

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:03-CV-244 FL(1)

HILARIE G. SCARBRO, Administratrix)
of the Estate of Gary Eugene Rummer)
)
Plaintiff,)
)
v.)
)
NEW HANOVER COUNTY, et al.,)
)
Defendants.)

ORDER

This matter comes before the court upon defendants' motion for summary judgment on remaining claims in the action (DE # 91), to which plaintiff responded February 1, 2008, and defendants have replied. In this posture, where trial is set to commence May 19, 2008, the issues raised on motion are ripe for decision. For the reasons stated below, defendants' motion for summary judgment is granted, and the case dismissed.

STATEMENT OF THE CASE

Plaintiff, as administratrix of the estate of decedent Gary Eugene Rummer ("Rummer"), filed the instant action December 23, 2003, raising claims of or relating to Rummer's alleged physical abuse and inadequate medical treatment while a detainee at the New Hanover County Jail on or about January 14, 2003, and his subsequent death January 16, 2003. (Compl. ¶¶ 2, 20, 26-27, 32). Plaintiff complains of federal civil rights violations pursuant to 42 U.S.C. § 1983 ("§ 1983"), and medical malpractice and wrongful death under North Carolina state law. (*Id.* at ¶¶ 33-70).

The procedural history of the case is a lengthy one. In order entered May 5, 2004, the court addressed several motions to dismiss, and dismissed all claims against defendants New Hanover County, New Hanover County Sheriff's Department, and New Hanover County Jail, in addition to plaintiff's conspiracy claims, redundant official capacity claims, and plaintiff's claims for punitive damages against defendant New Hanover County Health Department and certain individual defendants in their official capacities. The related case was consolidated by order entered June 14, 2005.¹

In order entered July 11, 2006, the court granted in part motions for summary judgment filed by New Hanover County Health Department, and New Hanover County Sheriff's Department, and dismissed numerous individual defendants. Later, stipulation of dismissal was entered as to certain other individual defendants.

Remaining defendants, Sidney A. Causey, individually and in his capacity as Sheriff of New Hanover County ("Causey"), B.R. Hudson, a Deputy of the New Hanover County Sheriff's Department ("Hudson"), W. Thomas Parker, Chief Deputy of the New Hanover County Sheriff's Department ("Parker"), and Clarence A. Hayes, Captain of the New Hanover County Sheriff's Department ("Hayes"), filed the instant motion for summary judgment January 2, 2008, seeking dismissal of plaintiff's remaining claims. These claims include: (1) plaintiff's first cause of action against defendant Hudson for excessive force in violation of § 1983; (2) plaintiff's second cause of action against defendants Causey, Parker, and Hayes for adopting and executing policies which caused the use of excessive force in violation of § 1983; (3) plaintiff's third cause of action against

¹ The court granted joint motion to consolidate filed by the parties May 17, 2005 (DE # 37), wherein the parties noted that both lawsuits were brought by the same plaintiff, and both lawsuits involved identical issues of fact.

defendant Hudson for inadequate medical care under § 1983; (4) plaintiff's fourth cause of action against defendants Causey, Parker, and Hayes for adopting and executing policies which led to inadequate medical care in violation of § 1983; and (5) plaintiff's eighth cause of action, a supplemental state law claim of wrongful death against Hudson, Causey, Parker, and Hayes. In the instant motion, supported by affidavits and depositions, these defendants argue entitlement to summary judgment on the basis of qualified immunity, and that plaintiff's claims fail as a matter of law.

STATEMENT OF THE FACTS

Upon arrest and detention by Carolina Beach Police in the late evening hours of January 9, 2003, pursuant to an order for arrest for failure to appear for driving under the influence, Rummer was transported to the New Hanover County Jail where he arrived at or around 1:30 a.m., January 10, 2003. (Compl. ¶¶ 18-19; Def.'s Mem. Supp. Mot. for Summ. J., Ex. A). On January 14, 2003, during a safety check at or about 4:30 a.m., Deputy Mitchell Marlow ("Marlow") heard a knocking on the door of cell 2-D, where Rummer was being held. (Marlow Aff. ¶ 2). When Marlow responded to the knock, Rummer told him that he was addicted to alcohol, and that he had been kidnaped by a federal housing agency and put to work as a painter. (Id. at ¶ 3). Marlow informed his sergeant that Rummer appeared to be suffering from "the DTs" [*delirium tremens*], a symptom of alcohol withdrawal, prompting the sergeant to direct Marlow to arrange for Rummer's transfer to a safekeeping cell. (Id. at ¶¶ 2-4).

