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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001073-MR

DAVID OSBORNE, VICKI ISOM,
AND PAM BARTLETT — APPELLANTS

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 09-CI-00235

GREGORY AULL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON AND VANMETER, JUDGES.

CAPERTON, JUDGE: David Osborne, Vickie Isom and Pam Bartlett appeal from an order denying their motion for summary judgment against Gregory Wayne Aull. Aull had filed suit against Osborne, who is the Daviess County Jailer, and Isom and Bartlett, who are employed as nurses at the jail, alleging gross medical negligence in failing to diagnose and treat his diabetes when he was an inmate at

the jail. The circuit court ruled that the appellants are not entitled to individual immunity from suit. Having reviewed the record and applicable law, we affirm.

David Osborne took office as the jailer of the Daviess County Detention Center in 2003. In response to a federal investigation, Osborne adopted and implemented several new policies and programs to improve inmate care. He formulated these measures in consultation with federal authorities, his own nursing staff, a consultant specializing in the medical care of inmates, and local physicians. The new measures included thirty protocols, which were intended to guide the nursing staff in assessing and treating the inmates' medical complaints. The protocols required the nurses to record relevant information and ask questions designed to help them determine whether a physician consultation was medically necessary. One of these protocols related to nausea and vomiting; it provided as follows:

> **SUBJECTIVE:**
> Duration of symptoms _____
> Is nausea accompanied by vomiting Y N
> Describe frequency and type of vomitus _____
> Weakness? Y N
> Vertigo? Y N
> Headache? Y N
> Fever? Y N
> Anorexia? Y N
> Abdominal pain? Y N
> Any exposure to noxious fumes, chemical or recent head trauma? Y N Specify:
> Diarrhea? Y N
> Bowel habits: _____
> Last BM: _____
> Recent emotional stress? Y N Specify:
> Current meds? Y N Specify:

OBJECTIVE:
Temp: _____
Pulse: _____
Resp: _____
BP: _____
Describe bowel sounds: _____
Abdominal tenderness? Y N Specify:
If c/o emesis, observe x 30 mins and describe emesis, if present, noting amount, color, frequency and consistency:
_____

ASSESSMENT: _____

PLAN: (check as applicable)
_____MD referral (if fever & abnormal pain accompany N & V; recent head trauma; and/or if symptoms persist after 24 h despite treatment protocol.)

_____No MD referral at this time (check as applicable):
_____Clear liquids as tolerated x 24 h
_____Pepto Bismol 30 cc prn qid x 24 h
_____Lay-in x 24 h

_____Patient education (check as applicable):
_____Importance of fluids to prevent dehydration
_____Importance of rest to conserve energy
_____Return if symptoms persist after 24 h
(Consider dietary causes if several inmates are displaying similar symptoms.)

Comments: _____

Signature: _____

MD Comments/Signature/Date: _____

Of particular significance in Aull's case was the requirement in the protocol, listed under the section entitled "Plan," that a physician be notified if symptoms of nausea and vomiting persisted for more than 24 hours.

Aull was incarcerated in the Daviess County Jail beginning in July 2006, serving a one-year sentence for selling marijuana. At the time he began serving his sentence, he was apparently unaware that he was diabetic and therefore did not indicate it on his intake form. On September 29, 2006, he requested medical attention, complaining of a head cold. He also asked for reading glasses. He was not seen by a nurse or doctor at that time. On October 10, 2006, he again requested medical attention, complaining of vomiting, blurry vision, and echo hearing. He was examined by Nurse Isom and Nurse Bartlett on the afternoon of October 13, 2006. He reported to the nurses that he had vomited after his supper meals; the nurses confirmed that he told them he was "not able to keep anything down." By that time, he was also experiencing abdominal pain. The nurses measured his blood pressure, but they did not determine his pulse, temperature or weight. The nurses gave Aull some Sprite and an injection of Phenergan, an anti-nausea medication. He was then was sent back to the general jail population. Nurse Isom wrote on his chart that she had been "in contact" with Dr. Robert Byrd, a local contracting physician who provided weekly medical services to the jail inmates, and had received a verbal order from him. Dr. Byrd later testified that this was untrue because he had not been contacted by Nurse Isom.

According to another inmate, Ray Benson, Aull continued to vomit and was so weak that he could not stand without assistance to go to the bathroom. Aull was provided with a bucket in which to urinate and vomit. He was urinating and vomiting as often as twenty times per day. Other inmates were banging on the cell

doors to get help for Aull. At each head count, which occurs three times daily at the jail, Aull made unsuccessful attempts to get assistance from the guards. He received no medical attention on October 14, 2006.

