COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-859

GAIL L. WILLIAMS, special administratrix,[1]

vs.

BOSTON PUBLIC HEALTH COMMISSION.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Gail Williams, as special administratrix of the estate of the decedent, Anneke Williams, appeals from a judgment dismissing her complaint against the Boston Public Health Commission (commission) alleging wrongful death and failure to supervise and train its employees. We conclude that the factual allegations in the plaintiff's complaint plausibly suggest that the plaintiff may be entitled to relief under G. L. c. 258, § 10 (j) (2), on her wrongful death claim because the public employees' intervention placed the decedent in a worse position than before the intervention. Further concluding that the public employees owed a duty of care to the decedent and that the complaint suggests that the decedent's suicide was a

[1] Of the estate of Anneke Williams.

foreseeable result of the employees' negligence, we reverse the portion of the judgment dismissing the wrongful death claim.

1. Standard of review. "We review a ruling on a motion to dismiss de novo, taking the complaint's allegations as true, as well as all reasonable inferences drawn in the plaintiff's favor" (citation omitted). Cournoyer v. Department of State Police, 93 Mass. App. Ct. 90, 90-91 (2018). "To survive a motion to dismiss, the factual allegations must plausibly suggest an entitlement to relief." Vigorito v. Chelsea, 95 Mass. App. Ct. 272, 274 (2019).

2. G. L. c. 258, § 10 (j) (2). The Massachusetts Tort Claims Act largely shields public employers from suits arising out of the violent conduct of third parties by immunizing public employers from "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer." G. L. c. 258, § 10 (j). See Reid v. Boston, 95 Mass. App. Ct. 591, 600 (2019). Here, the commission's failure to train or supervise the emergency medical technicians (EMTs) was not the condition that originally caused the injury, and thus the plaintiff cannot recover under count three of the complaint. See Serrell v. Franklin County, 47 Mass. App. Ct. 400, 401-402

(1998) (claim regarding failure to train and supervise employees barred by § 10 [j] even where employees exacerbated situation).

Section 10 (j), however, enumerates four exceptions for the exclusion it creates. Relevant here, § 10 (j) (2) provides an exception to immunity for claims "based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than [she] was in before the intervention." Although the Superior Court judge properly concluded that the plaintiff's claim based on the commission's failure to supervise and train employees was barred under § 10 (j), the plaintiff's claim for wrongful death based on the negligent acts of the EMTs "merits further scrutiny" under § 10 (j) (2). Serrell, 47 Mass. App. Ct. at 402.

Here, according to the amended complaint, Pine Street Inn staff members called 911 to report that the decedent was experiencing suicidal thoughts. In response to the call, Boston EMS, an ambulance company under the control of the commission, arrived at the Pine Street Inn. The EMTs staffing the ambulance were aware that the decedent had expressed suicidal ideations. The EMTs chose not to restrain the decedent. Although it is the practice of Boston EMS to transport suicidal patients to the hospital with a police escort, the EMTs did not do so on this occasion. When one of the EMTs opened the door to the ambulance when they arrived at the hospital, the decedent ran into the

street, lay down, and was struck by a car and killed. In short, at least according to the complaint, the EMTs removed the decedent from the Pine Street Inn, where staff was looking out for the decedent and securing help for her, and brought her to a place where nobody was willing or able to prevent her from killing herself. If these alleged facts were to be proved, a trier of fact could conclude that the EMTs "place[d] the victim in a worse position than [s]he was in before the[ir] invention." G. L. c. 258B, § 10 (j) (2). See Reid, 95 Mass. App. Ct. at 600 (liability permitted under § 10 [j] [2] where officer's intervention "escalated what had previously been a calm, controlled encounter into a shootout"); Williams v. O'Brien, 78 Mass. App. Ct. 169, 176 (2010) (correction officer calling plaintiff "a snitch" in public place and deliberately putting plaintiff in cell with dangerous inmate left plaintiff in worse position than before intervention). See also Serrell, 47 Mass. App. Ct. at 405 (officer's intervention in quarrel between inmate and visitor exacerbated situation causing plaintiff to be pinned behind iron gate in visitation room).

