IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOANNE P. LARE	:	CIVIL ACTION
v.	:	
CHESTER COUNTY PRISON BOARD et al.	:	NO. 03-4750

MEMORANDUM

Dalzell, J. August 9, 2004

Plaintiff Joanne P. Lare was an inmate at Chester County Prison for seven months in 2002. About forty days after her incarceration began, she slipped on a macadam walk and aggravated a pre-existing shoulder condition for which she underwent surgery shortly after her release. In this action, Lare asserts that the Prison Board negligently maintained the walk and that the Chester County Prison Board ("Prison Board"), Warden John Masters, and PrimeCare Medical Services, Inc. ("PrimeCare")[1] violated her constitutional right to receive adequate medical care for her shoulder condition.

The defendants have filed motions for summary judgment on both the negligence and civil rights claims.[2] For the reasons

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1. PrimeCare provides medical care at the Prison pursuant to a contract with Chester County.

2. Summary judgment is appropriate "if the pleadings, depositions, 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." Fed. R. Civ. P. 56(c). In resolving a motion for summary judgment, the Court must draw all reasonable inferences in the nonmovant's favor and determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where the

provided below, we grant the motions and enter judgment for the defendants.

Factual Background

On April 14, 2001, Lare struck a nine-year-old child while driving in a drunken state and fled the scene of the accident. She pleaded guilty in the Chester County Court of Common Pleas to aggravated assault while driving under the influence. On January 18, 2002, the Honorable James C. MacElree, II, sentenced her to nine to twenty three months' imprisonment and three years probation, but he stated that he would consider home detention or work release after Lare had served four months of her sentence. See N.T. at 2-3, Commonwealth v. Lare, No. 1974-01 (Chester County C.C.P. May 20, 2002). Lare entered the Prison that day.

Lare is a breast cancer survivor and has a number of medical conditions that required attention in prison, including insulin-dependent diabetes, hypertension, and depression. Most important for the purposes of this action, at the time of her incarceration she was receiving care from Dr. Joseph V. Vernace, an orthopaedic surgeon, for rotator cuff tendonitis and AC joint

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nonmoving party bears the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if admissible, would be insufficient to carry the nonmovant's burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the nonmoving party must go beyond its pleadings and designate specific facts by the use of affidavits, depositions, admissions or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

impingement. On October 2, 2001, Dr. Vernace had recommended that Lare undergo shoulder surgery "at a time that is convenient for her." See Vernace Treatment Notes of 10/2/01 (PrimeCare Ex. B). Lare decided to postpone the operation because her criminal defense attorney did not believe she would be able to receive physical therapy in prison. Lare Dep. at 44-46 (Prison Board Ex. D).

Shortly after her arrival at the Prison, Lare received a "new inmate screening" from a PrimeCare nurse. On January 24th, she saw a PrimeCare physician assistant, Jessie Kirsch, who examined her shoulder and noted that she was taking Celebrex for pain management. PrimeCare Treatment Notes of 1/24/01 (hereinafter "T.N.").

On February 28th, Lare slipped and fell on a macadam walk as a guard escorted her to the Prison's medical facility for diabetes testing.[3] At her deposition, Lare testified that as she proceeded down the walk, she fell when her foot went into a semicircular indentation that was between four and six inches deep. Lare Dep. 65-67. PrimeCare nurses cleaned Lare's scrapes and gave her an ice bag for her ankle. Lare Dep. at 64-86. Lare cannot recall whether she complained at that time of increased shoulder pain, but she soon began to experience what she now characterizes as "excruciating pain constantly, day and night, 24 hours a day." Id. at 86.

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3. PrimeCare provided Lare with diabetes testing three times a day while she was in jail.

In response to Lare's complaints of increased shoulder pain, PrimeCare nurse and contract administrator Mary Ellen Herbert examined her on March 8th. Ms. Herbert referred her to Mr. Kirsch, who saw her five days later. He obtained Lare's authorization to receive her shoulder treatment records from Dr. Vernace, instructed her to perform range of motion exercises and to apply moist heat to her shoulder, and advised that she continue taking Celebrex for pain management. See T.N. of 3/8/02 & 3/13/02; Jackson Aff. ¶¶ 17-22 (PrimeCare Ex. B). Marybeth Jackson, M.D., a PrimeCare physician, reviewed and countersigned Mr. Kirsch's treatment notes. Jackson Aff. ¶ 23. Dr. Davis, a PrimeCare psychiatrist, saw Lare on April 2nd and prescribed Elavil to address her complaints of pain and sleep disturbance. N.T. of 4/2/02. Dr. Jackson examined Lare's shoulder on April 9th. She concluded that shoulder surgery was not immediately necessary and devised a treatment plan in which Lare would continue taking Celebrex and Elavil along with prescription-strength Tylenol. N.T. of 4/9/02; Jackson Aff. ¶¶ 26-28.