On Sunday, October 15, 2006, Nurse Bartlett made an unscheduled visit to the jail. She took some of Aull's vital signs, but not his weight. According to the testimony of Dr. Byrd, who compared Aull's signatures of October 13 and October 15, Aull would at that time have displayed significant and potentially medically serious mental deterioration. According to internist Dr. Angela Jarvis, his condition should have been observable by the nurses on October 13, because the objective symptoms of severe dehydration include mental status alteration, temporal wasting and skin turgor or "tinting of the skin." Nurse Bartlett's records reflect that Aull was complaining of back pain and nausea. She administered Phenergan, Zantac and Motrin, and recorded that she had been in contact with Dr. Byrd, although she had not spoken with him. She directed Aull to be placed in a medical holding cell but left no instructions for the deputies. Her examination of Aull lasted less than ten minutes and ended at 1:47 p.m. At 2:30 p.m., she left the jail.

At 5:08 p.m. that afternoon, a "Signal 9" medical emergency code occurred in Aull's cell. Another emergency was called in about seven minutes later. The deputies testified that Aull was incoherent and shaking, which caused them to take a blood sugar reading. At 5:50 p.m., his blood sugar reading level measured the highest number on the glucometer. Nurse Bartlett was notified by telephone. She

requested that Aull be taken to Owensboro Medical Health System, which is located about two miles from the jail, for emergency medical treatment. Aull was transported to the hospital by a jail vehicle which left at 5:57 p.m. He did not arrive at the emergency room until 6:30 p.m.

When he arrived at the hospital, Aull was critically dehydrated, having lost approximately nine liters of fluid, and his blood-sugar level was extremely high. He eventually required partial amputation of his leg. According to the expert medical testimony, if Aull had been transported to the hospital as little as six to seven hours earlier, the result would have been different.

Aull filed suit against Osborne and the nurses, in their official and personal capacities. His allegations against Osborne included negligent hiring and training of the nurses; failure to train or supervise medical staff employees regarding the protocols; failure to ensure that written policies, procedures and protocols were accomplished and implemented; and the breach of statutory and regulatory duties.

The allegations against the nurses included failure to follow routine standing orders, failure to take a complete and necessary medical history; failure to perform a basic nursing assessment; working beyond the scope of their practice; and placing false or misleading information in the medical records.

Aull also brought an action pursuant to 42 U.S.C. § 1983 in federal district court, alleging that the jailer and the nurses violated his rights under the Eighth Amendment to the Constitution of the United States by acting with deliberate

indifference to his serious medical needs. In an unpublished opinion, the federal district court granted summary judgment to the defendants after finding that Aull's constitutional rights had not been violated. *See Aull v. Osborne*, No. 4:07CV-00016, 2009 WL 111740 (W.D.Ky. Jan. 15, 2009).

The appellants thereafter moved for summary judgment in the state circuit court action, pleading the defenses of immunity and the preclusive effect of the federal judgment. The circuit court ruled that the appellants were entitled to absolute immunity insofar as they were being sued as representatives of the County, and dismissed that portion of the action. Insofar as they were being sued in their individual capacities, however, the circuit court held that they were engaged in ministerial duties and thus not entitled to immunity. In the alternative, the court held that even if the appellants were engaged in discretionary duties, they were not entitled to qualified official immunity because they acted in bad faith by knowingly violating Aull's statutory rights to medical care and by acting willfully. The circuit court further ruled that the dismissal of Aull's federal claim did not have a preclusive effect on his state law claims because the federal action was decided strictly on the question of whether the appellants had violated the Eighth Amendment. This appeal followed.

"[A]n order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). A summary judgment will be rendered "if the pleadings, depositions, answers to

interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) Rule 56.03. "[A] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). A "trial court must then view the record 'in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.' " *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (citations omitted).

> Sovereign immunity is a concept from common law that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity. Governmental immunity is derived from sovereign immunity and applies to tort liability of governmental agencies. Therefore, a state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function. Official immunity protects governmental officials or employees from tort liability for performance of their discretionary functions. Furthermore, official immunity is absolute when an official's or an employee's actions are subject to suit in his official capacity.

Jones v. Cross, 260 S.W.3d 343, 345 (Ky. 2008) (citations and quotations marks omitted).

> The jailer is a constitutionally elected officer of the county under Section 99 of the Kentucky Constitution. And, the jailer reports to the fiscal court, which oversees the jail's operation and budget. See generally KRS

> Chapter 441. Thus, the official capacity claims are in essence claims alleging negligent operation of the jail and are, therefore, claims against the county. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165–66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114, 121 (1985) (Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.") (Internal citations and quotation
>
> marks omitted). This cloaks the jailer, in his official capacity, with the county's sovereign immunity.

Commonwealth v. Harris, 59 S.W.3d 896, 899 (Ky. 2001).

In light of the foregoing authorities, the circuit court correctly ruled that the jailer and nurses are cloaked in absolute immunity as to any claims made against them in their official capacities.

