RENDERED: JUNE 3, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001286-MR

SCOTT MCCALLISTER — APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 12-CI-00088

JAMES D. RILEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICK RILEY; CHIEF DEPUTY JAILER, TAMMY ROBERTSON, IN HER OFFICIAL CAPACITY AND INDIVIDUALLY; AND LIEUTENANT JAILER, TINA RUSHING, IN HER OFFICIAL CAPACITY AND INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT, AND MAZE, JUDGES.

J. LAMBERT, JUDGE: Scott McCallister has appealed from the summary judgment of the Crittenden Circuit Court dismissing his claims seeking damages against three jail officials arising from an altercation with another inmate. Finding no error, we affirm.

On July 11, 2012, McCallister filed a verified complaint against Crittenden County Jailer Rick Riley,[1] Chief Deputy Jailer Tammy Robertson, and Lieutenant Jailer Tina Rushing, all in their official and individual capacities. McCallister was an inmate at the Crittenden County Jail, and he was housed in a cell/pod along with eight other inmates, including Matthew Young. On the evening of June 26, 2011, Young assaulted McCallister in their cell/pod, breaking his leg near the left knee joint. In his complaint, McCallister alleged causes of action for lack of training of the jail staff, failure to protect him from an inmate who had a known propensity for assaultive behavior, and for lack of medical treatment. As a result, McCallister sought punitive and exemplary damages for their negligence, as well as past and future pain and suffering, medical expenses, and lost wages. In their response, the defendants alleged that McCallister's complaint was barred by absolute and qualified immunity. The defendants also moved and received permission to file a third-party complaint against Young. In the third-party complaint, the defendants indicated that Young had entered a guilty plea to assault under extreme emotional disturbance for his assault on McCallister,

[1] Appellee Riley passed away during the pendency of this appeal, and his estate, through his personal representative James D. Riley, was substituted as a party after the claim was revived by the circuit court.

and they sought contribution from him if they were found to be liable to McCallister. In his *pro se* response to the third-party complaint, Young objected to being named as a defendant, stating that he had signed a contract pursuant to his plea agreement to pay $4,000.00 in hospital bills. A guardian *ad litem* was later appointed to represent Young.

The parties all testified by deposition. At the time of his deposition, McCallister was no longer incarcerated, and he lived in Clay, Kentucky, with his mother. He had received his GED at Green River Correctional Complex in 2002. McCallister had worked as a carpenter before he went to jail and was injured, but he was currently being supported by his mother. At the time of his deposition, he was under indictment for first-degree assault[2] and for being a persistent felony offender, and he had past convictions for possession of drug paraphernalia, possession of methamphetamine, and criminal attempt to manufacture methamphetamine. He had been in Crittenden County when he was arrested on a parole violation for absconding in April 2011. McCallister also testified about his past medical history, which included back and shoulder problems. He admitted that he had had a problem with alcohol and had sought treatment for that while in prison.

When he was booked in the jail, McCallister learned about how to request medical assistance as an inmate, and he was aware of the grievance procedure. He was placed in Cell 112 at the jail, which he shared with Young for a

[2] His nephew claimed McCallister hit him in the head with an axe, an accusation McCallister denied.

couple of months. He did not relate any problems with Young prior to the incident. McCallister described what happened as follows:

> I'm sitting there eating, maybe he got up and turned the channel, maybe I turned it back, maybe he got mad. I'm not sure. Next thing I know, he's got me pinned between the bunks by the throat. I tried to push him off of me. He gets me in a bear hug, throws me to the ground breaking my leg. Then he kicks me in the face.

McCallister said it did not take long for the guards to get to the cell. Deputy Rushing took Young out of the cell, and he remembered asking Chief Deputy Robertson to call an ambulance. Chief Deputy Robertson called Jailer Riley, who told her not to call for an ambulance until he got there in the morning. McCallister was lying on the floor, in too much pain to let anyone touch him or to get into his bunk. Others got a mat onto the floor, and he was able to scoot onto it. He said he was given an ice pack and ibuprofen as well as a blanket to put under his knee by one of the deputies.

