VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 88-2-19 Frcv

Bittner vs. MHM-Centurion of Vermont et al

DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter arises from the tragic death of Joshua Bittner, who committed suicide in early March 2017 while in the custody of the Vermont Department of Corrections. Plaintiff Renee Bittner, in her capacity as Administrator for the Estate of Mr. Bittner, sued the Department of Corrections, its medical contractor (Centurion), and several individuals for damages arising out of his death. After dismissal of Ms. Bittner's medical malpractice claim, what remains are allegations that Defendants were deliberately indifferent to Mr. Bittner's serious mental health needs and that they acted outrageously, exacerbating his mental distress. *See Bittner v. Centurion of Vermont*, 2021 VT 475, ¶ 34, 215 Vt. 475. Defendants have moved for summary judgment on these claims. The court grants the motion.

Background

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(6); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party . . . must come forward with admissible evidence to raise a dispute regarding the facts."). The court must give the non-moving party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

Thus, "[i]n determining the existence of genuine issues of material fact, courts must accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Gates v. Mack Molding Co.*, 2022 VT 24, ¶ 13, 216 Vt. 379 (quotation omitted).

Here, Defendants properly shouldered their burden; their motion is supported by a Statement of Undisputed Material Facts, which in turn is supported by citations to admissible evidence in the record. In response, Ms. Bittner does not dispute many of Defendants' assertions. Others she purports to dispute, but she fails to do so properly. Thus, the court deems those assertions undisputed. V.R.C.P. 56(e)(2).

Viewed through this lens, the following narrative emerges. Defendants Centurion of Vermont, LLC, and the Vermont Department of Corrections (collectively referred to as "Centurion") were responsible for providing health and mental care services to inmates housed at the Northwest State Correctional Facility ("NWSCF") and Northern State Correctional Facility ("NSCF"). The named individual defendants were in their employ.

On February 3, 2017, Mr. Bittner, who had been on community supervision furlough, turned himself in on a violation of furlough and was lodged at NWSCF. Upon his entry into NWSCF, Mr. Bittner scored a "9" on his Initial Needs Survey (INS) (a score of 8 or higher requires notification of the Shift Supervisor), expressed suicidal ideation, and shared that he had attempted to take his own life the "other night." The Shift Supervisor determined that Mr. Bittner should remain in booking and be subject to 15-minute checks.

From February 3, 2017 through February 5, 2017, staff saw Mr. Bittner several times. On February 5, 2017, Defendant Mallory Supley, a Licensed Practical Nurse (LPN), conducted Mr. Bittner's healthcare screening, part of which included a suicide prevention screening. During that encounter, Mr. Bittner stated that he had tried to kill himself five days earlier; he also had multiple recent cuts on his forearms. Based on the outcome of that screening, Ms. Supley contacted the shift commander and initiated an immediate mental health referral. She also contacted the on-call provider, who in turn ordered that Mr. Bittner be placed (1) in a smock and (2) on 15-minute mental health checks. This narrative appears confirmed by a February 5, 2017 Incident Report offered by Plaintiff and involving a nurse "L.B." According to Officer Adam Patterson,

> [o]n 2/5/17 at approximately 1145 Nurse LB from medical informed this officer that Bittner, Joshua just completed his medical intake down in the health center. LB informed this officer Bittner broke down crying in the health center and made statements "I don't want to live anymore." LB informed me that she had contacted the on call Mental Health provider Emily. Emily informed her that Bittner be placed in a

> smock for his own protection. Once informed this officer entered booking and engaged in conversation with Bittner. Bittner stated to this officer that he did not have a plane [sic] of self-harm, nor was he thinking about harming himself. Bittner was informed he still needed to be placed in a smock until he was cleared by Mental Health. Bittner was reluctant at first to give up his clothing and he started to cry uncontrollably. After a few minutes and conversation Bittner gave up his clothing and was placed in the smock. Bittner remains on 15's until cleared by Mental Health and remains in booking. Superintended Hale notified via e-mail. End of Report.