Shortly thereafter, Rummer was transferred to cell 423 by Deputy Kelly Vernon ("Vernon"). (Id. at ¶ 5). Cell 423 is a safekeeping cell which, instead of having bunks, has one mat on the floor of the cell for each inmate being held in the cell. (Hudson Dep. pp. 25-27).

At approximately 7:00 a.m., Rummer was taken for purposes of medical examination to Susan Barfield (“Barfield”), a nurse, who noticed slight tremors about his person, and prescribed Vistaril to treat what she perceived to be symptoms of alcohol withdrawal. (Barfield Dep. pp. 21, 49-50). Rummer was returned to cell 423, where he continued to exhibit unusual behavior. (Cline Dep. pp. 18, 64; Mikol Dep. pp. 13-14, 26, 29).² Other inmates in cell 423 began yelling to guards, asking them to remove Rummer, fearing that his behavior was going to result either in injury to himself or injury to somebody else. (Goebel Dep. p. 9; Cline Dep. pp. 64-65; Mikol Dep. p. 31). Goebel reported the situation to her supervisor, Sergeant Frederick Hatch (“Hatch”). (Goebel Dep. p. 11).

Following an order from Hatch to assess the situation, defendant Hudson approached cell 423 and observed Rummer pulling on another inmate’s sheet, mumbling to himself, standing overtop of another inmate, and taking items from other inmates. (Hudson Dep. pp. 14, 28). Defendant Hudson reported these observations to Hatch, who directed defendant Hudson to transfer Rummer from cell 423 to cell 419 for safety purposes. (*Id.* pp. 40-42). Hatch noted that “the information in the computer was that [Rummer] drank alcohol and may possibly be suffering from the DT’s.” (Hatch Dep. Ex. 1). Officer Melody Grimes (“Grimes”) testified that “they said he was going through DT’s and that he was possibly bumping his head on the wall.” (Grimes Dep. p. 31). Cell 419 is a padded cell wherein prisoners who are suicidal or violent are placed for their own safety. (Hudson Dep. p. 41).

² Timothy Cline (“Cline”) was an inmate at New Hanover County Jail on January 14, 2003, and was in cell 423 with Rummer. (Cline Dep. p. 10). Sean Mikol (“Mikol”) was an inmate at the New Hanover County Jail on January 14, 2003, and shared a cell with Rummer. (Mikol Dep. pp. 6-7).

Defendant Hudson entered cell 423 by himself while Grimes stood watch by the door. (Id. pp. 42-43). Defendant Hudson testified that he ordered Rummer to come out of the cell three times, and received no response. (Id. p. 48). This account is corroborated by Grimes, who testified that she heard defendant Hudson tell Rummer that he was being moved to a different cell (Grimes Dep. p. 10), and by inmate Mikol, who testified that he heard defendant Hudson ask Rummer to get up and come with him, then advise Rummer that he was going to be moved to a different cell. (Mikol Dep. pp. 36-37, 77). Inmate Cline testified that he did not recall hearing defendant Hudson say anything to Rummer before defendant Hudson took Rummer down. (Cline Dep. p. 24).

Defendant Hudson testified that, after Rummer failed to respond to his verbal commands, he touched Rummer on the right arm and said “Mr. Rummer, you need to come with me,” at which time Rummer jerked away from him. (Hudson Dep. at 49). Defendant Hudson then grasped Rummer’s right arm with his right hand, and pushing Rummer downward with his left hand, forced him towards the floor. (Id.) Rummer, who had been seated on a bench, came into contact either with the concrete floor of the cell, mats which were covering the concrete, or both. (Id. at 48-50, 57, 62; Cline Dep. p. 24). Defendant Hudson testified that Rummer caught himself with his left arm and wound up prone on the mat with his left arm under him, and that Hansen arrived and helped secure the handcuff on the left arm. (Hudson Dep. p. 58). Defendant Hudson testified that he forced Rummer to the floor rather than asking him to stand up because “if he stand up, that could be more of a threat to me than actually putting him on the – across the mats on the floor.” (Id. at 52).

When Rummer resisted being handcuffed, Grimes called for backup. (Hansen Aff. ¶¶ 3,5; Grimes Dep. pp. 10, 21-22). Hatch and Officer Hugo Hansen (“Hansen”) responded to assist. (Hansen Aff. ¶ 5; Hudson Dep. p. 80). Hansen remembers helping defendant Hudson handcuff

Rummer, but Hatch believed that Rummer had already been cuffed upon their arrival. (Hansen Aff. ¶ 5; Hatch Dep. Ex. 1). Rummer was removed from cell 423 immediately, and taken to cell 419 by Hansen and Hatch. (Grimes Dep. p. 11; Hansen Aff. ¶ 6; Hudson Dep. p. 80).