McCallister remembered seeing the nurse the next morning, after which the mobile x-ray unit was brought in. He was transferred to the Trover Clinic at about 11:00 a.m. He was admitted to the hospital, where he stayed for two or three days. He had been sent back to the jail for a portion of that time, but returned to the hospital due to swelling. The orthopedic surgeon told him he needed to have surgery. Because of the swelling in his leg, surgery was scheduled for about ten days later. McCallister said the doctor told him the excessive swelling was due to the fact that he had not been brought to the hospital for thirteen hours after his leg

had been broken. He was transferred to Kentucky State Reformatory (KSR) for medical treatment on July 1, 2011, upon his second release from the Trover Clinic. He never returned to the jail. The day of his transfer, he was taken to the University of Louisville Hospital where he saw the surgeon who eventually performed his surgery. That day, the surgeon placed a fixator on his leg with pins to stabilize his leg until surgery could be performed. He underwent surgery on July 26, 2011. He thought KSR had missed his appointment, which caused his surgery to be postponed. After the surgery, the doctor told him that he had had to re-break his leg to set it because it had been a month since it had been broken. McCallister returned to the University of Louisville Hospital two times for follow-up appointments after the surgery. At his May 2012 appointment, the doctor told him he would more likely than not have to have knee replacement in the future. During his June 2012 visit, the steel plates and pins were removed from his leg.

In his deposition, Jailer Riley testified that he had been appointed to the position of Jailer in August 2003, and he had been elected and reelected to the position thereafter. His responsibilities included supervision of the 133-bed Crittenden County Detention Center that held federal, state, and county inmates. It was run by the Department of Corrections. There are two required inspections each year, one announced and the other unannounced. The facility had been in compliance with the applicable standards since it opened in 2008. As to this case, Jailer Riley was aware that Young had assaulted a jail employee, Corporal Sean Rushing, in the past while he had been incarcerated in the jail. Young was

convicted for this assault, and he had been placed in isolation for about seven or eight months. Shortly after his conviction, Young was put back into the general population because "he had not displayed any other mannerisms that would make us tend to think anything else was going to occur and had never had any issues with an inmate."

Jailer Riley was also aware that Young had attacked McCallister on the night of June 26th and had been convicted for this assault. Young was no longer in the jail. On the night of the incident, Jailer Riley received a telephone call at 11:00 p.m. from Lieutenant Rushing, who had been on duty until midnight. Robertson came on duty at 8:00 a.m. the next morning. Lieutenant Susan Gilland had been on duty between 12:00 a.m. and 8:00 a.m. Jailer Riley described the series of events as follows:

> . . . I do know that the incident took place, that the guards put Matthew Young into isolation. They were trying to get Mr. McCalister [sic] into his bunk; he wanted to remain on the floor. They got the mat. They got the ice. They got the blankets. And sometime in that period [Lieutenant Rushing] would have called Major Robertson . . . . She would have also made the phone call to Dr. Al-Shami, and this doctor, who is with Advanced Correctional Healthcare, was who our health care provider was at the time, ordered the 800 milligrams of ibuprofen, which I'm not allowed to do. That's a prescription.
>
> And since he was – I was told that the pain he was in, that he did not want to get back up in his bunk, and that he didn't want to move, and that the doctor had ordered the ibuprofen, and so the nurse would have been in at 8:00 a.m. the next morning.

> So when I was called, then I told them to do as the doctor had told them, make him comfortable and at 8:00 a.m. we would go from there.
>
> At 8:00 a.m. that next morning, Major Robertson, along with the nurse, went to Cell 112 and talked with Mr. McCalister [sic]. Mobile X-Ray was telephoned, and they arrived, did an x-ray of the knee. And before they even did any reports or anything, they took the machine back out to their automobile where they're able to hook it in. And Mobile X-Ray, at that time, said that it appeared to be broke without anybody else even looking at it.
>
> At that time, the nurse called for an ambulance. We got an ambulance there and he was transported to Trover Clinic in Madisonville.
>
> Now, the reasons for that transport that morning is because Crittenden County Hospital does not have and does not provide any orthopedic measures, so it was either Trover Clinic or Western Baptist or Lourdes would have been the closest hospitals that could accommodate what we were told at that time was appeared to be a break.

