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

MALEKA COHEN, Administratrix of the Estate of Chloe Cohen, et al., Plaintiffs,	**:**	**CIVIL ACTION**
v.	**:**	**NO. 04-713**
KIDS PEACE NATIONAL CENTERS, INC., et al. Defendants.	**:**	

MEMORANDUM AND ORDER

Stengel, J. **May 15, 2006**

I. Background[1]

Chloe Cohen ("Chloe") was a very troubled teenage girl who tragically committed suicide on February 21, 2002, while under treatment at KidsPeace, a residential pediatric mental health facility. From a very young age, Chloe experienced serious mental health problems, and was diagnosed with intermittent explosive disorder, mood disorder, oppositional defiant disorder, and self-injurious behavior including bulimia nervosa, an eating disorder. The record indicates that Chloe had a history of suicide threats. For instance, in 1998, upon admission at the Julia Dyckman Andrus Memorial Hospital, she said "she has thought of killing self with a knife but didn't want to, thought of jumping

[1] Plaintiffs have stipulated to the dismissal of their claims against Kids Peace National Centers of Pennsylvania and Wylie House. *See* Plaintiffs' Answer to Defendants Kids Peace National Centers, Inc., Kids Peace National Centers of Pennsylvania, Inc. and Wylie House's Motion for Summary Judgment.

out a window . . . but didn't think that would get her where she wants (home)," Initial Psychiatric Assessment, 6/26/1998, Pl. Br. Exh. "H"; in October of 2001, she was noted to have, among other symptoms, a "preoccupation with suicide" by intake at South Oaks Hospital, Psychiatric Evaluation, 10/29/2001, Pl. Br. Exh. "L"; the Pathways Program noted a history of suicidal ideation, Pl. Br. Exhs. "M"-"O", and specifically that in December 2001, she "repeatedly threatened to kill herself, stating 'I'm just going to end it now. I'm just going to do it,' as she mimicked slitting her wrists with her finger." Contact Form, 12/7/2001, Pl. Br. Exh. "P". It appears that she had never been hospitalized or treated solely due to suicide concerns, but rather the suicidal ideation was in conjunction with a number of other diagnoses and concerned. Chloe had never attempted suicide prior to February 21, 2002.

On January 9, 2002, Chloe was admitted to KidsPeace, in Orefield, Pennsylvania. Upon her admission, the administrators of KidsPeace, including Dr. Milton Adams, met with Chloe and her parents, Ruben and Maleka Cohen. At that meeting, Mr. and Mrs. Cohen discussed Chloe's psychiatric history, including, *inter alia*, a history of intermittent suicidal ideation. There is some dispute as to how extensive those discussions were - plaintiffs allege that they discussed an extensive history of suicide threats, and Dr. Adams remembers only that Chloe denied any suicidal ideation. By January 29, Chloe had continued self-destructive behavior, including self-induced vomiting and, on two occasions, superficial self-wounding. On February 17, 2002, it was observed by

KidsPeace staff that Chloe had vomited into a trash can shortly after eating a meal in the dining hall. As a result of concerns over her purging,[2] Betsy Ross, a child care counselor, placed Chloe on a restrictive regimen with requirements that:

> 1. Be in common area at ALL TIMES. 2. Need staff to go with her wherever she goes, including her room, and bathroom, shower (or a trusted peer). 3. She needs to change clothes in bathroom stall with staff in bathroom. 4. When she needs to use bathroom staff needs to go with her. 5. She will be sleeping in a common area.

Treatment Note 2/17/02, Plaintiff's Brief Exhibit "V". Chloe continued to be subject to "site watch" at least through February 19.[3]

On February 19, Chloe told Alice Kwiatkowski, a member of the KidsPeace treatment team, that she felt like killing herself. In accordance with KidsPeace's suicide prevention policy, Ms. Kwiatkowski then told Liz Balliet, Chloe's social worker at KidsPeace, what Chloe said.[4] Ms. Balliet spoke with Chloe, who confirmed that she said

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[2] It is undisputed that Chloe was placed on site watch as a result of her eating disorder, not as the result of any suicide threat. The significance of that initial reason is disputed.

