patient's hip. (Plaintiff's Exhibit 10.) NBH police conducted an internal investigation of the May 2011 incident and obtained statements from patients and staff. Trooper Bradford testified that, based upon the May 2011 allegations, he determined that a criminal investigation was not warranted.

{¶12} Trooper Bradford stated that he also participated in a criminal investigation of the November 2011 allegations against Simkovich and that he referred that case to local prosecutors who filed criminal charges against Simkovich. According to Trooper Bradford, the criminal charges were subsequently dismissed and never re-filed.

IMMUNITY

{¶13} Initially, the court must determine whether Simkovich is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. R.C. 2743.02(F) provides, in part: "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims that has

exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action."

{¶14} R.C. 9.86 states, in part: "[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶15} The issue whether an employee is entitled to immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether the employee acted outside the scope of his employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson*, 49 Ohio App.3d 9 (10th Dist.1989). In the context of immunity, "[i]f the Court of Claims determines that the employee's acts did not further the interests of the state, i.e., the employee was acting outside the scope of his employment, maliciously, in bad faith, or in a wanton or reckless manner, the state has not agreed to accept responsibility for the employee's acts and the employee is personally answerable for his acts in a court of common pleas." *Conley v. Shearer*, 64 Ohio St.3d 284, 287, 1992-Ohio-133.

{¶16} The Tenth District Court of Appeals has stated:

{¶17} "Malicious purpose encompasses exercising 'malice,' which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified. * * *

{¶18} "'Bad faith' has been defined as the opposite of good faith, generally implying or involving actual or constructive fraud or a design to mislead or deceive

another. * * * Bad faith is not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. * * *

{¶19} "Finally, 'reckless conduct' refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that such risk is greater than that necessary to make the conduct negligent. * * * The term 'reckless' is often used interchangeably with the word 'wanton' and has also been held to be a perverse disregard of a known risk. * * * As to all of the above terms, their definitions connote a mental state of greater culpability than simple carelessness or negligence. * * *." (Internal citations omitted.) *Wrinn v. Ohio State Highway Patrol*, 10th Dist. Franklin No. 11AP-1006, 2013-Ohio-1141, ¶ 12, quoting *Caruso v. State*, 136 Ohio App.3d 616, 620-22 (10th Dist.2000).

{¶20} The court has previously held that actions that amount to sexual harassment or assault are outside the scope of employment because they further only the interests of the alleged offender and not the employer. *See Jones v. Ohio Veteran's Home*, Ct. of Cl. No. 2002-03775, (Oct. 1, 2004) (finding that an employee who inappropriately touched a female colleague was not entitled to civil immunity.); *Smith v. Dept. of Youth Services*, Ct. of Cl. No. 2000-05860 (June 4, 2002) (finding that a corrections officer who permitted an incarcerated minor to touch her breasts and buttocks over her clothes was not entitled to civil immunity.); *Browning v. Ohio State Highway Patrol*, 10th Dist. Franklin No. 02AP-814, 2008-Ohio-1108.

{¶21} Both plaintiff and Rodd testified credibly that Simkovich's conduct was both unwanted and sexual in nature. Simkovich denied making inappropriate remarks and touching plaintiff. However, the court finds that the testimony of plaintiff and Rodd was more credible than Simkovich's testimony. Simkovich's explanation that plaintiff concocted her allegations because she became angry with him when he told her to end

a telephone call was not persuasive. Based upon the evidence, the court finds that Simkovich engaged in inappropriate sexual conduct with plaintiff.

{¶22} Although Simkovich was ostensibly performing his duties as a TPW during his contact with plaintiff, there is no question that his sexual advances toward plaintiff were not related to his duties and that he acted only to satisfy his own interests. Inasmuch as Simkovich was not furthering the interests of his employer during his interactions with plaintiff, those encounters were not within the scope of his employment. Moreover, the court is convinced that Simkovich acted with malice and in a wanton or reckless manner.

{¶23} Based upon the foregoing, it is recommended that Simkovich is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

STATUTE OF LIMITATIONS

Assault/Battery

{¶24} R.C. 2743.16(A) provides in relevant part:

{¶25} "[C]ivil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of the accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." "The Supreme Court held that the claim for relief premised upon acts of sexual abuse is subject to a one-year statute of limitations for assault and battery, even where pled as negligence and intentional infliction of emotional distress." *Waters v. Allied Mach. & Eng. Corp.*, 2003-Ohio-2293, ¶ 62, (5th Dist. Tuscarawas, Apr. 30, 2003), citing *Doe v. First United Methodist Church*, 68 Ohio St. 3d 531, 537, 1994-Ohio-531. R.C. 2305.111(B) provides, in relevant part:

{¶26} "[A]n action for assault or battery shall be brought within one year after the cause of the action accrues."