Jailer Riley stated that the deputy jailer did not directly contact Crittenden County Hospital because the doctor said to make him comfortable, give him ibuprofen and an ice pack, and have him x-rayed. Jailer Riley was not aware that McCallister had asked for an ambulance or anything else. He only knew that McCallister did not want to be moved. The nurse contacted EMS, who opted to transport McCallister to the Trover Clinic. Jailer Riley said that EMS would not transport him to Crittenden County Hospital because that hospital did not treat broken bones. Sometime that afternoon, McCallister was returned to the jail with crutches and a knee brace. McCallister was transported back to the Trover Clinic

the next morning in one of the jail's transport vehicles. The ibuprofen and knee brace/immobilizer were not working as McCallister was still in pain and his knee was still swollen. McCallister was admitted, and the jail began the emergency medical movement for him to have surgery at University of Louisville Hospital. Jailer Riley was aware that the Trover Clinic had planned to perform surgery ten to fourteen days later, but he did not know the reason for the length of time until surgery was scheduled. When he found out that the Trover Clinic planned to release McCallister with a different device and then wait up to fourteen days to perform surgery, Jailer Riley had the medical staff begin the process for the emergency medical movement through KSR. When the Trover Clinic released McCallister, he was taken straight to KSR, and he never returned to the jail. At that point, McCallister was in the custody of the Department of Corrections. Jailer Riley did not have any other knowledge of what happened to McCallister after he left his custody.

In her deposition, Lt. Rushing testified that she works second shift from 4:00 p.m. to 12:00 a.m., as she did in 2011. Her responsibility was to make sure the deputies were doing their jobs and that everyone was safe and secure. She was aware that Young had assaulted a guard at the jail in the past during one of her shifts, and this guard was her brother-in-law. Young was charged with both assaults and he was found guilty. On June 26th, one of the guards told her that McCallister had been assaulted. Deputy Jailer Moses Beachy initially reported the attack. She went to the location, where she saw Young walking away from

McCallister, who was on the floor. Deputy Jailer Beachy told her there had been a fight. McCallister told her that his knee and leg hurt, and she could tell that he was in pain. The other inmates were told to get on their bunks. Lt. Rushing then turned her attention to Young to get him out of the cell/pod. Turning back to McCallister, she asked him if they could move him up to his bed. He said no and that he was afraid to move because his knee hurt. Lt. Rushing pulled a mat and blanket to the floor from his bunk, and he moved himself onto the mat. She then left the cell/pod to make her report. She did not recall him asking for an ambulance.

Lt. Rushing called Chief Deputy Robertson, her supervisor, to tell her about the situation. She advised Lt. Rushing to call Jailer Riley and Dr. Al-Shami to get something for his pain. Lt. Rushing also told Jailer Riley about the altercation between McCallister and Young, that Young had been removed and placed in isolation, and that McCallister was still on the floor. Jailer Riley told her to make McCallister as comfortable as possible and to call Dr. Al-Shami to see what he wanted them to do per protocol. Dr. Al-Shami told her to give McCallister 800 milligrams of ibuprofen and an ice pack, and to make him as comfortable as they could. There was not a nurse on duty that night. For the shift change at midnight, Lt. Rushing told her replacement (Deputy Jailer Susan Gilland) what they had done and who they had called and that she should continue to monitor McCallister and keep him comfortable. She did not have any knowledge of what happened to McCallister, medically, after he left the Trover Clinic.