On February 6, 2017, Defendant Jacee Sutton met with Mr. Bittner to conduct a Self-Harm Watch/Mental Health Observation Admission Assessment.

> During the assessment, Mr. Bittner presented irritable and demanding. Mr. Bittner was upset that he was placed in a safety smock, but reported wanting his clothes back. Mr. Bittner reported he received some substance abuse treatment from Howard Center and denied any other prior mental health treatment. Mr. Bittner stated that the self-harm incident that he reported at his intake was from scratching his arms with a razor; Defendant Sutton noted that Mr. Bittner had superficial scratch marks on his right forearm. Mr. Bittner also denied any current suicidal or homicidal ideation, plan, or intent and denied ever claiming he was suicidal. Defendant Sutton determined that Mr. Bittner should remain on 15-minutes checks with camera status. Defendant Sutton returned Mr. Bittner to his regular clothes, regular food tray, no restrictions on sharps, and property according to unit rules.[1]

On February 7, 2017, Ms. Sutton met again with Mr. Bittner.

> The purpose of Defendant Sutton's visit was to assess the need for continued mental health checks. Mr. Bittner stated that he found it helpful to have people to talk to for distraction. Mr. Bittner also acknowledged that he felt overwhelmed. Despite his depressed appearance, Mr. Bittner denied active or passive suicidal, self-harming, or homicidal ideation, intent, or plan. Defendant Sutton also noted that Mr. Bittner was goal directed and future oriented, specifically that he was looking forward to going to [the] general population as well as [to] his upcoming court date. Following the visit, Defendant Sutton cleared Mr. Bittner for general population, but on [continued] mental health checks. Mr. Bittner was allowed regular clothes, a regular food tray, no restrictions on sharps, and property according to unit rules.[2]

The next day, Ms. Sutton again met with Mr. Bittner, and conducted a Mental Health Assessment-Part B ("Part B").

> Mr. Bittner denied mental health hospitalizations; denied outpatient mental health treatment; and denied family psychiatric history. The Part B also included a suicide risk assessment. Mr. Bittner denied thoughts of suicide; denied a current plan for suicide; denied prior suicide attempts; denied prior suicide attempts or ideation when incarcerated. Defendant Sutton noted Mr. Bittner had not attempted suicide in the last

[1] This narrative is a direct quote of Defendants' Statement of Undisputed Facts, ¶ 6, which Ms. Bittner does not properly dispute.
[2] Defendants' Statement of Undisputed Facts, ¶ 7, also not properly disputed.

> 90 days, but had engaged in self-harm by cutting (superficial scratch on right wrist). Based on the Part B, Defendant Sutton discontinued Mr. Bitt[n]er from mental health checks as well as scheduled Mr. Bittner for a psychiatric follow-up in 14 days.[3]

On February 13, 2017, Mr. Bittner was arraigned on several counts of domestic assault and criminal threatening and ordered held for lack of bail. Upon his return to NWSCF, he underwent another INS and again was placed on 15-minute checks. On February 14, 2017, Defendant Sutton met with Mr. Bittner. "Mr. Bitt[n]er reported that he struggled with anxiety and depression, but that he utilizes sleeping, watching TV, and socializing as coping skills. Defendant Sutton removed Mr. Bittner from mental health checks, scheduled Mr. Bitt[n]er for a follow-up in seven days, and confirmed referral to a psychiatric provider for further assessment and possible medication management."[4]

On February 16, 2017, Mental Health Provider Travis Sawyer evaluated Mr. Bittner and prescribed Celexa 20 mg and Trazadone 50 mg starting three days later. The medical record memorializing this visit indicates that the "Reason for Referral" was "depression," and the "Reason for Contact" was the "regular scheduled psychiatric evaluation" suggested by Ms. Supley and Ms. Sutton. The record further indicates that, while Mr. Bittner attempted self-harm by "superficially cutting his wrist in the past," he reported no history of prior mental health treatment or suicide attempts. Mr. Sawyer's narrative continues:

> 26 y/o that was seen today for a regular scheduled psychiatric evaluation. This is the first interview of this patient by this writer. He reports history of two DUI. He reports history of anxiety and depression. He says history of ODD and as a "rebellious kid." He reports drinking alcohol since he was 13 years old. He drinks until he "blacks out." He reports history of depression and low mood for several years. He reports isolates, irritable mood, and lack of motivation. He reports chronic sleep problems. He continues to have the support of his mom, dad died at age 4, and three sisters. He states, "I quit school because I was working and making more money than my teachers that taught me did." He reports history of physical abuse and states that he was "beaten" by his mother's boyfriends. He has a 3 ½ year old son, and he feels the mother is trying to keep him from seeing him as punishment. He works construction. He reports sleep is poor, appetite is okay and energy is a little low. He is currently in prison for aggravated assault. He has no manic or psychotic symptoms. He is future oriented. He has no formal thought disorder. He reports no acute medical concerns.
>
> MENTAL STATUS EXAM: 26 y/o average build and height, appropriate hygiene. Calm and Respectful, no pacing or agitation noted, mood is depressed, affect is blunted, no formal thought disorder, no concrete thinking, alert, and oriented x 3, no delusions or hallucinations. Memory and focus are good, speech is normal rate, tone, and volume. Psychomotor activity is normal, no manic, no psychotic symptoms. He denies any suicidal or homicidal ideations.

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[3] Defendants' Statement of Undisputed Facts, ¶ 8, also not properly disputed.
[4] Defendants' Statement of Undisputed Facts, ¶ 11, also not properly disputed.

> He reports depressed mood and objectively looks depressed. We discussed the risks and benefits of Celexa and Trazadone, and he agrees to start the medications.
> Diagnosis: unspecified depressive disorder, r/o persistent depressive disorder, narcissistic PD and ASPD traits, alcohol u[s]e disorder.

Defendant's Exhibit C, pp. 57–58 (select corrections to capitalization and punctuation added). As part of Mr. Bittner's treatment plan, Mr. Sawyer recommended the medications, "follow up with the psychiatric provider in 6 to 8 weeks, sooner as needed," and "follow up with MHP for regular scheduled appointments [and] with the nurses or counselor for any worsening symptoms or any side effects from psychiatric medications." *Id*. at 58.

On February 17, 2017, DOC transferred Mr. Bittner to NSCF. While Ms. Bittner claims that Mr. Bittner was not screened at NSCF, the record belies this assertion. *See* Defendants' Exhibit C, pp. 65–70 (Intra-System Transfer Form, Intake Medical Screening Form, and Initial Needs Survey Form). In fact, when deposed, Licensed Nursing Assistant (LNA) and Defendant, Tracy Utter, testified that she completed the Intra-System Transfer paperwork, which was auto populated into the system for later review by a nurse. She further explained that, as an LNA, "she could not assess patients and that her role in the provision of medical care was simply to take vital signs in anticipation of seeing a medical provider." While Ms. Bittner argues that the Intra-System Paperwork was insufficient "because it failed to effectively communicate the ongoing severity of Mr. Bittner's mental health status and the specifics of his status, including, but not limited to, his extremely recent suicide attempt, continuing suicidal ideation, and severe depression," the record does not support her description of Mr. Bittner's immediate condition, as he represented it to Defendants. While depressed, Mr. Bittner consistently denied that he suffered suicidal ideation or had other serious mental health concerns.

That aside, the undisputed record indicates that the transfer paperwork does include communication between NWSCF and NSCF concerning Mr. Bittner's mental health. The transfer paperwork classifies Mr. Bittner as "M2," signifying that he had a mental health diagnosis and was on medication. While Ms. Bittner faults the transfer paperwork for not including an additional alert concerning Mr. Bittner's mental health status, Mr. Bittner was not then on checks or suicide watch, so the notation of "none" in the "alert" section of the form appears accurate. The form does list his medications and indicates a "next scheduled psychiatric appointment" for April 6, 2017. Moreover, NSCF had access to Mr. Bittner's medical and mental health records, as both NSCF and NWSCF use the same electronic health records. In fact, Ms. Bittner does not dispute that, upon entering NSCF on February 17, 2017, Mr. Bittner underwent an INS and scored a "4"—well below the level of concern—and the Shift Supervisor notified the mental health providers of that score.