Rummer was partially walking and partially being carried during this period of transportation from cell 423 to cell 419. (Hansen Aff. ¶ 7; Grimes Dep. p. 31). Defendant Hudson had torn the rubber gloves that he was wearing, and stayed behind in cell 423. (Hudson Dep. p. 81). On the way to cell 419, Rummer was mumbling and told Hansen that he “want[ed] to go home.” (Hansen Aff. ¶ 8). When Rummer arrived at cell 419, Hatch was behind Rummer, holding his armpits. (Id. at ¶ 10). There was at that time another inmate lying on the floor in cell 419, and as Rummer stepped into cell 419, he tripped over the second inmate and fell to the floor, striking his chest and right shoulder. (Id.) Hatch sought to catch Rummer but was unsuccessful, and Rummer fell to the padded floor. (Id.)

When defendant Hudson caught up with the others and arrived at cell 419, Rummer was on the floor of the cell, curled in a fetal position, and being attended to by Deputy Keyes. (Hudson Dep. p. 85). Defendant Hudson testified that there was some blood on the mats that covered the floor of the cell, and that Keyes then noticed that there was a scratch or cut above Rummer’s right eye. (Id.) Rummer was conscious at that time. (Id.) There is no evidence before the court suggesting that defendant Hudson was aware of how Rummer came to be on the floor in cell 419.

Hatch ordered Rummer evaluated by medical staff. (Hatch Dep. 39; Hansen Aff. ¶ 10). Defendant Hudson, who was retrieving new rubber gloves from the control room of the New Hanover County Jail, was not present when the medical department was contacted. (Hudson Dep.

p. 143). Defendant Hudson, Hansen, and Ward transported Rummer by wheelchair from cell 419, to the jail's medical department. (Hansen Aff. ¶ 11; Hudson Dep. pp. 94-96; Ward Aff. ¶ 6).

By all accounts the injury above Rummer's eye was relatively minor. Hatch noticed "a little scratch" that "was not bleeding." (Hatch Dep. p. 41). Hansen stated that he "did not even notice the scratch until Sergeant Hatch pointed it out." (Hansen Aff. ¶ 10). Defendant Hudson did not notice it until he arrived at cell 419. (Hudson Dep. p. 86). In her notes, Barfield described it as "three small scratches" and noted that the wound was not bleeding. (DE # 46-5 (Barfield Notes) p. 2). Defendant Hudson testified that, after cleaning the wound, Barfield said "it did not need any stitches, that it would be fine." (Hudson Dep. 105). Although the origins of the injury are not certain, Barfield's notes show that defendant Hudson advised her that "he thought the scratches came from when [Rummer's] glasses became broken." (Hudson Dep. p. 80; DE # 46-5 (Barfield Notes) p. 2).

The record relied upon in support of and in opposition to the instant motion reveals the presence of five people in proximity to Rummer at time of his second examination, including two nurses, Barfield and Gaysheron Bell ("Bell"),³ and three officers, Hansen, Ward, and defendant Hudson. It illuminates through the testimony of Barfield and defendant Hudson, and the affidavits of Hansen and Ward, a cursory examination of Rummer by medical staff, resulting in the administration of medications per protocol for symptoms of alcohol withdrawal. (Hudson Dep. p. 101, 105; Barfield Dep. p. 43; Hansen Aff. ¶ 12). Notes made by Barfield contemporaneous with the examination recite in part:

³ Reliance on Bell's testimony at deposition is limited to a single page of the transcript introduced by plaintiff relating to examination on medical protocol. Facts pertaining to Rummer's second presentation to the medical department are adduced by the parties through introduction of Barfield and defendant Hudson's testimony at deposition.

There are three sm. scratches into and little beside right eyebrow. Cleansed [with water] but [no] blood noted on cotton ball and none on jumpsuit. Entire head [and] scalp area felt [and] checked for lumps, bumps, or skin breaks [and none] found. Asked attending deputy [defendant Hudson] if perhaps inmate had fallen recently [and] he stated he thought scratch came from when [patient's] glasses became broken.

(DE # 46-5 (Barfield Notes) p. 2).