Chief Deputy Robertson is next in line in the jail's chain of command after Jailer Riley. She knew McCallister and Young only from the time they spent in the jail. She knew that Young had assaulted one of the guards in the past and that the guard had sustained a head injury. Chief Deputy Robertson was not working when the attack on McCallister occurred, but she arrived at work the next morning at 8:00 a.m. She had learned of the assault on the night of the 26th when Lt. Rushing contacted her. Chief Deputy Robertson told Lt. Rushing to call Jailer Riley and Dr. Al-Shami. After she got to work, Chief Deputy Robertson reviewed the incident reports and met with the nurse, after which they went to see McCallister, and the mobile x-ray unit arrived. McCallister told her that he was in pain. The nurse accepted the mobile x-ray technician's opinion that McCallister's leg was broken and called Dr. Al-Shami, who ordered an ambulance to take McCallister to the Trover Clinic. McCallister returned that afternoon with crutches and his knee in an immobilizer. The physicians planned to perform surgery in ten to fourteen days. McCallister requested to go back to the Trover Clinic when Chief Deputy Robertson got to work the next morning. She and Jailer Riley made the decision to send him back that day because his knee was swollen. McCallister stayed at the Trover Clinic until he was sent to KSR, where his medical needs could be met. She did not know what medical care the Trover Clinic provided while he was there.

The defendants moved for summary judgment in June 2013, seeking dismissal of McCallister's complaint. First, they argued that McCallister's official

capacity claims against them were barred by sovereign immunity.[3] Second, they argued that the individual capacity claims should be dismissed due to lack of proof or because the claims were barred by qualified official immunity. In response, McCallister disputed that his claims were barred by sovereign immunity and argued that he had met his burden to defeat summary judgment.

The circuit court granted the defendants' motion for summary judgment by order entered July 10, 2014. The court determined that there was no evidence supporting the failure to train claim, noting that "a single event cannot establish this claim[,]" that the defendants had not violated any duty under the failure to protect claim, and that the facts established that the defendants had acted appropriately with respect to the failure to provide medical care claim, finding that "there is no evidence that suggests that they did not seek to obtain medical care in accordance with what would be expected of them." The court went on to determine that all three defendants were entitled to qualified immunity. Therefore, the circuit court concluded that the defendants were entitled to a summary judgment as a matter of law and dismissed McCallister's claims. This appeal now follows.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving

[3] The circuit court dismissed the official capacity claims, and this ruling has not been raised on appeal.

party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); Kentucky Rules of Civil Procedure (CR) 56.03. "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*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). With this standard in mind, we shall review the judgment on appeal.

McCallister first argues that disputed issues of material fact existed which necessitate the reversal of the circuit court's summary judgment. While it is true that the circuit court is required to review the record in a light most favorable to McCallister, the party opposing the motion for summary judgment, we agree with the appellees that the record does not support McCallister's assertion that any disputed issues of material fact remain to be decided. As the appellees point out, McCallister has ignored a plethora of evidence in the record, including the surveillance video showing the immediate response of the prison guards and the provision of emergency aid to him, medical records from the Trover Clinic, and evidence establishing that there was no indication that Young had shown any violent behavior since the prior assault on the guard and his punishment for that

assault. Accordingly, we shall consider whether the appellees were entitled to summary judgment as a matter of law.

We shall first consider McCallister's failure to train claim. The crux of this argument is the appellees' knowledge of Young's prior assault on a deputy jailer and the circuit court's statement that this claim must fail because it was based upon a single event when the evidence established that Young had assaulted two different people. McCallister relies upon *Glover v. Hazelwood*, 387 S.W.2d 600 (Ky. 1964), in which the former Court of Appeals addressed a common law cause of action seeking damages for personal injuries an inmate received from another inmate (Moss) while in jail. Glover argued that the jailer knew or should have known that Moss had dangerous propensities but failed to take precautions to protect him. Based upon the testimony of the jailer, who stated that other prisoners had been injured and that he heard later that Moss had caused the injuries, the appellate court found there was sufficient evidence to create a jury issue.