To this, the commission argues that the failure to protect the decedent is an omission, for which § 10 (j) (2) precludes liability. The failure to train and supervise was an omission. The removal of the decedent from the Pine Street Inn and her transport to where she could flee and commit suicide, however,

was not an omission but rather "an affirmative act on the part of the intervener." Stahr v. Lincoln Sudbury Regional High Sch. Dist., 93 Mass. App. Ct. 243, 249 (2018) (coaches' lack of supervision and inadequate instruction was not affirmative act that resulted in student's injury during practice). See Cormier v. Lynn, 479 Mass. 35, 41 (2018) (school staff's failure to supervise appropriately was not affirmative act that resulted in bullying incident). Contrast Audette v. Commonwealth, 63 Mass. App. Ct. 727, 733 (2005) (handler of narcotics-sniffing dog negligently releasing dog in police station parking lot was affirmative act). Accordingly, the commission is not immune under G. L. c. 258, § 10, for the negligence of the EMTs alleged in count one.

3. Breach of duty. "The existence of a duty is a question of law to be resolved by the judge." Cottam v. CVS Pharmacy, 436 Mass. 316, 320 (2002). "To recover for negligence, a plaintiff must show 'the existence of an act or omission in violation of a . . . duty owed to the plaintiff[] by the defendant.'" Rafferty v. Merck & Co., 479 Mass. 141, 147 (2018), quoting Cottam, supra. Here, the EMTs had a duty to make reasonable efforts to keep the decedent safe while transporting her to the hospital. "[A] defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct

unreasonably dangerous." R.L. Currie Corp. v. East Coast Sand & Gravel, Inc., 93 Mass. App. Ct. 782, 784 (2018), quoting Jupin v. Kask, 447 Mass. 141, 147 (2006) (foreseeability can inform limits of duty of care and of proximate cause).

We are not persuaded by Hernandez v. KWPH Enters., 116 Cal. App. 4th 170, 179-180 (2004). There, the California Court of Appeal determined that the EMTs had no duty to protect a suicidal patient from her own conduct because there was no special relationship between the EMTs and the patient. Id. at 180. We find no support in Massachusetts law for the notion that EMTs do not have a duty of care to the patients they transport. See Restatement (Second) of Torts § 314A comment d (1965). Cf. O'Brien, 78 Mass. App. Ct. at 176 (correction officers' duty to protect prisoners against "unreasonable harm while in their custody is a long recognized and fundamental tenet of the law of negligence").

4. Proximate cause. To prevail on her claim, the plaintiff ultimately must prove that the negligence of public employees was the proximate cause of the decedent's death. See Delaney v. Reynolds, 63 Mass. App. Ct. 239, 241 (2005). "[T]he act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen." R.L. Currie Corp., 93 Mass. App. Ct. at 785,

quoting Jesionek v. Massachusetts Port Auth., 376 Mass. 101, 105 (1978). "The question whether the risk of injury was foreseeable is almost always one of fact." Delaney, supra at 245, quoting Moose v. Massachusetts Inst. of Tech., 43 Mass. App. Ct. 420, 425 (1997). Here, the allegations in the complaint are at least sufficient to survive a motion to dismiss. The EMTs transported the decedent, who was known to have expressed suicidal ideations, without restraints and without a police escort. When arriving at the hospital, an EMT opened the ambulance door, and the decedent fled to a busy street, lay down, and was struck by a vehicle. As it is reasonably foreseeable that a suicidal person might attempt to commit suicide if given an opportunity to do so, the plaintiff has surmounted the minimal hurdle of surviving a motion to dismiss for failure to state a claim upon which relief could be granted. See Equipment & Sys. for Indus., Inc. v. Northmeadows Constr. Co., 59 Mass. App. Ct. 931, 932 (2003).

5. Conclusion. So much of the judgment as dismisses count

one is reversed. The judgment is otherwise affirmed.

So ordered.

By the Court (Rubin, Desmond & Ditkoff, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: August 27, 2019.

[2] The panelists are listed in order of seniority.