On February 20, 2017, Defendant Gabriele Rebbe, Licensed Mental Health Professional at NSCF, met with Mr. Bittner for 30 minutes. While appearing depressed, at this point Mr. Bittner was being treated with an anti-depressant. According to Ms. Rebbe's sworn testimony, Mr. Bittner was cooperative, calm, and friendly, but he professed suffering from depression since 2012, when his child was stillborn. He denied suicidal ideation, homicidal ideation, or urges to self-harm. While questioning the totality of Ms. Rebbe's recollections because some appear not to have been documented in the medical record, Ms. Bittner does not genuinely dispute her testimony.

The undisputed record further suggests that Mr. Bittner was able to contact NSCF personnel should he have a medical need. On February 17, 2017, he submitted a "Healthcare Request" form indicating that he "need[ed] to be put back to bottom bunk [because he] rolled off top bunk 3 times in the past two days . . . ." On February 19, 2017, he consented to a dental examination and scaling. There is no evidence that Mr. Bittner reported any mental health concerns or exhibited any symptoms—much less expressed suicidal ideation or urges to self-harm—at any time after his February 20 meeting with Ms. Rebbe.

On March 2, 2017, at approximately 8:05 p.m., Mr. Bittner was found hanging in his cell and was transported to a hospital. The next day, at 4:08 p.m., he was pronounced dead.

Discussion

In her Second Amended Complaint, Ms. Bittner sets forth three claims for relief:

In Count I, she alleges:

> 57. Defendants, and each of them, acting under color of state law violated Joshua Bittner's Fourteenth Amendment rights against cruel and unusual punishment and/or recklessly failed to mitigate a known risk of suicide by failing to provide adequate mental health treatment at the time of and after his transfer from NWSCF to NSCF to wit: the Defendants failed to communicate in, or amend to, the Notice of Intra-system Transfer a Mental Health Alert when such Notice was necessary and obvious given Joshua's mental state at and prior to said transfer;
>
> 58. [and] Failing to communicate a mental health alter constituted deliberate indifference to a high risk of suicide [in violation of 42 U.S.C. § 1983].

In Count II, she alleges:

> 60. The Defendants, and each of them, were deliberately indifferent to Josh[ua]'s treatment needs and failed to provide individual therapy, adequate drug monitoring and supervision and thereby caused his suicide [in violation of 42 U.S.C. § 1983].

In Count III, she alleges:

> 62. By their acts and omissions each of the Defendants acted outrageously and caused Josh[ua] to suffer severe emotional distress [that is Intentional Infliction of Emotional Distress (IIED) in violation of Vermont state law].

In addition, she argues that Centurion's actions during the period of February 3 to March 3, 2017 evidence faulty policies, procedures, and standards for mental health treatment and suicide prevention, including ones to ensure that inmates have access to care by appropriately trained individuals. *See generally* Plaintiff's Additional Statement at ¶¶ 45–54. None of these claims can survive summary judgment.

A. Counts I and II—42 U.S.C. § 1983

In *Chance v. Armstrong*, the Second Circuit summarized the applicable standard for evaluating § 1983 claims asserted by inmates as follows:

> The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." . . . This includes punishments that "involve the unnecessary and wanton infliction of pain." . . . In order to establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove "deliberate indifference to [his] serious medical needs." . . . The standard of deliberate indifference includes both subjective and objective components. "First, the alleged deprivation must be, in objective terms, 'sufficiently serious.' " . . . Second, the defendant "must act with a sufficiently culpable state of mind." . . . An official acts with the requisite deliberate indifference when that official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

143 F.3d 698, 702 (2d Cir. 1998) (citations omitted).

In this case, however, the standard is slightly different. Prior to his arraignment on February 13, 2017, Mr. Bittner was an inmate serving a sentence. Thereafter, he enjoyed dual status, as both an inmate on his prior conviction and a pretrial detainee on his new charges. As a pretrial detainee, his constitutional claims "are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). Although a detainee's rights are at least as great as those afforded a convicted inmate under the Eighth Amendment, several courts, including the Second Circuit, have construed *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), as applying a different standard in cases governed by the Fourteenth Amendment:

> After *Kingsley*, it is plain that punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause. Unlike a violation of the Cruel and Unusual Punishments Clause, an official can violate the Due Process

> Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm. . . . In other words, the "subjective prong" (or "*mens rea* prong") of a deliberate indifference claim is defined objectively.

Darnell, 849 F.3d at 35.

In *Hebert v. State*, our Supreme Court faced claims similar to those made here. 165 Vt. 557 (1996). The Court observed: "Deliberate indifference is a higher standard than negligence; the plaintiff must show that the defendant ignored or was willfully blind to a strong likelihood, rather than a mere possibility, that self-infliction of harm [would] occur." *Id.* at 559 (quotation marks omitted). Other courts have taken a similar approach. In *Estate of Vallina v. Country of Teller Sheriff's Office*, the court held: "A prison official does not act recklessly or with deliberate indifference by failing to act to avert the suicide of a detainee who displays no outward indicators of suicidal ideation, actively denies suicidal ideation, and has been cleared by a psychologist, a psychologist, or other medical professionals to be detained in general population." 757 Fed. Appx. 643, 647 (10th Cir. 2018) (footnote omitted). Similarly, in *Shimmel v. Moody*, the court held, "a plaintiff must clear[ly] show that strong likelihood of suicide existed," and "[a] jail official's knowledge that a detainee had been suicidal sometime in the past does not meet the standard." 2020 WL 555281, * 5 (E.D. Mich. 2020).

Federal caselaw also makes clear that more than simple negligence is required to make out a deliberate indifference claim, under either the Eighth or Fourteenth Amendment. Under the former,

> [i]t is well-established that mere disagreement over the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation. . . . Moreover, negligence, even if it constitutes medical malpractice, does not, without more, engender a constitutional claim.

Chance, 143 F.3d at 703 (citations omitted). Similarly, under the latter, "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (quoted in *Kingsley*, 576 U.S. at 396). Thus, in a conditions-of-confinement claim, the Second Circuit concluded,

> to establish a claim for deliberate indifference . . . under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.

Darnell, 849 F. 3d at 35.

In short, to prevail on a deliberate indifference claim, Ms. Bittner must first prove that one or more of Defendants knew or should have known that there was a "strong likelihood" that Mr. Bittner would attempt self-harm. This is an objective standard, requiring more than mere proof that he had expressed suicidal thoughts in the past. Ms. Bittner must then prove, again under an objective standard, that in the face of such knowledge, the official acted "intentionally or recklessly, and not merely negligently."

With these standards in mind, the court examines the purported deliberate indifference of each Defendant in this case. *See Darnell*, 849 F.3d at 38. On February 3, 2017, staff at NWSCF did an INS and decided to hold Mr. Bittner in booking, subject to checks every 15 minutes, because he expressed suicidal ideation when he referred to an attempt the "other night." On February 5, 2017, Mallory Supley met with Mr. Bittner and determined his situation required an immediate health referral, placement in a smock, and continuation of 15-minute checks. On February 6, 7, 8, and 14, 2017, Ms. Sutton met with Mr. Bittner to conduct further mental health assessments and responded as she judged to be appropriate. For example, on February 6, she returned Mr. Bittner's clothes, but determined he should remain on 15-minute checks. On February 16, 2017, Travis Sawyer diagnosed Mr. Bittner's condition as depressed but not suicidal, and he prescribed medication. On February 17, 2017, when Mr. Bittner was transferred from NWSCF to NSCF, Tracy Utter completed the Intra-System Paperwork, accurately indicating Mr. Bittner had a mental health diagnosis and was on medication. His medical records, which identified that he had a mental health diagnosis and medication, were input into the transfer system so that it could be accessed at NSCF. On February 20, 2017, Gabriele Rebbe met with Mr. Bittner, to assess mental health. They discussed, among other things, his coping mechanisms and sleeplessness and perhaps his taking a facility job or class in order to "get himself into a routine." Consistent with his prior statements, Mr. Bittner again denied suicidal ideation, homicidal ideation, or urges to self-harm. Ms. Rebbe also noted a "plan" to order further mental health visits. *See* Exhibit C at 74. As an incidental manner, when Mr. Bittner subsequently sought a new bunk and dental treatment, those requests were acknowledged, suggesting that Mr. Bitter was comfortable making known his health-related needs.

On these facts, there is no basis for a lay person to conclude that any of the Defendants knew or should have known that there was a strong likelihood that Mr. Bittner would attempt suicide; equally, there is no basis for a lay conclusion that they acted intentionally or recklessly in depriving him of necessary care. Rather, these are matters that would require expert testimony. While Ms. Bittner's claim for medical malpractice has been dismissed, the standard of proof applicable to such a claim is

informative here; the difference, of course, is that instead of proving negligence in the provision of medical or mental health services, Ms. Bittner must prove deliberate indifference. If expert testimony is required for the former, *a priori* it is necessary for the latter. Vermont law is clear that "medical malpractice plaintiffs must generally use an expert witness to satisfy their burdens of proving the elements of medical negligence"; the only exception to this rule is " 'in cases where the violation of the standard of medical care is so apparent to be comprehensible to the lay trier of fact.' " *Taylor v. Fletcher*, 2012 VT 86, ¶ 9, 192 Vt. 418, quoting *Senesac v. Assocs. in Obstetrics & Gynecology*, 141 Vt. 310, 313, 449 A.2d 900, 902 (1982).

Here, our Supreme Court has already answered the question, holding that this is not the "rare instance" in which expert testimony is not required. *Bittner v. Centurion of Vermont, LLC*, 2021 VT 73, ¶ 23, 215 Vt. 475. Admittedly, this was on a motion to dismiss, but the Court's teachings remain instructive on the court's consideration of a more robust factual record. The Court noted: "Expert testimony is generally required in medical malpractice cases because 'the human body and its treatment are extraordinarily complex subjects requiring a level of education, training and skill not generally within our common understanding.' [Citation omitted]. This is particularly true in cases involving suicide." *Id.*, ¶ 25. The Court cited its earlier decision in *Wilkins v. Lamoille County Mental Health Svcs., Inc.*, 2005 VT 121, ¶ 11, 179 Vt. 107, where it had observed "difficulties may . . . be uniquely complex and challenging in cases involving suicide, where even under accepted standards of care predictions of suicide are notoriously difficult and compounded by the fact that the patient, unlike other malpractice situations, may be actively working at cross-purposes to the practitioner's goals."

There is nothing in the facts of this case, as developed in discovery, that takes it out of the operation of the general rule. Rather, as in *Wilkins*, Ms. Bittner's deliberate indifference claims "all involve complex psychiatric/medical issues relating to the causes, warning signs, and prevention of suicide. These are plainly not issues within a lay juror's common knowledge and experience." 2005 VT 121, ¶ 17. Indeed, Ms. Bittner tacitly concedes this point; she disclosed an expert in correctional psychiatric treatment, Dr. Kahlil Johnson, to offer opinions on duty, breach, and causation. The court has carefully pored over Dr. Johnson's deposition. While he is critical of Mr. Bittner's treatment, conspicuously absent is anything remotely approaching an opinion that anyone knew or should have known that there was a strong likelihood that Mr. Bittner would attempt suicide. Dr. Johnson's criticisms all sound in simple negligence; they do not support the conclusion that any of the Defendant's failures were intentional or reckless. In short, his opinions fall well short of what is required to prove deliberate indifference.