The appellants argue that the trial court improperly undertook a review of facts unnecessary to resolve the issue of immunity, and failed to distinguish between facts pertinent to the determination of immunity and facts pertinent to summary judgment. The appellants do not specify which facts they deem to be irrelevant or unnecessary. A summary judgment in the appellants' favor would allow them to avoid further litigation altogether. The defense of immunity "renders one immune not just from liability, but also from suit itself." *Haney v. Monsky,* 311 S.W.3d 235, 239 -240 (Ky. 2010) (citations omitted). In light of the dispositive nature of an immunity determination, we see no error in the circuit court's decision to write a thorough and factually detailed order.

Next, the appellants dispute the circuit court's determination that immunity was not available to them in their individual capacities. For purposes of determining whether the defense of qualified official immunity is available, a distinction is made between ministerial and discretionary acts. Immunity is never available for the former; it may be available for the latter.

> [A]n officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature.

Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001) (citations and quotation marks omitted).

By contrast,

> Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed.

Id. (citations omitted).

Traditionally, under Kentucky law, providing medical care has been deemed a ministerial duty. "The administration of medical care is a ministerial function by employees, including doctors. Compliance with the applicable standard of care

does not involve a discretionary governmental function." *Gould v. O'Bannon*, 770 S.W.2d 220, 221 -222 (Ky. 1989). *See also Blue v. Pursell*, 793 S.W.2d 823, 825 (Ky.App. 1989) ("The administration of medical care is a ministerial rather than a discretionary function by employees, including physicians.")

The appellants have relied on a recent opinion of a panel of this Court which held that a deputy jailer, a member of the jail's medical unit, and a contracting psychologist were engaged in discretionary duties when an inmate hanged himself, and were, therefore, entitled to qualified official immunity. *See Jerauld ex rel. Robinson v. Kroger*, 353 S.W.3d 636 (Ky.App. 2011). Relying on *Yanero*, the *Jerauld* court emphasized the fact-specific nature of the ministerial/discretionary distinction: "[Q]ualified official immunity deals with the functions performed rather than the title or credentials of the one performing those functions." *Id.* at 641.

In *Jerauld*, the deputy jailer and the medical staff member had to make decisions regarding the inmate's suicide risk based on their observations. Similarly, the psychologist had to exercise his professional expertise and judgment in evaluating the mental state of the inmate. By contrast, the nausea and vomiting protocol supposedly in force at the Daviess County jail required the nurses to contact a physician if the inmate's symptoms persisted for more than 24 hours. This straightforward requirement imposed a ministerial duty on the nurses. The fact that the nurses apparently falsified the medical records on two occasions in order to make it appear that they had contacted Dr. Byrd further confirms this

conclusion. Therefore, the defense of qualified official immunity is not available to the nurses because their actions in treating Aull were ministerial.

By contrast, Osborne administered no medical treatment to Aull, nor did he have any direct contact with him during the period of medical treatment. The appellants correctly argue that Osborne is not vicariously liable for the acts of the nurses. "It has long been established that there is no vicarious liability on the part of a public official for acts of subordinates in which the official was not directly involved." *Franklin County v. Malone,* 957 S.W.2d 195, 199 (Ky. 1997) (*overruled on other grounds by Yanero*, 65 S.W.3d at 523). "[T]here is authority for the proposition that a public officer can be subject to personal liability in tort for hiring an employee known to that officer to be incompetent to perform the task for which he/she was hired." *Yanero*, 65 S.W.3d at 528. Evaluating the credentials of a potential employee is "an inherently subjective process which is the essence of a discretionary function." *Id.* However, "there is also a ministerial aspect to the hiring process in that the person or persons to whom the hiring of subordinates is entrusted must at least attempt to hire someone who is not incompetent." *Id.* Thus, only a showing that Aull knowingly hired an incompetent person could result in his personal liability for the nurses' actions. *See Smith v. Franklin County*, 227 F.Supp.2d 667, 680-681 (E.D.Ky. 2002). Although the appellees argue that the nurses deteriorated in competency during their employment at the jail, there was no evidence that Osborne knowingly hired nurses

who were incompetent or was aware of a deterioration in their professional competency.

A question of fact does remain, however, regarding Osborne's enforcement of the medical protocols, and whether he ensured that the nurses were observing the protocols. In *Yanero*, the plaintiff, a student injured when he was struck in the head by a ball during baseball practice, alleged that the coaches had failed to enforce the rule that student athletes had to wear helmets during batting practice. The *Yanero* Court explained that while "rule-making is an inherently discretionary function[,] . . . the enforcement of it [the rule] is a ministerial function." 65 S.W.3d at 529. In this case, the promulgation of the protocols was a discretionary function on Osborne's part. Ensuring that the nurses observed and followed the protocols, however, was a ministerial function on the part of the jailer. The nurses both testified that the protocols were no longer in effect; Osborne testified that he believed that they were. Thus, a question remains that precludes summary judgment since there is a factual dispute as to whether Osborne enforced the protocols. As in *Yanero*, the issue with respect to Osborne's negligence is best left to a jury. *Id*. at 529.

For the foregoing reasons, the Daviess order denying summary judgment is affirmed.

ALL CONCUR.

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