IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARIA EDELSTEIN,
Individually and as Trustee
for the Heirs and Next of
Kin of MATTHEW P.
MANCL, deceased,

Plaintiff,

v.

JOHN ANDREWS, KIM
SIEPEL, KENNETH A.
NIMMO, BRAD W. WURTZEL,
and JOEL D. WENER,

Defendants.

OPINION AND
ORDER

00-C-0319-C

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This is a civil suit in which plaintiff Maria Edelstein is claiming injuries for the loss of companionship of her son, Matthew Mancl, who hanged himself while in the custody of the Pepin County jail. Defendant John Andrews was the Pepin County sheriff at the time of Mancl's death; defendant Kim Siepel was the chief deputy sheriff; the other defendants were deputy sheriffs. In an earlier order entered on April 24, 2001, I granted summary judgment to all of the defendants and to Wisconsin Counties Mutual Insurance Corporation.

As to the individual defendants, I found that no reasonable jury could find from the evidence plaintiff adduced that any of these defendants would have known that Matthew Mancl was at a substantial risk of suicide before he hanged himself. As to the insurer, I held that plaintiff could not sue Wisconsin Counties directly because plaintiff was charging the individual defendants with deliberate indifference under the United States Constitution. Under Wisconsin law, an insurer may be sued directly only in an action alleging negligence by the insured.

Presently before the court are plaintiff's motions for reconsideration of the rulings with respect to the individual defendants; for an explicit ruling on the issue of deliberate indifference to plaintiff's serious medical needs (as opposed to his suicide); to amend the witness list to add Chief of Police Karl Goethel, Patrol Officer Christine Hall and Sergeant Charlotte Silberhorn; and defendant Nimmo's motion not to reopen the case against him. I conclude that the order granting summary judgment to defendant Nimmo should be vacated in light of plaintiff's newly discovered evidence. Plaintiff's motion for reconsideration of the order granting summary judgment to defendants on plaintiff's claim that they were deliberately indifferent to Mancl's risk of suicide will be denied with respect to all defendants except Nimmo. Plaintiff's motion for an explicit ruling on defendants' deliberate indifference to plaintiff's medical needs will be granted; the motion will be denied with respect to all defendants except Sheriff Andrews and the earlier grant of summary

judgment in his favor vacated. I conclude that plaintiff must have an opportunity to prove that this defendant displayed deliberate indifference to Mancl's serious medical needs when he failed to act on medical advice that Mancl see someone for depression. Plaintiff's motion to amend her witness list will be granted as to Silberhorn and denied as to Hall and Goethel. Defendant Nimmo's motion not to reopen the case will be denied.

A. Plaintiff's Motion for Reconsideration as to Defendant Nimmo and Defendant Nimmo's Motion Not to Reopen

These two motions are mirror images of the same issue: whether the April 24, 2001 order granting summary judgment to defendant Nimmo should be vacated in light of plaintiff's newly discovered evidence. This evidence is the testimony of Charlotte Silberhorn, a sergeant in the Durand Police Department, that on October 18, 1999, two days before Matthew Mancl killed himself, she overheard Nimmo tell another deputy that "There's problems in the jail. Mancl thinks he wants to kill himself. If the fucker wants to kill himself, make sure he's dead before you cut him down."

Plaintiff argues that this comment is direct evidence of defendant Nimmo's subjective awareness that Mancl was at risk of suicide. I agree. It may be that at trial defendant Nimmo can show that he never made the statement Silberhorn says she overheard or that when he said it, it was merely a throw away line that did not evince his knowledge of

Mancl's mental state, but these are matters a jury will have to assess.

Defendant Nimmo argues that no weight should be given to his statement because it is the kind of crude comment he makes all the time. As he points out, Silberhorn herself testified that she had heard him make similar comments in areas frequented by other law enforcement officers at least 20 times before. However, even if Nimmo made it a habit to make offensive remarks about inmates' hanging themselves, it is not clear that it was his habit to say that the inmates wanted to kill themselves. In any event, his comments require further exploration at trial.