Barfield testified that Rummer was “completely changed” from the first time that she had seen him. (Barfield Dep. p. 28). Rummer, now wearing a urine-saturated jumpsuit, kept trying to slide out of his wheelchair. (Id. at 25). Barfield checked Rummer’s head and scalp area for lumps, bumps, or skin breaks, but found none. (Id. at 31). Barfield cleaned the cut above his eye. (Id.; DE # 46-5 (Barfield Notes) p. 2). Barfield testified at deposition that she did not ask whether Rummer “had struck his head in any way.” (Barfield Dep. p. 29).

Specifically, Barfield testified that she performed neurological tests which consisted of checking Rummer’s eyes with a flashlight to make sure they both reacted equally, and having Rummer pull on her hands “to make sure that he had both side strength instead of one side weakness,” but that she neglected to document these neurological tests in her notes. (Barfield Dep. pp. 28-29).

Barfield testified that, to the extent she performed any neurological tests on Rummer, such tests were secondary because she “was not looking for head injuries,” given the lack of outward signs of head injury. (Id. at 29). She did not ask defendant Hudson what caused Rummer’s glasses to break. (Id. at 30). Barfield also testified that what caused Rummer’s glasses to break was not something that she needed to know. (Id.) Barfield gave Rummer Librium and Dilantin pills to treat

what she perceived as symptoms of alcohol withdrawal, but did not summon a doctor to observe and assess Rummer. (Id. at p. 43; DE # 46-5 (Barfield Notes) p. 2).

Defendant Hudson testified that Barfield asked him whether Rummer had fallen, and he responded “[n]o, he did not fall.” (Hudson Dep. p. 147). His observations concerning Rummer’s efforts to avoid the wheelchair were consistent with that of Barfield. (Id. at 96; Barfield Dep. at 31). His recollection of the administration of medicine by her, while not as technical, was consistent with and amplified upon that of Barfield. (Id. at 101; Barfield Dep. p. 43). Barfield did not, however, recall asking any question of the officer, including whether Rummer had fallen, though her notes report this inquiry and defendant Hudson testified to an exchange with the nurse initiated by her question whether Rummer had fallen. (Barfield Dep. p. 29-30; DE # 46-5 (Barfield Notes) p. 2).

Defendant Hudson did not recall telling Barfield that Rummer was scratched by glasses. (Id.) Barfield testified that she did not ask him about the cause of the scratches she observed, but her notes and testimony evidence her understanding that Rummer’s glasses caused the scratches on his face. (Id.; DE # 46-5 (Barfield Notes) p. 2).

The affidavits of Ward and Hansen, who were also present at the physical examination, shed no light on any communication between defendant Hudson and Barfield regarding the possible source of Rummer’s injuries, but are otherwise generally consistent with the testimonial accounts. Ward noted a scratch over Rummer’s eye, described Rummer’s attempts to get out of the wheelchair, and “recall[ed] Nurse Barfield giving pills to Mr. Rummer.” (Ward Aff. ¶¶ 5, 6, 8). Barfield then instructed the deputies to take Rummer back to cell 419. (Id. at ¶ 9). Hansen stated that Barfield inspected Rummer’s eye, cleaned the scratch, “felt his head for bumps,” gave him some “medication, which he ultimately swallowed,” and “also took his vital signs.” (Hansen Aff. ¶ 12). At this second

examination, Barfield observed the other symptoms presented by Rummer as consistent with alcohol withdrawal. (Barfield Dep. pp. 42-43).

After the second examination by Barfield, Rummer was transported by wheelchair back to cell 419. (Ward Aff. ¶¶ 9, 10). When returned to his cell, Rummer stood up and walked around the cell, looking for a mat. (*Id.*) Ward obtained a mat for him and other deputies got fresh clothes for Rummer and changed his clothes. (*Id.* ¶¶ 11-12). Ward stated that “Mr. Rummer did not complain of any injuries during any of this time. He was still standing when I left his cell.” (*Id.* at ¶ 13).

Barfield told Corporal Timothy Fuss (“Fuss”) that Rummer needed to go to Central Prison Hospital so that he could be at “a bigger facility with more people to monitor him,” and Fuss prepared a written request that Rummer be transferred. (Barfield Dep. p. 45-47; Fuss Aff. ¶ 2). Later, Officer Morton went to cell 419 to pick up Rummer (Morton Dep. p. 12), and observed that he “was breathing but appeared to be in a very deep sleep due to being heavily medicated by our medical staff.” (Morton Dep. Ex. 1). Morton was unable to awaken Rummer, and requested that Fuss and defendant Hudson help him get Rummer into a wheelchair. (*Id.* at Ex. 2).