{¶27} Plaintiff was a patient at defendant from November 2-9, 2011. Plaintiff filed her complaint on November 5, 2012. Although defendant argues that any claim for assault or battery that accrued on or before November 5, 2011, is time-barred, plaintiff testified that she was not aware of the exact date when the alleged misconduct took place. Inasmuch as plaintiff was under defendant's care prior to November 5, 2011, and the evidence presented by the parties does not establish the dates of the alleged incidents, the court cannot conclude that plaintiff's claims for assault and battery are time-barred.

{¶28} However, inasmuch as Simkovich was acting manifestly outside the scope of his employment with defendant at the time of the assault and battery upon plaintiff, defendant cannot be held liable for the assault on plaintiff under the theory of respondeat superior. *See Caruso v. State*, 136 Ohio App. 3d 616, 622 (10th Dist. 2000). "'[A]n intentional and wilful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his principal or employer is not responsible therefore [sic].'" *Schulman v. Cleveland*, 30 Ohio St. 2d 196, 198 (1972).

NEGLIGENT RETENTION AND SUPERVISION

{¶29} Plaintiff has alleged that defendant negligently failed to protect her from assault and battery by Simkovich. Based upon the allegations stated in the complaint, the court construes plaintiff's complaint to include a claim for negligent retention and supervision.

{¶30} The elements of a negligent retention claim are the same as those for negligent supervision. *Browning v. Ohio State Highway Patrol*, 151 Ohio App.3d 798, 811, 2003-Ohio-1108, citing *Harmon v. GZK, Inc.*, 2nd Dist. Montgomery No. 18672, 2002-Ohio-545. The factors needed to establish a claim for negligent retention and supervision are: 1) the existence of an employment relationship; 2) the employee's

incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employer's act or omission causing plaintiff's injuries; and, 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 729 (10th Dist.1999), citing *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 739 (10th Dist.1996); *Payton v. Receivables Outsourcing, Inc.*, 163 Ohio App.3d 722, 2005-Ohio-4978 (8th Dist.).

{¶31} Liability for negligent retention arises where an "employer chooses to employ an individual who 'had a past history of criminal, tortious, or otherwise dangerous conduct about which the [employer] knew or could have discovered through reasonable investigation.'" *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶ 14 (10th Dist.) quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 61 (1991).

{¶32} Applying the above-referenced elements, it is undisputed that there was an employment relationship between Simkovich and defendant. However, plaintiff failed to establish that defendant had actual or constructive knowledge of Simkovich's "incompetence." As noted above, plaintiff admitted that she did not report that Simkovich had acted inappropriately prior to the sexual assault. Although plaintiff completed a discharge survey wherein she noted that defendant needed to "watch" one of its male nurses, plaintiff did not name Simkovich or provide any details of inappropriate behavior that might have instigated an investigation before subsequent interactions with Simkovich.

{¶33} Moreover, to prevail on her negligence claim plaintiff must demonstrate that Simkovich's alleged sexual assault was foreseeable. *Wagner v. Ohio State Univ. Med. Ctr.*, 188 Ohio App. 3d 65, 70-71, 2010-Ohio-2561, ¶ 23 (10th Dist.); *Browning v. Ohio State Hwy. Patrol*, 151 Ohio App.3d 798, 2003-Ohio-1108, ¶ 63 (10th Dist.). "The foreseeability of a criminal act depends upon the knowledge of the defendant, which must be determined by the totality of the circumstances, and it is only when the totality

of the circumstances are 'somewhat overwhelming' that the defendant will be held liable." *Staten v. Ohio Exterminating Co., Inc.*, 123 Ohio App.3d 526, 530 (10th Dist.1997), quoting *Evans, supra*, at 742. Only where the employer could anticipate the misconduct, and the employer's taking the risk of it was unreasonable, will liability be imposed for any consequences. *Id.* "[I]n a negligent hiring [supervision or retention] context, a plaintiff must show 'at a minimum, that the employer knew, or should have known, of the employee's criminal or tortious propensities.'" *Prewitt v. Alexson Servs.*, 12th Dist. No. 2008-Ohio-4306, ¶ 30, quoting *Rozzi v. Star Personnels Services*, 12th Dist. Butler No. CA2006-07-162, 2007-Ohio-2555, ¶ 10.