B. Plaintiff's Motion for Reconsideration as to Remaining Defendants

Plaintiff contends that the grant of summary judgment in favor of the remaining defendants should be vacated for several reasons. The newly discovered evidence produced by Silberhorn and additional evidence by Chief of Police Karl Goethel shows that defendants withheld evidence that is relevant to their liability; the same evidence shows that defendants had greater knowledge of Mancl's emotional situation than was apparent earlier; and the court applied the wrong standard in determining whether defendants knew of Mancl's risk for suicide.

Silberhorn's testimony shows only that defendant Nimmo made a statement about Mancl's wanting to kill himself and that he made the statement to deputy Glandner, who

is not a defendant in this case. Plaintiff has offered nothing but conjecture to support her contention that if Nimmo knew that Mancl wanted to kill himself, the other defendants must have known it as well. More is required to justify vacation of the earlier grant of summary judgment in favor of defendants on the issue of their deliberate indifference to a serious risk of suicide.

Goethel has not been deposed and he has never sworn to the subject matter of his purported testimony. The only evidence of what he might say is in the hearsay affidavit of plaintiff's investigator to the effect that on the night of October 19, Goethel heard Wurtzel discussing the possibility of a Chapter 51 proceeding for Mancl and that Goethel saw Mancl hitting his head against his cell walls or door. Affid. of James Brieske, dkt. #158. Even if all this is true, it would not prove that defendants knew that Mancl was at imminent risk of suicide or that any of them was deliberately indifferent to such a risk. As I explained in the April 24 order, Wurtzel kept a watch on Mancl the entire night, monitoring him at 15 minutes intervals (whether the monitoring was done either by sight or hearing is immaterial; when Wurtzel heard Mancl yelling he knew he was still alive and conscious); he called his superiors for directions and kept them apprised of Mancl's situation; and he checked with the doctor to see whether Mancl's muscle relaxant medication might be causing his agitation. Mancl's violent outburst lasted only about an hour and a half before it subsided for the rest of the night with the exception of one 15 minute episode shortly after midnight. No

reasonable jury could find that Mancl's behavior was so obvious a sign of imminent risk of suicide that defendants knew of it. "[S]trange behavior alone, without indications that that behavior has a substantial likelihood of taking a suicidal turn, is not sufficient to impute subjective knowledge of a high suicide risk to jail personnel," Estate of Novack v. County of Wood, 226 F.3d 525, 530 (7th Cir. 2000), and Mancl's behavior was not particularly strange. Angry, even violent inmates are not unusual in the jail setting. No reasonable jury could find that the remaining defendants responded with deliberate indifference.

As for plaintiff's assertion that I applied the wrong standard to the facts in the earlier ruling, I am not persuaded that any discussion is necessary. Plaintiff has done nothing more than re-argue the arguments she made earlier. The purpose of a motion to reconsider is to correct manifest errors of law or fact or to present newly discovered evidence; it is not to re-assert previous arguments or to consider evidence that could have been presented earlier but was not. Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1269 (7th Cir. 1996). Plaintiff's motion to reconsider will be denied as to all defendants except Nimmo.

C. Motion for Explicit Ruling on Plaintiff's Claim of Deliberate Indifference to Medical Needs

Defendants object to plaintiff's motion as untimely, saying that she argued in her

brief in support of her motion for summary judgment, filed in January 2001, that she was raising two separate constitutional issues, one of defendants' deliberate indifference to her son's serious risk of suicide and one of their deliberate indifference to her son's serious medical needs. Looking back at plaintiff's brief now, I can see that she did raise both claims but in such a slapdash manner that it was not at all obvious at the time. She did not explain why she was doing so, how the claims differed or what proof she had to support each of them. When defendants argued in their brief in opposition that the two issues were really the same she never objected or even commented on their assertion, either in her brief in reply on her own motion for summary judgment or in her brief in opposition to defendants' motion for summary judgment. Moreover, she never returned to the issue in either of the two previous motions for reconsideration she has filed.

It is arguable that plaintiff waived her right to proceed on this issue by failing to respond to defendants' assertion but there are enough loose ends and wrong turns in this litigation that I prefer to decide the issue on its merits. As I understand plaintiff's claim, it is that whether or not defendants knew that plaintiff posed a substantial risk of suicide, they knew that he had serious mental health problems that needed treatment and their deliberate indifference to these problems caused plaintiff injuries independent of his suicide.