We must agree with the appellees that Young's attack on the deputy jailer was irrelevant to its consideration on this claim and that this claim must fail because McCallister did not introduce any evidence that Young had attacked another inmate as a result of lack of training. We further agree with the appellees that the Supreme Court of Kentucky's opinion in *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 479 (Ky. 2006), as corrected (Sept. 26, 2006), supports their position:

> Admittedly, a more stringent compulsion applies to the incarceration of prisoners as the jailer has custody, rule and charge of the jail and all persons therein pursuant to

> KRS 71.020. And, "[t]he law imposes the duty on a jailer to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody, but he cannot be charged with negligence in failing to prevent what he could not reasonably anticipate." *Lamb v. Clark*, 282 Ky. 167, 138 S.W.2d 350, 352 (1940.); see also, KRS 71.040 (stating that "[he] shall treat them humanely"). . . .
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> "Ultimate liability, [then], depends upon the particular circumstances of each case." *Sudderth v. White*, 621 S.W.2d 33, 35 (Ky. App. 1981); *see also Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 200 (1998), *reversed on other grounds by Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). And, "a single tragic incident involving jail personnel is not sufficient to establish a claim of inadequate training," *Franklin County*, Ky., 957 S.W.2d at 200 (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985)), and "[t]he duty of ordinary care to prevent [harm] arises only upon the discovery of some fact which would lead a reasonable person to believe there is some likelihood of ... injury." *Franklin County*, Ky., 957 S.W.2d at 200.

Based upon the evidence of record, we hold that the appellees were entitled to a judgment as a matter of law on this claim.

Next, McCallister contends the circuit court erred in granting summary judgment on his failure to protect claim, arguing that the appellees had "placed [him] in the same pod with a known violent inmate" and failed to protect him from being assaulted. Again, we disagree.

There is no dispute that a jailer owes a duty of reasonable care to inmates in his custody. *See Sudderth v. White*, 621 S.W.2d 33, 35 (Ky. App. 1981). But as the former Court of Appeals pointed out in *Lamb v. Clark*, 282 Ky. 167, 138 S.W.2d 350, 352 (1940):

> [T]he liability of the jailer for such injuries is recognized where he had reasonable ground to apprehend the danger to the prisoner. The law imposes the duty on a jailer to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody, but he cannot be charged with negligence in failing to prevent what he could not reasonably anticipate.

Id. at 352, citing *Ratliff v. Stanley*, 224 Ky. 819, 7 S.W.2d 230 (1928). In this case, the undisputed evidence of record establishes that Young had been punished both in the jail and through a criminal action for this assault, which had happened many months before the assault on McCallister, and he had been monitored for a period of time before being permitted to return to the general population. Young had been back in the cell/pod with McCallister and others for another several months without further incident before the assault took place. Based on this evidence, McCallister could not establish a cause of action for failure to protect, and the circuit court properly entered a summary judgment on this claim in favor of the appellees.

Finally, McCallister contends that the appellees were not entitled to a summary judgment on the failure to provide medical care claim, arguing that he did not receive emergency medical care as quickly as he should have. This claim is based upon McCallister's assertion that he lay on the floor for thirteen hours before being taken to the hospital and did not receive surgery for approximately thirty days. While it is true that McCallister was not taken to the hospital until the next morning and that surgery was delayed, the undisputed evidence establishes

that prison personnel responded immediately after the assault took place and appropriately sought direction from Dr. Al-Shami for McCallister's immediate treatment. They followed the physician's orders, which included providing prescription strength ibuprofen and ice packs. McCallister complains that he was left on the floor for thirteen hours, but he fails to admit in his brief that he refused to be moved or that the deputy jailers pulled his mat to the floor for him. The deputies continued to monitor McCallister over the course of the night until he was taken to the hospital the next morning. None of the appellees ignored McCallister or withheld medical attention from him, but rather they relied upon and followed the advice from appropriate medical professionals. Therefore, McCallister cannot establish a claim for failure to provide medical care as a matter of law, and the circuit court properly entered a summary judgment in the appellees' favor.

Based on our holdings above, we need not address whether the appellees were entitled to qualified official immunity.

For the foregoing reasons, the summary judgment of the Crittenden Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Zack N. Womack Henderson, Kentucky	Stacey A. Blankenship Kristen N. Worak Paducah, Kentucky