RENDERED: JULY 20, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001726-MR
AND
NO. 2011-CA-001727-MR

MELISSA GAIL SIMPSON, AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF CHARLES FANCHER — APPELLANT

V.

APPEALS FROM METCALFE CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
ACTION NOS. 08-CI-00055 AND 11-CI-00009

KEVIN THOMPSON;
RONDAL SHIRLEY;
SCOTT GORDON; JIMMY SHIVE;
AND GREG WILSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Melissa Gail Simpson, as personal representative for the Estate of Charles Fancher (the "Estate") appeals from the Metcalfe Circuit Court's order

of summary judgment dismissing the Estate's negligence claims against the above-captioned appellees. Finding no error, we affirm.

PROCEDURAL AND FACTUAL HISTORY

This matter was originally filed in Metcalfe Circuit Court on March 7, 2008, as a Kentucky negligence action.[1] Later on March 4, 2009, this matter was re-filed in the United States District Court, Western District of Kentucky, as both a Kentucky negligence action and 42 United States Code (U.S.C.) § 1983 civil rights action based upon the same operative facts.[2] On or about October 27, 2010, the Federal Court summarily dismissed the aforementioned 42 U.S.C. § 1983 claim but declined to exercise jurisdiction over the remaining Kentucky negligence claim. *See Simpson v. Thompson*, No. 1:09-CV-00031-TBR, 2010 WL 4365573 (W.D. Ky. Oct. 27, 2010) (slip copy). On January 18, 2011, the remaining Kentucky negligence claim was re-filed in Metcalfe Circuit Court.[3] This new

[1] As we will discuss later in this opinion, there is an issue of whether certain parties who were named in this litigation below have been named as parties to this appeal and placed within our jurisdiction. The March 7, 2008 Kentucky negligence action was captioned *Melissa Froedge, as Next Friend of Kaneca Danielle Fancher; Melissa Froedge, as Next Friend of Chase Nathaniel Fancher; Melissa Froedge as Next Friend of Kaley Frances LeeAnn Francher; Melissa Froedge as Next Friend of Kandis MaRae Fancher v. Kevin Thompson, as Deputy Sheriff for Metcalfe County, Kentucky; Scott Gordon, as Deputy Sheriff for Metcalfe County, Kentucky; Rondal Shirley, as Sheriff for Metcalfe County, Kentucky; Jimmy Shive, as Metcalfe County Jailer; and Metcalfe County, Kentucky*, No. 08-CI-00055.

[2] This federal action was captioned as *Melissa Gayle Simpson, As Personal Representative of the Estate of Charles David Fancher v. Kevin Thompson, as Deputy Sheriff for Metcalfe County, Kentucky; Scott Gordon, as Deputy Sheriff for Metcalfe County, Kentucky; Rondal Shirley, as Sheriff for Metcalfe County, Kentucky; Jimmy Shive, as Metcalfe County Jailer; and Metcalfe County, Kentucky*, No. 1:09-CV-00031-TBR.

[3] This second Kentucky action was styled *Melissa Gail Simpson, As Personal Representative of the Estate of Charles David Fancher v. Kevin Thompson, Individually and as Deputy Sheriff for Metcalfe County, Kentucky; Scott Gordon, Individually, and as Deputy Sheriff for Metcalfe County, Kentucky; Rondal Shirley, Individually, and as Sheriff for Metcalfe County, Kentucky, Jimmy Shive, Individually, and as Metcalfe County Jailer; and Metcalfe County, Kentucky*, 11-

action alleged the same operative facts and the same negligence claim as those asserted in the previous action filed in that court; consequently, the two actions were consolidated.

Finally, after the circuit court dismissed the two consolidated actions through a single order of summary judgment, the appellants filed two notices of appeal (one for each of the consolidated actions). Each notice named as the sole appellant "Melissa Gail Simpson, as Personal Representative of the Estate of Charles David Fancher," and, as appellees, "Kevin Thompson, Rondal Shirley, Scott Gordon, Jimmy Shive, and Greg Wilson."[4]

With that said, the parties agree that the Federal Court's order of summary judgment in *Simpson*, 2010 WL 4365573, accurately summarized the relevant facts of this case:

> On March 10, 2007, Charles David Fancher was at a friend's house with his children. DN 29, Ex. 4, 'Dep. Melissa Simpson.' At some point, the eldest child observed Mr. Fancher drinking 'red kool-aid' which the child suspected was alcoholic. *Id*. The child called her mother, Melissa Gayle Simpson, Mr. Fancher's ex-wife, to pick them up. *Id*. While picking up the children, Ms. Simpson observed that Mr. Fancher appeared to be under the influence of alcohol. *Id*. As she drove away, Ms. Simpson's children expressed concern that Mr. Fancher was in a fight with the friend that owned the home they were visiting. *Id*. As she was driving away, Ms. Simpson saw Deputy Sheriffs Kevin Thompson and Scott Gordon, two of the defendants, at a gas station. *Id*. She

CI-00009.