Defendants argue that a plaintiff may not assert both claims because the Court of Appeals for the Seventh Circuit treats them as one. They cite Estate of Novack, 226 F.3d

525, for this proposition. In Novack, the plaintiff raised both claims but the court of appeals discussed them only in terms of suicide. However, I can find no indication in the opinion that the court did so because it believed that the claims could never be pursued separately if the plaintiff asserting them had the evidence to support them. It would be reading too much into the opinion to say that it stands for the proposition that a plaintiff can never pursue both claims.

When the two claims are examined separately, it is possible to discern an issue for trial in Sheriff Andrews's refusal to obtain a psychiatric consultation for Matt Mancl after Dr. Castleberg had said one was needed. The situation fits within the language in Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), that for constitutional purposes, a serious injury or medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Sheriff Andrews may have had good reasons for thinking such a consultation was unnecessary. Alternatively, he may be able to show that Castleberg's statement was nothing more than a suggestion and not a mandate for treatment or that Mancl's mental health needs were not sufficiently serious to rise to a constitutional level. However, I cannot say at this stage of the proceedings that no reasonable jury could find that Andrews acted with deliberate indifference to Mancl's serious mental health needs when he did nothing about a psychiatric evaluation after Castleberg had said one was needed.

As to the other defendants, plaintiff lacks sufficient evidence to raise a jury question about their knowledge of any serious mental health need or their indifference to one. Except for the incident on September 11, 1999, when he cut himself, Matt Mancl gave no indication that he suffered from any serious mental illness. After that, he caused no trouble and exhibited no signs of mental distress, much less mental illness, until October 18, when he came back from court and asked to see a nurse about his feelings of depression. The sheriff refused to call one until Mancl wrote down his medical history or listed the medications he had taken previously. On October 19, Mancl had still not written down his medical history but he had written a note in which he said that he was a manic depressive and had severe anxiety attacks and that he wanted to speak to a nurse about Xanax and Mellaril prescriptions. No nurse was called at that time. That night Mancl became loud, profane, abusive and self-destructive for about one and half hours when he was moved to a receiving cell after it was discovered that he had been trying to dig through the outside wall of his former cell. He reported having hit his head and blood was found on the cell walls the next day. He hit his head against the door the next morning when defendant Nimmo brought him his breakfast but he quieted down after that. He talked to Sheriff Andrews and agreed to modulate his behavior if he could be housed in a different cell. Sheriff Andrews moved him to his preferred cell in a cell block with other inmates and tried to arrange for a social worker to come to see him. When Andrews learned that the social worker he had

called was out of the office, he told Mancl he would have to wait a day; Mancl showed no apparent distress at hearing this news. No one from outside the jail ever told defendants that Mancl might have mental health problems, with the exception of the doctor's suggestion that Mancl see someone about his depression, and Mancl denied having ever had any psychiatric treatment when he was first booked into the jail in July 1999.

No reasonable jury could find from this evidence that defendants would have known that Mancl was suffering from serious mental health problems on October 18, 19 and 20. Were it not for the fact of his suicide on October 20, 1999, plaintiff would not be making the argument that defendants had to have known her son had such problems. It is only in hindsight that anyone could say that Mancl had mental health problems. It is noteworthy that plaintiff herself did not recognize any such problems despite talking with her son nine times by telephone between October 9 and October 19 and having a master's degree in guidance and counseling and several years' experience in alcohol and drug counseling.

Plaintiff argues that her son's self-destructive behavior in his cell on the night before he committed suicide alerted defendants to his mental health problems, as shown by Wurtzel's decision to call both the sheriff and the chief deputy to seek their advice for handling Mancl. As I stated before, however, even assuming that Mancl's actions on the night of October 19-20 alerted Wurtzel to a serious mental health problem, Wurtzel did not respond with deliberate indifference. Instead, he called to let both the sheriff and the chief

deputy know what was going on; he checked with a doctor to be sure that the medication Mancl was taking was not the cause of his agitation; and he monitored Mancl's condition throughout the night. Plaintiff can argue with the benefit of hindsight that Wurtzel could have done more and she may be right, but she cannot argue that he was deliberately indifferent to her son's serious mental health needs.