{¶34} Plaintiff contends that defendant had knowledge of certain "prior acts" and "propensities" that Simkovich had exhibited prior to the alleged assault on plaintiff. Specifically, plaintiff contends that defendant should have terminated Simkovich following allegations made against him in May 2011. Plaintiff further contends that Simkovich's conduct with female staff members placed defendant on notice of his inappropriate conduct.

{¶35} With regard to the incident in May 2011, NBH police investigated allegations that Simkovich had made inappropriate sexual remarks to a patient. Although plaintiff contends that defendant's investigation was "flawed" and that staff exhibited a "head in the sand" attitude, the evidence showed that the patient's allegations were promptly reported to NBH police and a thorough investigation was conducted. As part of the investigation, statements were obtained from several patients and NBH staff members, including nurses and TPWs. The employees who provided statements were not aware of any sexual remarks or inappropriate contact between Simkovich and the patient. Jeffrey Sims, the director of nursing at NBH during the time of the investigation, testified that he discussed the matter with both NBH police and human resources personnel and that he determined the patient's allegations could not be substantiated.

{¶36} Regarding Simkovich's conduct with other staff members, both plaintiff and Rodd testified that on separate occasions they each had witnessed Simkovich touch a female staff member in a way they believed was inappropriate. Even if the court concluded that the interactions between Simkovich and nursing staff described by plaintiff and Rodd occurred, the court is not persuaded that staff involved necessarily had a duty to report Simkovich's conduct.

{¶37} Not all conduct in the employment context that can be construed as having sexual connotations can be classified as harassment. *Vitatoe v. Lawrence Industries, Inc.*, 153 Ohio App.3d 609, 2003-Ohio-4187 ¶ 36 (8th Dist.), citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The conduct at issue must be severe or pervasive enough to create an environment that is abusive or hostile on a subjective basis by the individual, as well as abusive or hostile by a reasonable person. *Id.*, citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Therefore, conduct that is offensive but is not severe or pervasive under the subjective and objective standard is not actionable. *Id.*

{¶38} Simkovich denied touching female staff in an inappropriate manner and no such conduct was reported by any staff member. Sims testified that he was unaware of any report that Simkovich had engaged in inappropriate conduct with nurses or other staff members. Moreover, both plaintiff and Rodd admitted that they did not report those allegations to anyone during the time they were patients. Consequently, the court finds that plaintiff failed to prove that NBH had any notice that Simkovich had engaged in inappropriate sexual conduct with either its patients or staff prior to the November 2011 allegations which led to the termination of Simkovich's employment.

{¶39} To the extent that plaintiff argues NBH was negligent in hiring Simkovich based upon his April 27, 2010 DUI arrest, Wendy Ivory, NBH's acting Director of Human Resources explained that NBH conducted a criminal background for Simkovich through law enforcement agencies. The evidence showed that the results of the

background check did not reveal the arrest, which occurred on or about the time that Simkovich's employment application was submitted. The court finds that it was reasonable for NBH to rely on the results of the background check and that NBH's failure to discover such information does not support plaintiff's contention that NBH was negligent for "widespread failure to follow procedure." Similarly, the court finds that the lack of a signature by a human resources officer on Simkovich's "pre-hire review" checklist is, at most, a clerical error and insufficient to support an inference that NBH was negligent in hiring or retaining Simkovich. Furthermore, Simkovich's arrest for DUI is not indicative of a propensity to commit sexual assault.

{¶40} Under the totality of the circumstances presented, the court finds that NBH had no basis to anticipate that Simkovich would commit the actions alleged by plaintiff. The unsubstantiated May 2011 allegations that Simkovich had made sexual advances toward a patient are insufficient to establish that a subsequent sexual assault on plaintiff was foreseeable. *Prewitt, supra*, at ¶ 35.

{¶41} For the foregoing reasons, the court finds that plaintiff has failed to prove her claims by a preponderance of the evidence. Therefore, judgment is recommended in favor of defendant. Further, it is recommended that the court issue an order that Matthew Simkovich is not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

{¶42} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely*

and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

____
ANDERSON M. RENICK
Magistrate

cc:

Craig S. Rapp
Eric A. Walker
Frank S. Carson
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Louis J. Carlozzi
1382 West 9th Street, Suite 215
Cleveland, Ohio 44113

Filed July 8, 2014
Sent To S.C. Reporter 11/5/15