[4] Greg Wilson is the Judge/Executive of Metcalfe County, although the capacity in which he has been named in this consolidated appeal is unspecified and he was never named as a party in this action prior to the two notices of appeal filed herein.

reported everything to the Deputies, and they agreed to look into the incident. *Id*.

After arriving at the scene, the Deputies met the owner of the home in which Mr. Fancher was located. The owner advised the Deputies that he did not want Mr. Fancher in his home. The Deputies entered the home and tried to convince Mr. Fancher to leave. When he refused, the Deputies placed Mr. Fancher under arrest. As they were leaving the home, Mr. Fancher allegedly went limp, as he often did during his arrests, and the Deputies were forced to carry him from the home. After being removed from the home, Mr. Fancher allegedly began to struggle and pull away from the officers. At some point, the Deputies handcuffed Mr. Fancher's hands behind his back. Throughout this process, Mr. Fancher was allegedly being verbally abusive towards the Deputies.

Because there is no jail in Metcalfe County, where the arrest took place, Mr. Fancher needed to be transported to a neighboring county. The Deputies called dispatch requesting a transport to the jail. Jailor Jimmy Shive, a third defendant, responded to the call. Upon arriving at the scene, Jailor Shive provided the Deputies with a pair of leg shackles, which they used to shackle Mr. Fancher's legs. The Deputies tried to question Mr. Fancher about the amount of alcohol and drugs he had consumed, but were met with obscenities. To the deputies, this indicated that Mr. Fancher was at his normal level of intoxication. Due to his lengthy arrest record, the Deputies and Jailor Shive were aware that Mr. Fancher would kick at the doors, windows, and safety cage of the transport car while he was en route to jail. Accordingly, two additional pairs of handcuffs were connected to each other and then connected between the shackles on Mr. Fancher's legs and the handcuffs on his wrists. Mr. Fancher was then place[d] on his belly in the rear seat of the transport car. After Deputy Thompson checked Mr. Fancher's breathing, Jailor Shive left with Mr. Fancher.

From the arrest scene to the jail was a 15 to 20 minute drive. Jailor Shive enquired into Mr. Fancher's well being on multiple occasions, and was met with continued

> obscenities. Jailor Shive last spoke to Mr. Fancher 3-4 miles out from the jail. Jailor Shive stated that driving the last 3-4 miles probably took 5 to 7 minutes. Upon arriving at the jail, Jailor Shive went to the back seat to remove Mr. Fancher. At that time, Jailor Shive noticed that Mr. Fancher had some discoloration in his face. Jailor Shive called for help and removed the cuffs and shackles. Prison officials started life saving measure[s], and an ambulance was called. Mr. Fancher was pronounced dead later that evening at the hospital.
>
> An autopsy by the medical examiner found a blood alcohol content of .337-.341. The autopsy also revealed .15 milligrams of Diazepam (Valium) per liter of blood. The medical examiner concluded that both of these substances would work together to suppress the central nervous system and other functions. Accordingly, the medical examiner ruled the cause of death to be an overdose of alcohol and Diazepam resulting in heart and lung failure.

Id. at *1-2.

At both the federal and state level, the Estate argued that the manner in which Fancher was restrained was a substantial factor in causing Fancher's death. To that end, the Estate produced the opinion of Dr. Karl Williams, who believed that the method of Fancher's restraint, in conjunction with his intoxication, possible exhaustion from arrest, and what the medical examiner had discovered was Fancher's enlarged heart had resulted in Fancher's "accidental" death from "positional asphyxiation." The Estate also produced an opinion from a private investigator, Eddie Railey, stating Railey's belief that the method used to restrain Fancher was, under the circumstances, a breach of the applicable standard of care.