Meanwhile, Lare and her defense counsel acted on Judge MacElree's willingness to consider releasing her after four months of imprisonment. On May 7th, she filed a petition in the Court of Common Pleas requesting release on electronic home monitoring. In the petition, as well as at a hearing before Judge MacElree on May 20th, defense counsel emphasized that home monitoring would enable Lare to obtain treatment for her shoulder. Judge MacElree took the matter under advisement and

instructed Lare to file a motion for a medical furlough so that she could see Dr. Vernace and provide the Court with a full report on her shoulder. He concluded by advising Lare that

> you're going to get the necessary medical care that you can pay for your shoulder. I have to emphasize the word necessary and [counsel] can explain to you what that means. That doesn't mean anything you want. It doesn't necessarily mean that it would be convenient for you because some things can be delayed, other things can't be. Until I see a doctor's report I don't know.

N.T. of 5/20/02, at 24.

Judge MacElree duly approved Lare's medical furlough. She saw Dr. Vernace on May 23rd, and he reported to PrimeCare that Lare should receive an MRI and lab work. On June 5th, Dr. Vernace wrote to Judge MacElree and advised him as follows:

> Joanne was recently seen in my office on 5/23/02 and her right shoulder pain is worse that it was late last year. She has marked diminished range of motion. I understand that she fell on 2/28/02 at the prison injuring her right shoulder further.
>
> It is my recommendation at this time that Joanne undergo arthroscopic shoulder surgery to relieve her pain and to start a physical therapy program to increase her range of motion. Further delay will not only cause her continued pain, but may result in a frozen shoulder, which will be that much more difficult to rehab and will yield much less desirable clinical results.

Letter of Vernace to Judge MacElree of 6/5/02 (Prison Board Ex. L).

On the same day, Judge MacElree authorized Lare's release on electronic home monitoring to begin on August 17th, at the end of her seventh month of imprisonment. See Order of 6/5/02 (Prison Board Ex. U).

Back at the Prison, PrimeCare staff asked Lare on June 4th to provide authorization for the release of the records from her recent appointment with Dr. Vernace. According to Lare's treatment notes, she became upset and refused to sign a release. A staff member "advised this was Dr. Hoffman's[4] request so we could address her request appropriately but she again refused to sign."[5] T.N. of 6/5/02.

Lare next saw a PrimeCare physician, Dr. Shah, on June 10th. Dr. Shah noted that he did not have Dr. Vernace's recommendations concerning her shoulder, and he deferred the creation of a comprehensive plan for Lare until he had an opportunity to view those records. He concluded that, in the interim, Lare should "continue her medication as prescribed by her physician." T.N. of 6/10/02. Later that day, Lare told a PrimeCare nurse that she would authorize the release of the records from her recent appointment with Dr. Vernace. Id.

On June 19th, Judge MacElree sent Warden Masters a copy of Dr. Vernace's letter along with a cover letter summarizing the doctor's opinion that Lare should have shoulder surgery. The Judge noted that defense counsel had asked for a conference, and he asked Warden Masters for any information he could provide

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4. Dr. Hoffman is a PrimeCare physician who keeps hours at the Prison.

5. At her deposition, Lare confirmed that she refused to sign a release and explained that she did so because she had already signed a release and had given PrimeCare a report from Dr. Vernace when she returned to prison after her appointment. Lare Dep. at 148.

concerning Lare's condition. Letter of Judge MacElree to Masters of 6/19/02 (Lare Ex. C). The request for information made its way to Director of Inmate Services Ronald Phillips, who passed it along to Ms. Herbert. On June 21st, Ms. Herbert sent Mr. Phillips a memorandum that summarized Lare's notes of treatment. The memorandum concluded with Lare's refusal to sign a release and her subsequent decision to let PrimeCare see her records, but it noted that "[t]o date we have not received these records." Memorandum of Herbert to Phillips of 6/21/02 (Prison Board Ex. I).