Fuss testified that prior to transport Rummer was:

. . . snoring and breathing. Nothing appeared out of the ordinary. I saw no reason to call the nursing staff or take him to the hospital. He appeared fine. I was aware that he had been placed on medication. It was not unusual to have inmates in a deep sleep after being medicated by the medical staff.

(Fuss Aff. ¶ 3). Defendant Sheriff of New Hanover County Causey testified to his observation that “[i]t is not unusual for inmates suffering from DTs to be medicated by the nursing staff and to then fall into a deep sleep.” (Causey Aff. ¶ 7).

Rummer, who was snoring, appeared asleep so Morton placed a seat belt across his chest and hooked it to the cage so that Rummer would not fall over. (Morton Dep. Ex. 1). Morton and Rummer left New Hanover County Jail at or about 12:05 p.m., and arrived at Central Prison Hospital at or about 2:15 p.m. (Id.) Later that day, following an examination of Rummer, Central Prison Hospital notified New Hanover County Jail that Rummer was in a coma, and then later reported that he had died as a result of trauma to his head. (Fuss Aff. ¶ 6). An autopsy performed by Aaron M. Gleckman, M.D., January 17, 2003, revealed that the cause of death was blunt head trauma on the right side of Rummer's head, and that Rummer had also suffered an anterior fracture of the fifth cerebral vertebra. (Gleckman Dep. Ex. 2).

DISCUSSION

A. Standard of Review

Under Rule 56(c), 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). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). The court tests for a “genuine issue” through recourse to the relevant law, “view[ing] the evidence presented through the prism of the substantive evidentiary burden.” Id.

A party seeking summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must then “set forth

specific facts showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)).

In making a determination on a summary judgment motion, the court construes evidence in the light most favorable to the non-moving party and draws all reasonable inferences in the non-movant’s favor. Anderson, 477 U.S. at 255; see also Odom v. S.C. Dep’t of Corr., 349 F.3d 765, 774 (4th Cir. 2003) (“we are to view the evidence in a light most favorable to the nonmoving party and to give him the benefit of all reasonable inferences”). Nevertheless, judges are not “required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.” Id. at 251. Evidence considered by the court must be admissible, and “airy generalities, conclusory assertions and hearsay statements [do] not suffice to stave off summary judgment.” United States v. Roane, 378 F.3d 382, 400-01 (4th Cir. 2004).

A court required to rule upon the issue of qualified immunity potentially engages in a two step inquiry. The court initially must determine whether “[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer’s conduct violated a constitutional right.” Saucier v. Katz, 533 U.S. 194, 201 (2001). If no constitutional violation can be established, the inquiry ends there and summary judgment based on immunity is valid. Id.

If, however, a constitutional violation is detected, the court must determine whether the right was clearly established at the time of the alleged violation. Id. “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” Id. at 202. The Supreme Court also warned in Saucier that denying summary judgment any time a material issue of fact

remains upon consideration of the first step, if upon consideration of the second, and the law did not put the officer on notice that his conduct would be clearly unlawful, “could undermine the goal of qualified immunity to ‘avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.’” *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Court held that “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Id.*

The Fourth Circuit has held that “in gray areas, where the law is unsettled or murky, qualified immunity affords protection to an officer who takes an action that is not clearly forbidden—even if the action is later deemed wrongful.” Rogers v. Pendleton, 249 F.3d 279, 286 (4th Cir. 2001). Even where an officer is mistaken with respect to the relevant law, “[i]f the officer’s mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense.” Saucier, 533 U.S. at 205. In making its determination, the court must avoid engaging in “impermissible 20/20 hindsight,” even when faced with a tragic outcome. Grayson, 195 F.3d at 695; see also Belcher v. Oliver, 898 F.2d 32, 35 (4th Cir. 1990) (“Only an exercise in impermissible judicial hindsight could justify holding these officers responsible for [detainee’s unforeseeable death by] suicide.”).

B. Excessive Force Claim Under § 1983 Against Defendant Hudson

“[E]xcessive force claims of pretrial detainees are governed by the Due Process Clause of the Fourteenth Amendment.” Riley v. Dorton, 115 F.3d 1159, 1166 (4th Cir. 1999) (en banc). To succeed on the claim of excessive force against defendant Hudson under the Fourteenth Amendment, plaintiff must demonstrate that defendant Hudson “inflicted unnecessary and wanton pain and suffering” against Rummer. Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998) (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). The court must determine whether the force was applied “in