As noted previously, the Estate's suit began as a Kentucky negligence action, but evolved into a federal suit alleging both a Kentucky negligence claim and a 42 U.S.C. § 1983 based upon excessive force and deliberate indifference to medical needs. When the Federal Court dismissed the Estate's action, it dismissed the § 1983 claims with prejudice on the basis of sovereign immunity (to the extent they were asserted against Metcalfe County and its sheriff's office) and qualified immunity (to the extent they were asserted against Thompson, Shirley, Gordon, and Shive in their individual capacities).

When the Estate re-filed its Kentucky negligence action in Metcalfe Circuit Court, the appellees raised the same defenses of sovereign and qualified immunity, along with a defense of *res judicata*, and moved for summary judgment on those bases. Thereafter, the circuit court granted summary judgment in favor of the appellees, but its final order of summary judgment essentially stated nothing more than that (*i.e.*, it specified no basis). This appeal followed.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "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 Rule(s) of Civil Procedure (CR) 56.03. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v.*

Belknap Hardware & Manufacturing Co., 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment.") Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate

court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

ANALYSIS

The Estate's prehearing statement limits the "issues proposed to be raised on appeal, including jurisdictional challenges, and any question of first impression" to the following: "The Trial Court's wrongful grant of Summary Judgment on an unspecified basis." To this effect, the Estate asserts that it was reversible error for the circuit court to dismiss the balance of its claims through an order of summary judgment that included no factual findings or conclusions of law. However, the circuit court's order "was a summary judgment order, and pursuant to CR 52.01, specific findings and conclusions of law are not required with summary judgments." *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government*, 317 S.W.3d 23, 39 (Ky. 2010) (citing *Wilson v. Southward Inv. Co. No. 1*, 675 S.W.2d 10 (Ky. App. 1984)). Thus, it would appear that the sole issue raised in the Estate's prehearing statement has no merit.

The Estate's appellate brief, on the other hand, notes that the appellees raised arguments of *res judicata* and immunity as defenses below; it reasons that the circuit court must have based its summary judgment upon one or both of those issues; and, the Estate's brief raises two additional arguments of error relating to those issues. CR 76.03(8) would ordinarily prohibit this Court from considering issues not raised in a prehearing statement or submitted upon timely motion. *See, e.g., American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky.

2008); *see also Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004) (refusing to reach appellant's argument to reverse trial court's judgment on ground not among issues raised in prehearing statement or by timely motion under CR 76.03(8)). Nevertheless, CR 76.03(8) poses no obstacle to our review of the Estate's arguments relating to *res judicata* and immunity because the appellees have also raised *res judicata* and immunity in their own prehearing statement, have extensively briefed those issues, and have thus negated any reason for the Estate to have filed a motion, per CR 76.03(8), to add these as issues on appeal.

That said, the Estate is correct that in the absence of any specificity we will presume that the circuit court's threadbare order incorporates and is based upon each of the grounds asserted by the motion for summary judgment submitted by the appellees in this matter (*i.e.*, *res judicata* and immunity). *See, e.g., Sword v. Scott*, 293 Ky. 630, 169 S.W.2d 825, 827 (1943) ("In the absence of the court's specifying the ground or grounds for his dismissal of the petition, it will be assumed that it was upon any or all of the grounds which the proof sufficiently established.") And, because *res judicata* and immunity presented alternative grounds for dismissal, the Estate has the burden of demonstrating on appeal that both grounds are erroneous in order to justify reversing the circuit court's judgment. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979) ("the trial court's determination of those issues not briefed upon appeal is ordinarily affirmed."); *see also id*. at 729 ("When a judgment is based upon alternative

grounds, the judgment must be affirmed on appeal unless both grounds are erroneous.")

Therefore, we will begin with the Estate's argument relating to immunity. As noted previously, the defense of sovereign immunity was asserted by Metcalfe County, Shirley (in his official capacity as Metcalfe County Sheriff), Shive (in his official capacity as Metcalfe County Jailer), and Thompson and Gordon (in their official capacities as Deputy Sheriffs). In their individual capacities, Shirley, Shive, Thompson and Gordon each asserted defenses of qualified immunity.

The entirety of the Estate's argument is founded exclusively upon Kentucky Revised Statute(s) (KRS) 70.040:

> Truly, the one and only argument disposed of by the federal court's Memorandum Opinion is the Defendants' reoccurring claims of immunity. As the federal court noted:
>
> > KRS 70.040 waives 'the sheriff's official immunity . . . for the tortious acts or omissions of his deputies.' *Jones v. Cross*, 260 S.W.3d 343, 346 (Ky. 2008).
>
> (Page 10 of Memorandum Opinion). For the same proposition, the Court may also look to *Overstreet v. Thomas*, 239 S.W.2d 939 (Ky. 1951).
>
> Neither *Jones*, nor KRS 70.040, could be more clear. The aforementioned statute clearly waives and abrogates the immunity of a sheriff for the tortious and/or negligent acts and/or omissions of his deputies.