Rather, the undisputed facts demonstrate that the individual Defendants took a number of steps to assess, protect, and treat Mr. Bittner. They assessed him on several occasions, and before his death, he had repeatedly shown no current outward indicators of his intent to self-harm. Upon initial intake at NWSCF, he was, for his safety, given a smock to wear and place on mental health watch. On several occasions, he self-reported and displayed signs of depression, and he was prescribed medication for this condition. When assessing his state, mental health providers acknowledged his admitted minor self-harming, but judged it not to be an immediate, serious threat. In fact, repeatedly and consistently before his suicide, Mr. Bittner denied that he felt suicidal. On these facts, no reasonable trier of fact could find that the individual Defendants were deliberately indifferent to Mr. Bittner's mental health needs or a risk of suicide. *See Kelsey v. City of New York*, 306 Fed. Appx. 700 (2d Cir. 2009); *cf. Wool v. Pallito*, 2018 WL 3912948, * 5 (Vt. Aug. 6, 2018) (unpublished mem.) ("[W]e see nothing in the record, including medical expert testimony, supporting a claim that, given the information available to Dr. Fadness, any misjudgment on her part as to plaintiff's mental health needs rose to the level of deliberate indifference."). Accordingly, the individual Defendants are entitled to judgment as a matter of law on Counts I and II.

The same conclusion applies to Ms. Bittner's assertion that DOC and Centurion are liable for Mr. Bittner's suicide. In her briefing, she argues that the undisputed record suggests a number of policy violations that contributed to Mr. Bittner's suicide. Even if this were so, this claim would still fail.

> When assessing corporate liability under the deliberate indifference standard,
>
> a corporate entity violates an inmate's constitutional rights if it maintains a policy that sanctions the maintenance of prison conditions that infringe upon the constitutional rights of prisoners. . . . This liability is not founded on a theory of vicarious liability or *respondeat superior* that holds a municipality responsible for the misdeeds of its employees. Rather, a municipal policy or practice must be the 'direct cause' or 'moving force' behind the constitutional violation. . . . In other words, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983.

Woodward v. Correctional Medical Services of Illinois, Inc., 368 F.3d 917, 927 (7th Cir. 2004) (footnote, citation, and quotation marks omitted). Applying this standard, Ms. Bittner's claims against DOC and Centurion are insufficient as a matter of law. She has established no constitutional violations; nor has she alluded to any factual material suggesting that either DOC or Centurion instituted a policy or procedure that was the direct cause or moving force behind any such violation. *Cf. Rojas v. Alexander's Dept. Store, Inc.*, 924 F.2d 406, 409 (2d Cir. 1990) ("[T]o recover under § 1983, it is not

enough for Rojas to show that his arrest by Luck was without probable cause. He must show that Alexander's had a policy of arresting shoplifting suspects on less than probable cause.").

The undisputed record shows that the individual Defendants conducted a number of visits and evaluations, placed Mr. Bittner on mental health watches several times, and prescribed medications to address his self-report of depression. These actions do not support a conclusion that they acted pursuant to a policy or procedure implemented or designed to be indifferent to serious mental health or medical needs. Likewise, Ms. Bittner's complaint concerning communication between facilities is based on lack of effectiveness of communication, not a policy which resulted in no communication at all. At most, then, the evidence could suggest that one or more individual Defendants either were negligent or failed to follow best practices; this is a far cry from suggesting the implementation of the type of policies and procedures that encouraged either ignoring or disregarding a risk of suicide. On this point, Ms. Bittner's expert appears to speculate only that the individual Defendants acted negligently. *See, e.g.*, Plaintiff's Response at 4 ("Dr. Johnson testified that Defendant Sutton should have been more curious about why Mr. Bitt[n]er engaged in self-harm."); at 10 (arguing that the MH-2 notation "failed to effectively communicate the ongoing severity of Mr. Bittner' mental health status . . . "); at 13 ("Dr. Johnson faulted Defendant Rebbe because she did not document whether she reviewed the mental health records from NWSCF."); at 14 ("When asked whether Defendant Rebbe's failures caused Mr. Bittner's suicide, Dr. Johnson responded by explaining that while her failures may not have caused Mr. Bittner to hang himself, she could have engaged in interventions to prevent Mr. Bittner's suicide had she reviewed his record."); *see also* Plaintiff's Additional Statement at 25 ("After detaining numerous contributing factors, . . . Dr. Johnson surmised, 'I do think they all are factors that contributed to him not having the level of care or follow-up that he needed that could have played a role in preventing him from killing himself.' "). In addition, Dr. Johnson does not identify the offending policy or procedure or alleged lack of training which he concludes led to the tragedy at issue. *See* Plaintiff's Response at 16 ("While Dr. Johnson hesitantly acknowledged that it is possible that all procedures and standards can be followed, but a negative outcome could still occur, he clarified that it is a rare occurrence and that hypothetical proposition did not match Defendant's conduct."). Having failed to identify a policy or procedure which caused the alleged violation of Mr. Bittner's constitutional rights, Ms. Bittner's claims for corporate liability also fail.