[3] Alice Kwiatkowski testified that Chloe did not remain on the strict site watch for very long. Rather, she stated that she and another member of the treatment team, Jan Lizotte, discussed Ms. Ross's restrictions and decided that they were overly strict for Chloe's treatment purposes. She characterized the restrictions as a "recommendation" and said that she determined that they were "too invasive and was sort of impinging upon the client's dignity to make choices on her own." Kwiatkowski dep., Def. Br. Exh. "L".

[4] Specifically, KidsPeace's suicide ideation/threat policy, in relevant part, required the following:

> (a) All suicidal ideation/talk by children must be viewed as a 'warning sign' and must be treated with extreme seriousness. The message to children will be that suicidal talk will always be taken seriously and that there will always be a staff response to such talk.
>
> (b) When a staff member learns that a child may be seriously considering suicide (in whatever manner the child communicates this intent), that staff member must immediately notify the supervisor, or the in-charge supervisor at the center/site. An incident report must then be written as soon as possible.
>
> (c) Once notified of a child's suicidal ideation/talk, the supervisor must

that she felt like killing herself. When asked whether she had a plan as to how she would do it, Chloe said "I don't know, I'd probably cut myself." Treatment Note 2/19/02, Plaintiff's Brief Exhibit "Y". Ms. Balliet indicated in the note that Chloe should continue to be watched per the watch instituted as a result of her purging.[5] Treatment notes up to and until February 21 further indicated that Chloe remained on "site watch" through that time period. In the evening of February 21, Chloe was permitted by Alice Kwiatkowski to go to the bathroom by herself to shower. Approximately 20 minutes later, Ms. Kwiatkowski went to check on her, and found that she had hanged herself in the bedroom.

> arrange for that child to be interviewed privately by the social worker, primary therapist or another clinician as soon as possible.
>
> (d) The Social Worker or whomever is conducting the interview, will determine:
>
> (1) Whether the child may be at risk of self-injurious behavior and should be monitored closely as a precaution.
>
> (2) Whether the child in question is at risk of self-injurious behavior and should be placed on immediate in sight observation.
>
> (3) Whether the child in question is definitely at risk of harming him or herself and requires immediate psychiatric evaluation to determine a preventive protocol for supervision of the child or the potential need for hospitalization.
>
> (e) The social worker or whomever conducted the interview will determine, in consultation with the Treatment Team, whether the child should be placed on preventative close observation immediately. The interviewer should consult with the Treatment Team to establish a plan for observation, implement a contract with the child committing to not self injure, or other therapeutic interventions and/or for re-assessment of risk.

KidsPeace Policy - Suicide Ideation/Gesture/Attempts, Def. Br. Exh. "N".

[5] It appears that Ms. Balliet informed Dr. Milton Adams of her conversation with Chloe. Plaintiffs dispute this fact because Dr. Adams had no recollection of a specific reference to suicide in the voicemail left by Ms. Balliet, and neither did he make any notation of a suicide threat. Because I find that Ms. Balliet made a diagnostic judgment call that was, at most, merely negligent, I find that whether Dr. Adams received a voicemail specifically referencing a suicide threat is immaterial.

II. Standard of Review

The court has subject matter jurisdiction over this case due to diversity, pursuant to 28 U.S.C. § 1332. Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to

that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *Id.* at 252. If the non-moving party has exceeded the mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Discussion

A. Gross Negligence Under the MHPA

Defendants argue that under Pennsylvania Mental Health Procedures Act, 50 P.S. § 7114(a) ("MHPA"), they are not liable to Plaintiffs. The MHPA provides that:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or

> criminally liable for such decision or for any of its consequences.

50 P.S. § 7114(a).[6] Both parties agree that the MHPA applies, and that therefore the appropriate standard of care is gross negligence. Gross negligence is "a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of defendant must be flagrant, grossly deviating from the ordinary standard of care." *Albright v. Abington Memorial Hosp.*, 696 A.2d 1159, 1164 (Pa. 1997) (citing *Bloom v. Du Bois Reg. Med. Center*, 597 A.2d 671, 679 (Pa. Super. Ct. 1991)). Though normally, whether behavior is grossly negligent is a matter for the jury, "a court may take the issue from a jury, and decide the issue as a matter of law, if the conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence." *Albright*, 696 A.2d at 1165 (citing *Willett v. Evergreen Homes, Inc., et al.*, 595 A.2d 164 (Pa. Super. Ct. 1991).