Similarly, plaintiff cannot show that Sheriff Andrews responded with deliberate indifference to her son's statement on October 19 that he was manic depressive and had been taking medications for his condition in the past. It is true that he did not send for a nurse immediately after hearing that Mancl had asked to see one and that he pressed Mancl to give him more information before agreeing two days later to arrange for a social worker to come to the jail. However, he had no reason to know that Mancl had an immediate and serious need to see a nurse or social worker when he had exhibited no such need for the preceding five to six weeks since the arm cutting incident on September 11 and when he had gotten along without incident for the preceding two months that he had been in jail.

The evidence with respect to defendant Siepel is essentially the same as that with respect to Andrews, with the exception that Siepel did not speak with Mancl after his return from the doctor in September or on the morning of October 20. Plaintiff has not shown that on September 11, October 19 or 20, Siepel had any reason to know that Mancl had serious mental health problems that required immediate intervention.

Plaintiff has adduced no evidence to suggest that defendant Wener acted with deliberate indifference to any serious mental health need that Mancl had. The only evidence about this defendant is that on September 11, 1999, he discovered that Mancl had cut himself; he took Mancl to the hospital; he reported back to the sheriff the doctor's statement that Mancl see someone about his depression; and he initiated 15-minute checks on Mancl upon his return from the hospital.

As to defendant Nimmo, there is no evidence that he knew that Mancl had serious mental health problems separate and apart from his intent to commit suicide. If this defendant is liable to plaintiff, it will be because he knew of Mancl's intent to commit suicide and disregarded the risk deliberately, not because he ignored any independent mental health needs.

D. Plaintiff's Motion to Amend Witness List

Because I am vacating the grant of summary judgment as to defendant Nimmo, I will grant plaintiff's motion to amend her witness list to add Charlotte Silberhorn. At this point, I am not persuaded that plaintiff would have any reason to call either Christine Hall or Karl Goethel. Christine Hall would have admissible evidence only if defendant Nimmo puts in evidence suggesting that Charlotte Silberhorn's testimony is a recent fabrication. Defendant Nimmo disavows any such purpose. Rather, at trial, he will be trying to show that

Silberhorn's testimony should be discounted because she did not consider it important enough to pass on to the sheriff or to anyone investigating Mancl's suicide. Christine Hall will not be allowed to testify unless Nimmo changes his present position and tries to show that Silberhorn's testimony was fabricated recently. Unless he does, Hall's testimony remains inadmissible hearsay. United States v. Williams, 128 F.3d 1128, 1132-33 (7th Cir. 1997).

As to Karl Goethel, his testimony goes only to the events of October 19, when he may have been present at the jail and observed Mancl and Wurtzel. Such evidence would have no relevance to Andrews's alleged deliberate indifference to Mancl's need for a psychiatric evaluation in early September or to Nimmo's alleged deliberate indifference to Mancl on October 20. Plaintiff argues that the evidence is relevant with respect to Nimmo because Goethel will testify that he and Wurtzel discussed a chapter 51 mental proceeding for Mancl on the night of October 19 and that this was such important information that Wurtzel would have passed it on to Nimmo the next morning, giving Nimmo additional reason to know that Mancl was suicidal. At this point, Goethel has not even submitted an affidavit from which I could determine what he is likely to say at trial. It is far too tenuous a proposition that he will testify as plaintiff suggests and that his doing so will create any basis from which the jury can infer that Nimmo knew about the chapter 51 proceeding and knew from the fact it had been discussed that Mancl was suicidal. As I said before, it does not

follow from the mere fact that a person may need mental health treatment that the person is suicidal.

ORDER

IT IS ORDERED that

1. Plaintiff Maria Edelstein's motion to reconsider the grant of summary judgment to the individual defendants is DENIED with respect to all defendants, except defendants Kenneth Nimmo and John Andrews; as to these defendants, the motion is GRANTED;

2. Plaintiff's motion for an explicit ruling on her claim that defendants were deliberately indifferent to plaintiff's serious mental health needs is GRANTED; the motion is DENIED with respect to all defendants except defendant Andrews;

3. Defendant Nimmo's motion not to reopen the case as to him is DENIED; and

4. Plaintiff's motion to amend her witness list is GRANTED with respect to Charlotte Silberhorn; it is DENIED with respect to Karl Goethel and Christine Hall.

Entered this 6th day of August, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge