

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ARLYN J. EASTMAN, Personal
Representative of the Estate of)
LINO LOWELL SPOTTED ELK, JR.,)
Deceased,)
)
Plaintiff,)

Case No.07-cv 5004

vs.)

THIRD AMENDED COMPLAINT

COUNTY OF SHERIDAN, a)
Nebraska Political Subdivision;)
LEVI MCKILLET, in his individual)
and official capacities; and)
DOES 1-5, in their individual and)
official capacities,)
)
Defendants.)

Arlyn J. Eastman, Personal Representative of the Estate of Lino Lowell Spotted Elk, Jr.,
Deceased, Plaintiff in the above-captioned matter, by and through her counsel of record, for her
cause of action against Defendants, states as follows:

PARTIES, JURISDICTION AND VENUE

1.

Arlyn J. (LeRoy) Eastman (“EASTMAN”) is a resident of Rosebud, South Dakota.
Defendant County of Sheridan (“COUNTY”) is a Nebraska political subdivision. Defendant
Levi McKillet (“MCKILLET”) was employed by Defendant COUNTY as a correctional
officer/jailer at all relevant times, and is liable for his actions in his individual and official
capacities. Defendants DOES 1 - 5 are and were employed by Defendant COUNTY as
correctional officers, jailers, and/or law enforcement officers at all relevant times, and are liable

for their actions in their individual and official capacities. Any and all actions undertaken by any

2.

This action is brought pursuant to the provisions of U.S.C. §1983. The proper venue for this action is the United States District Court for the District of Nebraska because the acts and omissions complained of herein occurred in Rushville, Sheridan County, Nebraska.

FACTUAL BACKGROUND

3.

On July 19, 2005, Lino Lowell Spotted Elk (“SPOTTED ELK”), then age 20, was arrested in Rushville, Sheridan County, Nebraska on an outstanding warrant, and was taken to the Sheridan County Jail in Rushville.

4.

COUNTY agents and employees booked SPOTTED ELK into the jail, with the expectation that SPOTTED ELK would stay in the jail at least until a bond hearing could be convened and potentially until the disposition of the charge for which SPOTTED ELK had an outstanding warrant. Nevertheless, COUNTY agents and employees did not provide SPOTTED ELK with a jail uniform and remove SPOTTED ELK’s access to his own clothing, including his belt.

5.

COUNTY agents and employees, including MCKILLET, failed to inquire regarding SPOTTED ELK’s mental health and suicidality during the intake/booking process in violation of the Nebraska Jail Standards, despite that SPOTTED ELK exhibited objective signs of clinically-diagnosable and treatable mental illness and suicidality. SPOTTED ELK talked of suicide and

was intoxicated to the point at which his reasoning and coping skills were impaired, which are indicators for mental health care triggering a civil and constitutional duty to protect SPOTTED ELK on the part of Defendants. From SPOTTED ELK's statements and based on the Nebraska Jail Standards' requirements for assessing mental health of prisoners upon intake, Defendants knew or should have known that SPOTTED ELK was mentally ill and suicidal.

6.

COUNTY agents and employees thereafter disregarded and were deliberately indifferent to warning signs in SPOTTED ELK's words and behavior of mental illness and suicidality. The need for medical care for SPOTTED ELK was so obvious that a trained jail person would or should recognize it.

7.

Other inmates heard noise and struggling in SPOTTED ELK's cell and called for help, but were ignored. Approximately one hour after his arrest, SPOTTED ELK was found hanging from his own belt in his cell. At the time of his death, SPOTTED ELK also had head contusions and visible injuries that he did not have before his arrest

8.

Suicide is a known risk to detainees in any detention center. The Nebraska Jail Standards require that jails train employees, and that employees follow such training, to assess detainees for mental health and suicidality upon booking into the jail. Notwithstanding, MCKILLET and DOES 1-5 did not assess SPOTTED ELK for mental health and suicidality and failed to respond to signs that he was mentally ill and suicidal, or to calls for help from other inmates who heard the noise and struggling in SPOTTED ELK's cell.

FIRST CAUSE OF ACTION

42 U.S.C. § 1983 – ALL DEFENDANTS

EASTMAN incorporates Paragraphs 1-8 above as if fully set forth herein.

9.

SPOTTED ELK had a right under the Constitution of the United States to be free from all punishment (given that he was a pretrial detainee), and from indifference to his medical needs, as well as a right to due process and equal protection, by employees of governmental entities.

10.

At all times relevant to this Complaint, MCKILLET and DOES 1-10 were acting under color of law – under the constitutions, statutes, administrative rules, customs, policies and usages of the County of Sheridan, State of Nebraska and the United States – and had assumed the responsibilities, activities, and rights involved in exercising their roles as members of COUNTY’s professional staff.

11.

When SPOTTED ELK was under Defendants’ supervision and custody, Defendants acted with deliberate indifference to SPOTTED ELK’s known and recognized constitutional and legal rights to due process, equal protection and bodily integrity (meaning, the right to life, to pursue his right to life and to have his body protected from harm to the extent that every human being has the same right to life and protection from harm), and to be free from indifference to his medical needs. To Plaintiff’s best knowledge or belief, SPOTTED ELK was a young Native

American man and the named Defendants MCKILLET and the JOHN DOES, were white, and that part of the reason why Defendants were so callous and uncaring toward SPOTTED ELK and other Native American detainees was because of SPOTTED ELKS' race. Defendants actively participated in the deprivation of SPOTTED ELK's constitutional rights by causing SPOTTED ELK's injuries and suicide. This includes subjecting SPOTTED ELK to disparate treatment based on the fact that SPOTTED ELK was Native American (Lakota), and COUNTY's employees are Caucasian: Defendants made decisions based in racial animus regarding the need to follow jail procedures (including procedures for removal of prisoners' belts), the need to assess SPOTTED ELK for mental illness/suicidality, and the need to provide SPOTTED ELK with adequate protection and medical care relative to mental illness/suicidality.

12.

Defendants' conduct, within his duties as a member of COUNTY's professional staff, under color of state law, deprived SPOTTED ELK of rights, privileges and immunities secured by the United States Constitution. Particularly, SPOTTED ELK was deprived of his constitutional liberty interest in due process, equal protection and bodily integrity and in freedom from excessive punishment and indifference to his medical needs. This includes subjecting SPOTTED ELK to disparate treatment based on the fact that SPOTTED ELK was Native American (Lakota), and COUNTY's employees are Caucasian: Defendants made decisions based in racial animus regarding the need to follow jail procedures (including procedures for removal of prisoners' belts), the need to assess SPOTTED ELK for mental illness/suicidality, and the need to provide SPOTTED ELK with adequate protection and medical care relative to mental illness/suicidality. When Defendants assumed the role of guardians/custodians of certain

prisoners, inmates, detainees or persons, Defendants are charged with the legal obligation to abide by at least the minimal protections of individual citizens' constitutional rights, and not to subject any person within the Defendants' care, custody, and control, and not to cause or prevent bodily harm or death to be had upon any detainee. Even an accused citizen in custody of Defendants, is entitled to be protected against the violation of even the most base constitutional protections while in custody, and not to be subject to negligent and/or intentional violations of Defendants own policies, procedures and protocol, which policies were likely designed to provide protection against the loss of a citizen's bodily integrity through serious bodily injury, maiming or death, such as in the case of SPOTTED ELK.

13.

As a result of Defendants' deprivation of SPOTTED ELK's constitutional liberty interests described above, EASTMAN has incurred damages.

SECOND CAUSE OF ACTION

42 U.S.C. § 1983 – DEFENDANT COUNTY

14.

EASTMAN incorporates paragraphs 1-13 above as if fully set forth herein.

Count I – Policy or custom of ignoring reports

15.

COUNTY had a special relationship with SPOTTED ELK by virtue of the fact that COUNTY had custody and control over SPOTTED ELK, such that SPOTTED ELK could not care for his own medical needs while incarcerated. In so doing, COUNTY had a duty to exercise

reasonable care in the selection, training, assignment, supervision and retention of its professional staff, including MCKILLET and DOES.

16.

By those failures set forth above, COUNTY acted with deliberate indifference to a known risk of constitutional deprivation to SPOTTED ELK and other detainees incarcerated in the Sheridan County Jail. COUNTY thus acted according to a persistent, widespread practice of jail employees, which is so common and well-settled as to constitute a custom fairly representing municipal policy of providing inadequate assessment of and care for suicidal detainees.

17.

As a result of COUNTY's deliberate indifference to the risk of deprivation of SPOTTED ELK's constitutional liberty interests, EASTMAN incurred damages as set forth below.

18.

SPOTTED ELK could not have reasonably discovered that COUNTY had a custom or practice of tolerating misconduct by employees, and of failing to provide adequate training and staffing to implement reasonable suicide prevention practices, because such knowledge was specifically held by officers and agents of COUNTY.

Count II-Failure to Train

19.

At all times relevant to this Complaint, COUNTY had a custom or practice of failing to train its employees to be observant of and act upon signs and indications of suicidality in detainees. COUNTY failed to implement training materials and programs related to recognizing

and understanding patterns of mental illness and suicide. In particular, COUNTY failed to train its employees to recognize the dangers and warning signs of suicide.

20.

By failing to train its employees to recognize warning signs and dangers of mental illness and suicidality in detainees, COUNTY acted with deliberate indifference to a known risk of constitutional deprivation to SPOTTED ELK and other detainees.

21.

As a result of COUNTY's deliberate indifference to the risk of deprivation of SPOTTED ELK's constitutional liberty interests set forth above, EASTMAN has incurred damages as set forth below.

THIRD CAUSE OF ACTION

NEGLIGENT SUPERVISION AND RETENTION BY EPSD

22.

Plaintiff incorporates paragraphs 1-21 above as if fully set forth herein.

23.

The wrongful death of SPOTTED ELK was proximately caused by COUNTY in one or more of the following particulars:

- a. Failure to adequately assess SPOTTED ELK for mental illness and suicidality upon booking SPOTTED ELK into the jail;
- b. Failure to adequately monitor and obtain mental health assistance for SPOTTED ELK in the time between his admission to the jail and his death;
- c. Failure to train and supervise employees and agents in suicide assessment and suicide prevention, and to provide adequate staffing to carry out reasonable suicide assessment and prevention procedures;

- d. Failure to follow Defendant's own procedures for suicide prevention and assessment;
- e. Failure to respond reasonably to sounds and signs of distress by SPOTTED ELK in his cell.

24.

As a result of COUNTY's negligent supervision and training of its professional staff and agents, EASTMAN has incurred damages as set forth below.

25.

On July 17, 2006, EASTMAN submitted a Notice of Administrative Claim to the Sheridan County Commissioners, the Sheridan County Clerk, the Sheridan County Attorney, the Sheridan County Sheriff and the Sheridan County Jail Administrator. More than six months have passed with no response from Defendants. Accordingly, on February 8, 2007, Plaintiff withdrew her claim.

PUNITIVE DAMAGES

26.

Plaintiff incorporates by reference the allegations contained in paragraph 1-25 above as though fully set forth herein.

27.

In addition to compensatory damages, EASTMAN hereby makes a claim for punitive damages against defendants in an amount to be proven at trial for the willful and wanton acts and omissions of Defendants, to include violation of SPOTTED ELK's civil rights, as alleged herein. The acts and omissions of Defendants in this case were so gross and culpable in nature that they constitute reckless indifference and wanton disregard for the law and for the lives and safety of

others, including SPOTTED ELK. Defendants committed the acts and omissions alleged herein and subjected SPOTTED ELK to improper treatment that caused SPOTTED ELK to suffer psychological and psychiatric harm so severe that no person should be expected to endure it. Defendants' actions should be punished, and an example should be made so that these actions and omissions are not repeated.

28.

The recovery of punitive damages is permitted under the federal civil rights statutes for reckless and callous indifference to the federally protected rights of others, and is thus appropriate in this case. This instance of reckless and callous indifference to SPOTTED ELK's safety and constitutional rights should be punished through the imposition of punitive damages so as to make an example of conduct that will not be tolerated.

29.

Plaintiff incorporates by reference the allegations contained in 1-28 above as though fully set forth herein.

30.

As a result of defendants' actions as alleged herein, EASTMAN has been required to retain the services of attorneys and are entitled to a reasonable amount for attorney's fee pursuant to 42 U.S.C. § 1988 for those violations covered by the Civil Rights Act.

DAMAGES

31.

Plaintiff incorporates by reference the allegations contained in paragraph 1-30 above as

though fully set forth herein.

32.

The acts and omissions of defendants as set forth above have resulted in SPOTTED ELK's death and damages to EASTMAN. By virtue of these damages, EASTMAN is entitled to the following damages:

- A. Compensatory damages for the violation of SPOTTED ELK's rights under the federal and state Constitutions;
- B. Funeral expenses were incurred by EASTMAN following SPOTTED ELK's death, which should have been absolutely unnecessary and needless, to the sum of not less than \$5,000.00;
- C. Loss of society and companionship in such amounts as are allowable by law;
- D. Punitive damages to punish and deter the reprehensible conduct alleged in this Complaint;
- E. Attorney's fees; and
- F. The costs of this action and such other and further relief as this Court deems equitable and proper.

33.

As a result of the negligent acts and omissions of Defendant described herein, SPOTTED ELK also sustained injuries that caused him pain, suffering, and mental anguish from the time that he was booked into the jail until his death.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

- A. Plaintiff prays for damages in an amount which will fairly and justly compensate them for the violation of their civil rights, their pain and suffering and other consequential damages flowing from the violations and torts set forth herein;
- B. Punitive damages in an amount sufficient to adequately punish defendants and to deter future conduct of the type alleged in this Complaint;

- C. For attorneys fees pursuant to 42 U.S.C § 1988; and
- D. For the costs of this action and for such other and further relief as this Court deems equitable and proper.

JURY DEMAND AND DESIGNATION OF PLACE OF TRIAL

EASTMAN requests that this matter be tried to a jury in North Platte, Nebraska.

ARLYN J. EASTMAN, Persona Representative of the
Estate of LINO LOWELL SPOTTED ELK, JR., Deceased,
Plaintiff,

By: /s/ Robin L. Zephier

Robin L. Zephier, SDSBA # 1878

Abourezk & Zephier P.C.

2020 West Omaha

P.O. Box 9460

Rapid City, SD 57709

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AND

Maren Lynn Chaloupka – NSBA # 20864

Chaloupka Holyoke Hofmeister Snyder & Chaloupka

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(308) 635-5000

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2007, I caused to be served, by electronic filing, a true and correct copy of the *Third Amended Complaint* to:

Michael J. Javoronok
JAVORONOK LAW FIRM
2425 Circle Drive, Suite 100
Scottsbluff, NE 69361
(308) 630-0202

By: /s/ Robin L. Zephier
Robin L. Zephier