In a letter dated June 26th that appears to be based on Ms. Herbert's memorandum, Masters reported to Judge MacElree that Lare "had been receiving ongoing treatment from PrimeCare" but concluded that "[i]t should be noted . . . that Ms. Lare has refused to sign a Release of Information so that adequate and accurate services may be provided."[6] Letter of Masters to Judge MacElree of 6/26/02 (Prison Board Ex. W).

During her final two months of incarceration, Lare had several appointments with PrimeCare doctors and nurses. On June 21st, Mark Evans, a PrimeCare nurse, met with Lare about monitoring her breast cancer and asked her to authorize release of her oncology records. Lare stated that she would "think about

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6. According to Lare, Judge MacElree subsequently sent her counsel a letter in which he denied her request for release before August because Warden Masters had reported that the Prison was meeting her medical needs and that she had been uncooperative. Lare Dep. at 147. However, Judge MacElree's letter is not part of the record in this case.

it and confer with [her] spouse and let us know [her] decision." T.N. of 6/21/02. The nurse noted that "if records attained will try to order any necessary monitoring." Id. PrimeCare received oncology records toward the end of June, and Mr. Evans began to make monitoring arrangements. T.N. of 6/25/02. Lare saw a PrimeCare psychiatrist on July 16th, and he noted that "[i]nmate is upset because of medical report that she feels that affected her release from prison. She is not sleeping well." T.N. of 7/16/02. He raised her Elavil dosage and continued her on Zoloft.

Finally, on July 22nd, Lare met with Dr. Shah concerning her shoulder. Dr. Shah summarized their discussion as follows:

> Pt. says I can't help her much and she need[s] surgery. Orthopedist's recommendation - suggests arthroscopic surgery followed by PT. Also orthopedic surgeon's opinion - may result in frozen shoulder if surgery not done soon.
> Pt. thinks she was examined by her physician & physician here also & do[es] not need further examination.
> - Pt. had long discussion with administration.
> - Pt. also says she has her surgery scheduled on July 19 but can't be done now.
> - Pt. is taking Celebrex for pain / Elavil.
> - Pt. has stopped PT on recommendation of her physician.
> - F/u as needed.

T.N. of 7/22/04.

Lare was indeed discharged on August 17th. Dr. Vernace performed arthroscopic surgery on her shoulder six days later. Lare underwent physical therapy for two months, and Dr. Vernace discharged her in January of 2003.

Discussion

The defendants have moved for summary judgment on both Lare's negligence and § 1983 claims. We examine each in turn.

A. Negligence

Count I alleges that the Prison Board negligently maintained the macadam walk upon which Lare slipped and fell on February 28th. Lare seeks damages for pain and suffering as well as medical expenses. Compl. ¶¶ 25-29.

The Prison Board has exclusive authority over the government and management of the Prison. 61 Pa. C.S. § 408. It is a local agency within the meaning of Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541 et seq., which provides that no local agency shall be liable for any damages on account of any injury to a person unless it comes within one of eight exceptions set forth in § 8542. Damron v. Smith, 616 F.Supp. 424, 426 (E.D. Pa. 1986). Lare's negligence claim falls within one of the exceptions because her injury occurred on "real property in the possession of the local agency." § 8542(b)(3).[7] However, it is also governed by § 8553(c), which authorizes her to seek actual medical expenses and damages for pain and suffering, but she may only claim the latter if she sustained

7. Section 8542(b)(3) excludes sidewalks from the definition of "real property," and § 8542(b)(7) creates a separate -- and more limited -- exception from immunity for dangerous conditions on "sidewalks within the rights-of-way of streets owned by the local agency." Because the macadam walk is on Prison grounds, Lare's claim is governed by § 8542's "real property" exception rather than the public sidewalk exception.

"permanent loss of a bodily function, permanent disfigurement or permanent dismemberment" and her medical expenses exceeded $1500. See § 8553(c)(2)(ii).

As the Prison Board argues, Lare's claim for medical expenses fails because she had already planned to have shoulder surgery before she entered the Prison. She has not pointed to any evidence suggesting that her operation on August 23, 2002 was different from -- or more expensive than -- the procedure Dr. Vernace contemplated in October of 2001. Thus, Lare has failed to show that her medical expenses were any greater than they would have been had she not fallen on the macadam walk.