B. Count III—IIED

In Count III, Ms. Bittner sets forth a claim for IIED. "To sustain a claim for IIED plaintiff must show defendants engaged in outrageous conduct, done intentionally or with reckless disregard of the

probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct." *Fromson v. State*, 2004 VT 29, ¶ 14, 176 Vt. 395 (citation and quotation marks omitted). "The conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable." *Delude v. Fletcher Allen Health Care, Inc.*, 174 Vt. 74, 83, 807 A.2d 390 (2002). The plaintiff's burden on a claim of IIED is a "heavy one," and "[i]t is for the court to determine as a threshold question whether a jury could reasonably find that the conduct at issue meets this test." *Id.*; *Fromson*, 2004 VT 29, ¶ 14 (same).

Earlier in the case, this court determined that Plaintiff's allegations of a series of failures (1) in addressing Mr. Bittner's mental health, and (2) in ensuring that NSCF was notified and aware of Mr. Bittner's mental health needs "despite knowing that he was at substantial risk for self-harm and suicide" were sufficient to survive a motion to dismiss IIED claims. *Bittner v. Centurion of Vermont, LLC,* No. 88-2-19 Frcv, slip op. at 10–11 (Vt. Superior Ct. April 9, 2020) (Mello J.). The record now before the court, however, could not reasonably support a jury finding that the conduct at issue constitutes the intentional infliction of emotional distress. The court need not rehearse its observations above; it suffices simply to observe that if the evidence does not support a claim that any of the Defendants intentionally or recklessly ignored a strong likelihood that Mr. Bittner would commit suicide, it cannot support a claim that they "engaged in outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress." *Fromson*, 2004 VT 29, ¶ 14. Rather, at best, it supports a claim of negligence.

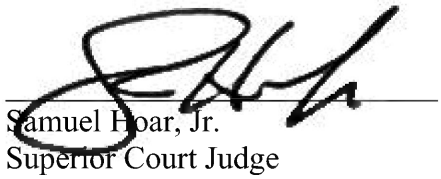
As discussed, collectively and individually, the individual Defendants did not ignore, but attempted to assess and address, Mr. Bittner's expressed mental health needs. In addition, the nature and extent of the notification of those needs upon Mr. Bittner's transfer to NSCF was not so incomplete or deficient as to be extreme and outrageous or otherwise constitute conduct beyond all bounds of that which is decent and tolerable in a civilized community. *Cf. Baptie v. Bruno*, 2013 VT 117, ¶ 25, 195 Vt. 308 ("In short, the record demonstrates that, even if defendant's investigation proved to be inadequate or incomplete, he made some effort to locate and charge Bruno for what he reasonably believed to be a misdemeanor crime."). Accordingly, Defendants are entitled to judgment as a matter of law on Ms. Bittner's IIED claims.

ORDER

The court grants the motion for summary judgment. Defendants are entitled to judgment as a matter of law on all claims remaining in the case. Within 14 days, Defendants' counsel shall submit the

form of judgment required by V.R.C.P. 58; counsel also shall submit any request for costs pursuant to V.R.C.P. 54(d)(1).

Electronically signed pursuant to V.R.E.F. 9(d): 7/12/2023 10:20 AM



Samuel Hoar, Jr.
Superior Court Judge