In this case, Plaintiffs' expert, Dr. Timothy Michals, opined that

> the failure of the staff to obtain relevant medical records, conduct an appropriate suicidal risk assessment, failure to appropriately communicate the results of her clinical evaluation and findings, resulting in the failure to properly monitor and maintain her on constant suicide observation, and

[6] The purpose of the MHPA is "to provide limited immunity from civil and criminal liability to mental health personnel and their employers in rendering treatment in this unscientific and inexact field." *Albright v. Abington Mem. Hops.*, 696 A.2d 1159, 1167 (Pa. 1997) (citations omitted). It is intended to insulate workers in the health care field from liability so they are free to make reasonable medical determinations as to the treatment of mentally ill patients. *Id.*

> failure to comply with the facility's suicidal protocol represents a gross deviation from the reasonable standard of psychiatric care and treatment.

Expert Report of Dr. Timothy Michals, Pl. Br. Exh. "B". The essence of plaintiffs' argument is that KidsPeace should have monitored Chloe 24 hours a day - that they were grossly negligent for either not realizing that she was suicidal and then failing to put her on 24-hour suicide watch, or that they knew she was suicidal and were grossly negligent for not breaching the 24-hour watch she was on as a result of her purging.

I find that, even in the light most favorable to the plaintiffs as non-moving party, the facts here are insufficient to prove a case of gross negligence. The record indicates that Defendants knew of Chloe's history of suicidal threats, and that they took the suicide threat of February 19 seriously. Alice Kwiatkowski testified that as a result of the conversation she had with Chloe, after the statement that she might as well kill herself, she made a diagnostic decision that Chloe had no immediate plan to commit suicide. Deposition of Alice Kwiatkowski, Def. Br. Exh. "L". Nonetheless, Ms. Kwiatkowski referred the matter to Liz Balliet, in accordance with KidsPeace's suicide threat policy. *Id*. Ms. Balliet testified that she had an extensive conversation with Chloe with regard to her statement that she "might as well kill herself," but that she determined the threat was not immediate. Deposition of Liz Balliet, Def. Br. Exh. "C"; Treatment Note, Pl. Br. Exh. "Y". Pursuant to the KidsPeace suicide policy, Ms. Balliet, the social worker, determined

that Chloe did not need to be put on "preventative close observation."[7] This judgment, though it may have been faulty and had tragic results, was no more than mere negligence.

Further, Ms. Kwiatkowski testified that allowing Chloe to shower unsupervised on the evening of February 21, was based on professional judgment about the treatment Chloe should receive. Kwiatkowski Dep., Def. Br. Exh. "L".

All these circumstances amount to exactly the type of diagnostic determination protected by the MHPA. The evidence indicates that, at worst the KidsPeace employees made judgments with regard to Chloe's treatment that can be questioned in hindsight, but the evidence does not suggest that those decisions were made with a flagrant disregard for ordinary treatment standards. As a result, I will grant summary judgment in favor of Defendants as to all counts.

[7] The KidsPeace suicide policy, reproduced in footnot 4, requires a Social Worker to assess the risk posed by the suicide threat. Here, Ms. Balliet assessed Chloe and determined that she did not pose an imminent suicide risk and therefore that she did not need to be put on "preventative close observation." The fact that Ms. Balliet's judgment turned out to be incorrect is, while tragic, not gross negligence.

ORDER

AND NOW, this day of May, 2006, after consideration of the Motion For Summary Judgment of Defendants KidsPeace National Centers, Inc., KidsPeace National Centers of Pennsylvania, Inc., and Wiley House (Dkt. # 28), joined by Defendant Dr. Milton Adams on April 24, 2006, and any responses thereto, it is hereby **ORDERED** that the Motion is **GRANTED**. Judgment will be entered in favor of Defendants on all claims.

The clerk of court is directed to close this case for statistical purposes.

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LAWRENCE F. STENGEL, J.