It is true that KRS 70.040 represents a waiver of the official immunity enjoyed by the office of Metcalfe County Sheriff; thus, in the context of an "official capacity" suit, it would be relevant. But, the statute has no bearing upon the liability of the individual holding the office of Metcalfe County Sheriff, nor any defense of qualified immunity that could be asserted by such an individual or his deputies, and it is thus irrelevant in the context of a "personal capacity" suit.[5] The distinction between "official capacity" and "personal capacity" suits was further explained by the United States Supreme Court in *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985):

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 237-238, 94 S.Ct. 1683, 1686-1687, 40 L.Ed.2d 90 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 1978). 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. *Brandon, supra*, 469 U.S., at 471-472, 105 S.Ct., at 878. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on

[5] In relevant part, KRS 70.040 provides:

> The sheriff shall be liable for the acts or omissions of his deputies; except that, *the office of sheriff, and not the individual holder thereof, shall be liable under this section*. When a deputy sheriff omits to act or acts in such a way as to render his principal responsible, and the latter discharges such responsibility, the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission. (Emphasis added.)

> a damages judgment in an official-capacity suit must look to the government entity itself.

473 U.S. at 165-66, 105 S.Ct. at 3105 (footnote omitted).

> With this distinction in mind, it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense. That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a nonparty. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

473 U.S. at 167-68, 105 S.Ct. at 3106.

Therefore, if the Estate has failed to join Shirley, Shive, Thompson, or Gordon (in their official capacities), or Metcalfe County or the office of Metcalfe County Sheriff in this appeal, the Estate has failed to join any governmental entity. And, if no governmental entity is present in this appeal, KRS 70.040 does not apply in *any* way to this matter.

Here, the Estate's complaint specifically named as defendants Shirley, Shive, Thompson, and Gordon (in their individual and official capacities), along with Metcalfe County. But, only those parties named in a notice of appeal are placed within our appellate jurisdiction. *City of Devondale v. Stalling*s, 795 S.W.2d 954, 957 (Ky. 1990). And, a review of the two notices of appeal filed by the Estate in this matter discloses that the only parties the Estate named in this

appeal, aside from itself, are "Kevin Thompson, Rondal Shirley, Scott Gordon, Jimmy Shive, and Greg Wilson." It excludes any mention of their official capacities and any mention of Metcalfe County or its sheriff's office. We do not presume that merely listing the name of a government official, in and of itself, implicates his official capacity. *See, e.g., McCollum v. Garrett*, 880 S.W.2d 530, 532-3 (Ky. 1994). Nor, for that matter, may we presume that the Estate's general designation of the appellees as "Kevin Thompson, et al." in the caption of its notices of appeal operated as a remedy: CR 73.03(1) expressly prohibits specifying the names of parties as "et al." in a notice of appeal; moreover, the use of "et al." in the caption of a notice of appeal does not make those parties to the action not specifically named in the caption parties to the appeal. *Schulz v. Chadwell*, 548 S.W.2d 181, 184 (Ky. App. 1977).

In short, any further discussion of KRS 70.040 within the context of this case is a moot point: the only function of that statute would have been to impute civil liability upon the Metcalfe County sheriff's office. We have no jurisdiction to reverse any part of the circuit court's order relating to the Metcalfe County sheriff's office because neither it, nor Metcalfe County, are parties to this appeal.[6]

[6] On the last page of its appellate brief, the Estate asserts that "any immunity of the Metcalfe County Sheriff's office is waived and abrogated by the herein aforementioned authority." The appellees' brief rebuts what appears to be the Estate's contention regarding sovereign immunity. In that light, an argument could be made that Metcalfe County, along with its sheriff's office, would not be prejudiced if we were to address this issue. The matter of prejudice is irrelevant, however, because failing to specifically name a party in the notice of appeal constitutes a jurisdictional defect that prohibits our review. *See Slone v. Casey*, 194 S.W.3d 336 (Ky. App. 2006); *see also Commonwealth v. Maynard*, 294 S.W.3d 43, 47 (Ky. App. 2009):

That is not to say that Metcalfe County and its sheriff's office were indispensable parties to this appeal, or that their absence mandates dismissal. Under our appellate rules, parties are only "indispensable" to an appeal if their "interest would be divested by an adverse judgment," or if their "absence prevents the Court from granting complete relief among those already parties." *Watkins v. Fannin*, 278 S.W.3d 637, 640 (Ky. App. 2009) (citations omitted). Having failed to appeal that part of the circuit court's order relating to its claims against Metcalfe County and its sheriff's office, the Estate has waived any review in that regard. And, in any event, neither entity would be prejudiced by a determination that Shirley, Shive, Thompson, and Gordon could be individually liable to the Estate. *See Graham*, 473 U.S. at 167-68, 105 S.Ct. at 3106 ("A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him.").

We are left, then, to address the claims of qualified official immunity asserted by Shirley, Shive, Thompson, and Gordon in their individual capacities.

> We find little if any prejudice to Maynard's heirs caused by the Commonwealth's error in naming the proper party to this matter. The attorney representing Appellee in this appeal is the same attorney that represented Maynard's estate at the forfeiture hearing attended by Maynard's heirs. Moreover, the heirs have all been appointed executors of Maynard's estate and thus, their interest in the real property has been actively and vigorously litigated at all stages of this litigation, including this appeal. Nevertheless, we are bound by prior Supreme Court case law, including case law set forth by prior panels of this Court in the absence of an *en banc* sitting.

Thus, to the extent that the Estate now seeks review of the circuit court's summary dismissal of its claims against Metcalfe County or the Metcalfe County Sheriff's Office in this appeal, we are precluded from granting it for the reasons stated above. *See, e.g., Watkins v. Fannin*, 278 S.W.3d 637, 643 (Ky. App. 2009) ("[W]e note as irrelevant the fact that the Cabinet, which defended this appeal, has not raised this issue; an appellate court may not acquire jurisdiction through waiver.") (citing *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005)).

As a general matter, "qualified official immunity" immunizes public officers or employees from liability for negligence, provided that the negligence in question arises from "(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." *James v. Wilson*, 95 S.W.3d 875, 905 (Ky. App. 2002) (internal citations omitted). "Once the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act [was in bad faith]." *Rowan County v. Sloas*, 201 S.W.3d 469, 476 (Ky. 2006) (citing *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001)).

In the case at bar, it cannot be disputed that when the officers arrested and restrained Fancher, they were performing a discretionary act within the scope of their authority. As stated in *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007),

> Under Kentucky statutory law, a peace officer is not allowed to use unnecessary force or violence in making an arrest. KRS 431.025(3). But, he is entitled to use such force as is necessary, or reasonably appears so, to take a suspect into custody. *City of Lexington v. Gray*, 499 S.W.2d 72, 74 (Ky. 1973). Statutory law is also clear that all persons have a legal duty to surrender to lawful arrest. *See Lawson v. Burnett*, 471 S.W.2d 726, 729 (Ky. 1971). Constitutional search-and-seizure jurisprudence provides similar substantive results. Indeed, the United States Supreme Court has held that, under the Fourth Amendment, the reasonableness of any particular use of force in effecting an arrest must be

> judged from the perspective of a reasonable officer at the scene, not with the perfect vision of hindsight. *See, e.g., Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).

Because the officers have demonstrated *prima facie* that their acts in question (the arrest and restraint of Fancher) were performed within the scope of their discretionary authority, the burden shifted to the Estate to establish by direct or circumstantial evidence that the officers performed their discretionary acts in bad faith. *Haugh* provides further guidance in this regard:

> [T]he law affords qualified immunity to the discretionary acts of peace officers performed in an official capacity, thereby shielding them "from [ ] liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 521-523 (Ky. 2001). To show that a peace officer acted in bad faith when making an on-the-spot judgment call, the complainant must demonstrate that the officer "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate" the complainant's rights or that the officer "took the action *with the malicious intention* to cause a deprivation of
>
> constitutional rights or other injury. . . ." *Yanero*, 65 S.W.3d at 523.

Id.