Lare's pain and suffering claim founders for similar reasons. Because there is no evidence of record that the fall increased her medical expenses, she has failed to show that she satisfies the $1500 statutory threshold. Moreover, the Prison Board's medical expert, Dr. David Glaser of the University of Pennsylvania Health System's Department of Orthopaedic Surgery, has examined Lare and concluded that she is "not demonstrating any permanent limitation of bodily function related to her fall" on the Prison grounds. Letter of Glaser to Donahue of 1/6/04, at 5 (PrimeCare Ex. C). Although Lare complains that Dr. Glaser's opinion is entitled to no weight because he was not her treating physician and examined her after she had completed physical therapy, the fact remains that she has not come forward with any evidence -- not even an affidavit from Dr. Vernace -- to contest Dr. Glaser's opinion.

B. Section 1983

Lare's § 1983 claims allege that the Prison Board, PrimeCare, and Warden Masters violated her constitutional right to adequate medical care in their response to her shoulder injury. The Supreme Court has held that the Eighth Amendment entitles prisoners to treatment for serious medical needs. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976). However, it is not enough for Lare to show that a defendant was negligent in ignoring or mishandling her medical need. Instead, she must show a serious medical need, and acts or omissions that indicate deliberate indifference to that need. Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999). Because Lare's deliberate indifference claim against Warden Masters, an individual official, is governed by a very different standard than her claims against the Prison Board and PrimeCare, we examine them separately.

1. Warden Masters

Although the complaint could be more clearly worded, Lare appears to allege that Warden Masters both directly manifested deliberate indifference to her medical needs and failed to supervise PrimeCare's provision of care. We agree with Masters that he is entitled to summary judgment on both theories of liability because Lare has not come forward with evidence showing the existence of genuine issues of material fact that are relevant to either dimension of her claim.

a. Direct Liability

As we note above, Lare must show that she had a serious medical need and that Warden Masters's omissions demonstrated deliberate indifference to that need. Our Court of Appeals has found deliberate indifference where there was "objective evidence that [a] plaintiff had serious need for medical care," and the defendant ignored that evidence. It has also found deliberate indifference where "necessary medical treatment is delayed for non-medical reasons." Natale v. Camden County Correctional Facility, 318 F.3d 575, 582 (3d Cir. 2003), quoting Nicini v. Morra, 212 F.3d 798, 815 n.14 (3d Cir. 2000), and Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987).

Even if Lare could show that she had a serious medical need, there is nothing in the record to suggest that Masters ignored it or had a hand in delaying her treatment for non-medical reasons. Masters had no awareness of Lare's medical condition until he received Judge MacElree's letter in June, and the uncontroverted evidence of record is that his role in responding to the letter was largely ministerial. Masters testified at his deposition that he has no actual memory of corresponding with Judge MacElree about Lare. However, his usual practice upon receiving such an inquiry is to refer the matter to PrimeCare and Director of Inmate Services Ronald Phillips, and he has confirmed that he followed this practice in Lare's case and then based his letter on Herbert's memorandum. Masters Dep. at 48-49 (Lare Ex. G).

Regardless of whether Ms. Herbert's memorandum was accurate or not, the record offers no reason to conclude that Masters was unreasonable in relying on it. Lare asserts that Warden Masters, the top administrator at a prison with over eight hundred inmates, had a constitutional duty to launch a personal investigation of her situation once Judge MacElree wrote to him. This argument is devoid of merit. Ms. Herbert has worked at the Prison for sixteen years, first as a nurse and later as an administrator, and she deals regularly with Masters and other Prison officials. Herbert Dep. at 8, 12-13, 81-82. As we explain in some detail below, the Prison administration is in regular contact with PrimeCare, and there is no evidence here that PrimeCare is systemically deficient in addressing prisoners' needs. It was thus entirely reasonable for Masters to delegate day-to-day responsibility over health care matters to his deputies and to rely on Ms. Herbert's memorandum in responding to Judge MacElree.

Finally, there is absolutely no factual support for Lare's fanciful suggestion that when Masters "had an opportunity to stick it to Ms. Lare -- he did." Pl.'s Resp. at 17.

b. Supervisory Liability

To establish Warden Master's liability in his supervisory capacity, Lare must

> (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the existing custom and practice without the identified, absent custom or procedure created an

> unreasonable risk of the ultimate injury, (3) the supervisor was aware that this unreasonable risk existed, (4) the supervisor was indifferent to the risk; and (5) the underling's violation resulted from the supervisor's failure to employ that supervisory practice or procedure.

Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001).

