COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1437

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

JOHNNY LACY, JR.,

PLAINTIFF-APPELLANT,

V.

JAMES LABELLE, SECTOR CHIEF, AND COURTNEY GREELEY, HEALTH SERVICES SUPERVISOR,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Johnny Lacy, Jr., has appealed pro se from a summary judgment dismissing his action against James LaBelle and Courtney Greeley. We affirm the judgment.

Lacy's complaint alleged that in late 1995 LaBelle and Greeley released three pages of his medical records without his informed consent in violation of § 146.82, STATS. At that time, Lacy was an inmate at the Racine Correctional Institution (RCI), Greeley was the manager for the health services unit at RCI, and LaBelle was the health services sector chief for RCI. Lacy demanded damages pursuant to § 146.84(1)(b), STATS. He also sought relief under 42 U.S.C. § 1983.

The parties filed cross-motions for summary judgment in the trial court. Our review of the trial court's grant of summary judgment is de novo. *See* ***Millen v. Thomas,*** 201 Wis.2d 675, 682, 550 N.W.2d 134, 137 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.*** When, as here, both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues, although always subject to the rule that summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts. *See* ***id.*** at 682-83 & n.2, 550 N.W.2d at 137.

Based upon these standards, we conclude that the trial court properly granted summary judgment dismissing Lacy's complaint. In an affidavit submitted by Greeley in opposition to Lacy's motion and in support of his own cross-motion, Greeley stated that he did not send anything from Lacy's medical file to anyone on or after October 19, 1995. Because Lacy's affidavit and attachments did not dispute the factual allegations made by Greeley, no basis existed to conclude that Greeley released any medical records in violation of Lacy's rights. Lacy's claims against him for damages under § 146.84, STATS., and 42 U.S.C. § 1983 therefore were properly dismissed.

Based on the affidavit submitted by LaBelle, the trial court also properly dismissed Lacy's claims against him. In his affidavit LaBelle denied faxing Lacy's medical records to the Fox Lake Correctional Institution (FLCI) registrar as alleged by Lacy, but admitted that on October 19, 1995, he faxed three pages of Lacy's medical records to an assistant attorney general. He stated that he did so in response to the attorney's request, and that it was his understanding that the attorney needed the records for submission to a Dane County Circuit Court judge pursuant to an order issued by that judge on October 3, 1995, in which she ordered production of documents requested by Lacy in his petition for a writ of mandamus in ***State ex rel. Lacy v. Koening***, Dane County Circuit Court case no. 95-CV-451. LaBelle stated that he believed the assistant attorney general was representing the respondents in that action, including the FLCI registrar, and that the medical records were for the trial court judge's review only.

Section 146.82(1), STATS., provides in part that "[a]ll patient health care records shall remain confidential" and that "[p]atient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient." However, it further provides that a custodian of records incurs no liability for the release of records under § 146.82 "while acting in good faith." *See* § 146.84(1)(a), STATS. Exemplary damages may be awarded under § 146.84(1)(b) only when a person violates § 146.82 in a manner that is "knowing and wilful."

Section 146.82(2)(a)4, STATS., provides that a patient's health care records shall be released upon request without informed consent "[u]nder a lawful order of a court of record." LaBelle's undisputed affidavit establishes that he released three pages of Lacy's medical records upon request believing that he was doing so pursuant to a circuit court order dated October 3, 1995. Because it is thus

undisputed that LaBelle acted in good faith and did not knowingly and willfully violate § 146.82, Lacy's claim for damages under § 146.84, STATS., was properly dismissed.

Lacy's claim against LaBelle under 42 U.S.C. § 1983 was also properly dismissed. Lacy claimed that he was entitled to relief because the release of his medical records violated his constitutional rights under the Fourth Amendment to the United States Constitution, as well as the Wisconsin Constitution. However, government officials are entitled to qualified immunity from civil liability for a violation of an individual's constitutional rights if their conduct did not violate a clearly established constitutional right which would have been known to a reasonable person. *See* ***Henes v. Morrissey***, 194 Wis.2d 338, 346, 533 N.W.2d 802, 805 (1995). The relevant inquiry in a qualified immunity case is whether a reasonable state official could have believed that his or her conduct was constitutional in light of clearly established law and the information he or she possessed at the time of the action. *See* ***id.*** "The standard of objective legal reasonableness used in determining qualified immunity requires the court to focus on the degree to which clearly established case law gives guidance to officials faced with a particular fact situation." ***Id.*** at 346-47, 533 N.W.2d at 805 (quoted source omitted). Under this test, a party bringing an action under 42 U.S.C. § 1983 must show that the constitutional rights he or she alleges were violated were clearly established at the time of the conduct at issue. *See* ***Henes***, 194 Wis.2d at 347, 533 N.W.2d at 805.

While Lacy alleges that he has a constitutional privacy right to the confidentiality of his medical records, as recently as December 1995, two months after the release of records occurred here, the Seventh Circuit Court of Appeals stated that it could not find any appellate holding that prisoners have a

constitutional right to the confidentiality of their medical records. *See* ***Anderson v. Romero***, 72 F.3d 518, 523 (7th Cir. 1995). It is thus obvious that a prisoner's constitutional right to the confidentiality of his or her medical records was not clearly established in the law at the time LaBelle released the three pages from Lacy's medical records. Consequently, he was entitled to qualified immunity from suit under 42 U.S.C. § 1983 and the action against him was properly dismissed.

In his brief on appeal, Lacy also contends that the release of his records violated the physician-patient privilege under § 905.04, STATS. However, we have found nothing in the record on appeal indicating that this issue was raised in the trial court. We therefore decline to consider it on appeal. *See* ***Allen v. Allen,*** 78 Wis.2d 263, 270, 254 N.W.2d 244, 248 (1977).

None of the remaining arguments made by Lacy provides any basis for disturbing the trial court's judgment. Lacy seems to allege that various parties or their counsel violated perjury or false swearing statutes and that the trial court should have addressed this matter and referred it to the district attorney's office for possible prosecution. However, the only issue before this court is whether the trial court properly granted summary judgment dismissing Lacy's action. To the extent that Lacy disputed facts as alleged in the affidavits of LaBelle or Greeley, it was his obligation to do so in his affidavit or other material properly and timely made part of the summary judgment record. He did not adequately raise a material issue of fact and summary judgment was properly granted.[1]

[1] We also warn Lacy that the making of irrelevant, scurrilous and unfounded allegations will not be tolerated by this court.

Lacy also alleges that he was denied a fair hearing at the March 31, 1997 hearing at which summary judgment was granted. However, the transcript of that hearing is not part of the record on appeal. When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***Fiumefreddo v. McLean,*** 174 Wis.2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993).[2] In any event, when reviewing a grant of summary judgment we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). Based upon our independent review of the summary judgment record, we conclude that summary judgment was warranted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[2] We recognize that Lacy attempted to obtain a waiver of the transcript fee and preparation of the transcript for appeal. However, as discussed in prior orders of this court, he failed to demonstrate to the trial court or to this court that his appeal presented any arguably meritorious issues, and his request for waiver of the fee therefore was denied. *See* ***State ex rel. Girouard v. Circuit Court,*** 155 Wis.2d 148, 159, 454 N.W.2d 792, 797 (1990).