In the case at bar, the Estate generally alleges that the officers' treatment of Fancher was negligent, but it does not cite affirmative evidence of record or supporting case law demonstrating that the officers took any action against Fancher with any of the above-described intentions evincing bad faith. If a party does not cite authority for an argument, we are not required to address the

argument; therefore, we would be justified in affirming the circuit court's summary dismissal of the Estate's claims against the individual officers on this basis alone. *See* CR 76.12(4)(c)(v); *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

Nevertheless, we deem it more expeditious to adopt the well-reasoned opinion of the United States District Court as it applies to this issue.[7], [8] And, while the Estate does not clearly identify the nature of its negligence claims in its brief, the Federal Court divided the Estate's claims into the categories of "Deliberate Indifference" and "Excessive Force," and these categories appear to be applicable to the Estate's state law claims of negligence asserted in its complaint.

A. Deliberate Indifference

> As its jurisprudence has evolved, the Supreme Court has stated that the Eighth Amendment encompasses "the evolving standards of decency that mark the progress of a maturing society" and "the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (internal quotations omitted). "These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. *Id*. Failure to provide medical care could produce pain and suffering, physical

[7] Kentucky courts analyze the "good faith" element of qualified immunity somewhat differently than our Federal counterparts. *See, e.g.*, *Sloas*, 201 S.W.3d at 474:

> In *Harlow v. Fitzgerald*, 457 U.S. 800, 816–18, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the United States Supreme Court rejected the subjective, or "good faith" test for immunity, in favor of an "objective reasonableness standard" designed to avoid the many subjective factual issues so as to permit the early resolution of as many qualified immunity issues as possible prior to trial, typically by summary judgment. *Id*. at 818, 102 S.Ct. 2727. . . . We, however, still maintain the subjective element of good faith in our jurisprudence.

However, because the Estate failed to cite *any* evidence of bad faith, the distinction is irrelevant in this case.

[8] The Estate points to no authority, and we have found none, providing that under the circumstances of this case the Kentucky Constitution afforded Fancher a greater degree of protection than the United States Constitution.

torture or a lingering death "inconsistent with contemporary standards of decency[.]" *Id*. Accordingly, the "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Id*. at 104. "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id*. at 104-05.

However, an "inadvertent failure to provide adequate medical care" or a "negligent [diagnoses or treatment]" does not state a valid claim of medical mistreatment under the Eighth Amendment. *Id*. at 104-05. Similarly, a dispute over the adequacy of treatment also does not generally result in a constitutional violation. *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976). Rather, an inmate must be "exposed to undo suffering or the threat of tangible residual injury." *Id*.

In the current case, it is undisputed that Mr. Fancher never requested medical care. When observing Mr. Fancher, the officers felt that his level of intoxication was the same as it normally was. When asked about his consumption of alcohol and drugs that evening, Mr. Fancher refused to respond. During transportation to the jail, Jailor Shive attempted to interact with Mr. Fancher to ensure that he was still responsive, and was met with obscenities. Accordingly, there is no evidence of deliberate indifference in the current case and no Eighth Amendment violation.

B. Excessive Force

"Use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (overruled on other grounds). To determine if the constitutional violation was clearly established, a court must decide if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*.

> Plaintiffs do not dispute that Mr. Fancher had been arrested on multiple previous occasions. Plaintiffs do not dispute that on previous occasions when Mr. Fancher was arrested while heavily intoxicated, he kicked at the cage, windows, and doors of the police cruiser while being transported to the county jail. Plaintiffs do not dispute that, given Mr. Fancher's past behavior, some method of restraining Mr. Fancher's legs was necessary for the protection of police property and the safety of the transporting officer. Given all of the undisputed facts above, Defendant police officers did not use an unreasonable amount of force under objective standards of reasonableness. Rather, Defendants' actions were "within the bounds of appropriate police responses." *Id*. at 208.
>
> Alternatively, there is no evidence that any alleged excessive force would have violated a clearly established right. There is no Supreme Court or Sixth Circuit precedent decrying the use of the restraint method employed by the officers. While some Circuits have questioned the constitutionality of the aforementioned restraint method, other[s] have found it constitutionally valid. *Compare Garrett v. Athens-Clarke County, Ga*., 378 F.3d 1274 (11th Cir. 2004); *Maynard v. Hopwood*, 105 F.2d 1266 (8th Cir. 1997) *with Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001). The lack of precedent from either the Supreme Court or the Sixth Circuit, combined with the split of authority over the restraint method used by the officers qualifying as excessive force, requires a finding that no constitutional right was clearly established.

Simpson, 2010 WL 4365573 at *5-6.

CONCLUSION

For the reasons stated above, the judgment of the Metcalfe Circuit Court is affirmed.

ALL CONCUR.

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