Lare has not come forward with any evidence that Warden Masters's supervision of PrimeCare was deficient. To the contrary, the only evidence in the record suggests that the Prison's arrangements for medical care function reasonably well and that Masters has delegated day-to-day responsibility for inmate health care to his deputies, who in turn maintain adequate control over PrimeCare. As Masters explained at his deposition, the Prison has made provisions for inmates to communicate their medical needs to PrimeCare. Masters Dep. at 18-21. Messrs. Phillips and McFadden have testified that the Prison has a grievance system in place and that they regularly investigate and resolve prisoners' complaints concerning PrimeCare. Phillips Dep. at 25-28; McFadden Dep. at 14-15. Moreover, Prison administrators have monthly meetings with PrimeCare representatives. Mr. McFadden attends these meetings and provides Masters with an oral report. PrimeCare also provides Masters with a monthly written report. Masters Dep. at 22-24.

2. PrimeCare and the Prison Board

PrimeCare and the Prison Board are not responsible for the acts of their employees under a theory of vicarious liability or respondeat superior.[8] Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 691 (1978). Instead, Lare must show that each maintains a custom or policy of sanctioning the maintenance of prison conditions that infringe upon the constitutional rights of the prisoners. Estate of Novack ex rel. v. County of Wood, 226 F.3d 525, 530 (7th Cir. 2000).

An employee's acts are deemed to be the result of a custom or policy in three circumstances. The first is where the entity or supervisor promulgates a generally applicable statement of policy, and the employee was simply implementing that policy. The second is where there is no formally announced policy, but an act of the policymaker violates federal law. The third is where

> the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need.

Natale, 318 F.3d at 584, quoting Bd. of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 417-18 (1997).

Lare has failed to show the existence of any factual issues that, if resolved in her favor, would enable her to satisfy this standard. Although Lare is critical of the care she

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8. PrimeCare has not contested Lare's assertion that it is a state actor for purposes of § 1983.

received from individual doctors, physician assistants, and nurses, there is no evidence suggesting that their alleged malfeasance stemmed from a custom or policy of the Prison Board or PrimeCare.

At the time of Lare's incarceration, there were PrimeCare nurses on duty at the Prison around the clock, and a physician was on call at all times. A doctor or physician assistant was at the Prison several days a week for approximately four hours per visit and stayed until he or she had seen all prisoners with appointments. Herbert Dep. at 15-16, 20-22. Ms. Herbert has testified that one or two prisoners receive off-site medical testing every month and that prisoners occasionally receive operations and physical therapy, id. at 69, all of which belies Lare's unsubstantiated suggestion that the contractor has a policy of fobbing off sick prisoners with Band-Aids, ice packs, and painkillers. Finally, the uncontradicted evidence in the record is that although overcrowding at the Prison in recent years has slowed down the day-to-day provision of health care, it has not affected inmates' access to care or its overall quality. McFadden Dep. at 36.

Finally, as we detail above, all of the practices and policies that the parties have identified confirm that the Prison administration appropriately supervises PrimeCare's performance under the contract.

Conclusion

Lare's negligence claim cannot withstand summary judgment because she has not shown that her surgery in August of 2002 was any different from, or more expensive than, the procedure Dr. Vernace contemplated before she entered the Prison.

As to her § 1983 claims, there is no evidence here that Warden Masters was deliberately indifferent to Lare's needs. His only involvement in her case was to pass along to Judge MacElree the information he received from Ms. Herbert, a longstanding PrimeCare employee whose assessment he could reasonably rely upon because she worked on a daily basis with his deputies. Moreover, under the very high standard for municipal liability that the Supreme Court set forth in Monell, there is no evidence here that the Prison Board or PrimeCare maintained a custom or policy of deliberate indifference to inmates' medical needs. The defendants are therefore entitled to summary judgment on these claims.

An appropriate Order and Judgment follow.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOANNE P. LARE	: CIVIL ACTION
	:
v.	:
	:
CHESTER COUNTY PRISON et al.	: NO. 03-4750

ORDER

AND NOW, this 9th day of August, 2004, upon consideration of defendants' motions for summary judgment (docket entries ## 18 and 20) and plaintiff's omnibus response thereto, and in accordance with the accompanying Memorandum, it is hereby ORDERED that the motions are GRANTED.

BY THE COURT:

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Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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		:
v.	:	
		:
CHESTER COUNTY PRISON	:	
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JUDGMENT

AND NOW, this 9th day of August, 2004, the Court having granted defendants' motions for summary judgment, and in accordance with the accompanying Memorandum and Order, it is hereby ORDERED that:

1. Judgment is ENTERED in favor of defendants Chester County Prison Board, Warden John Masters, and PrimeCare Medical, Inc; and

2. The Clerk of Court shall CLOSE this action statistically.

BY THE COURT:

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Stewart Dalzell, J.