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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000224-MR

JANET KELSO; HARVEY PELFREY;
BRITTANY LUMPKINS; AND
BRENDA MILLER APPELLANTS

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 12-CI-00096

MONICA HUDSON ALLEN; AND
MICHAEL ALLEN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Janet Kelso, Harvey Pelfrey, Brittany Lumpkins and Brenda Miller appeal from the order of the Lee Circuit Court denying their motion to dismiss the complaint of Monica Hudson Allen and Michael Allen on qualified immunity and other grounds. For the following reasons, we affirm.

I. Factual and Procedural Background

On April 29, 2011, Monica, then pregnant, was arrested and jailed at the Three Forks Regional Jail ("Three Forks"). Upon admission, Monica, a frequent methadone user prior to her arrest, began experiencing symptoms of detoxification. Thereafter, Monica experienced prenatal distress and was hospitalized. She was ultimately transferred to the Schwartz Center, a drug rehab facility, where she stayed from May 18 through May 27, 2011. On May 28, 2011, Monica delivered a healthy child at the University of Kentucky Medical Center ("UK Medical Center"). She received an epidural injection in her spine as treatment for labor pain while at the UK Medical Center.

Following the birth of her child, Monica returned to the drug rehab center until June 11, 2011, when she was released and returned home. Two days later, she was admitted to the Jackson Hospital Emergency Room for severe back and ankle pain, where she informed the physician that she had recently had an epidural. Monica was diagnosed with an epidural abscess, a condition in which infection and swelling around the spinal cord pressures the nerves.

Monica returned to Three Forks under court order on June 13, 2011. The jail check-in sheet indicated that Monica was in obvious pain and had been recently hospitalized. She immediately submitted a medical request form asking to see the jail nurse and physician, complaining of back pain and trouble breathing. At that time, Kelso, a Licensed Practical Nurse ("LPN"), was the medical authority at Three Forks; she had been hired by Pelfrey, the Jail Administrator, who was

unaware of her scope of education or the scope of an LPN's practice. Kelso examined Monica on June 14th and determined that Monica had anxiety and her lungs were clear. Kelso started Monica on drug withdrawal medications and provided her with an extra mat for her back. She did not refer Monica to the jail physician, Dr. Derrick Hamilton, nor did she inform Dr. Hamilton of Monica's complaints or condition. Monica was returned to her cell in a wheelchair.

Monica was housed in medical segregation or isolation. Jail Policy and Procedures ("P&P) require medically segregated inmates to be monitored every 20 minutes and entries to be made in the log on the cell door. According to jail logs, the female guards on duty the evening of June 16, 2011 through the early morning of June 17, 2011, Lumpkins and Miller, took Monica to medical at 7:00 p.m. on June 16 because she complained of numbness in her extremities. Kelso was called and instructed Lumpkins and Miller to simply continue to monitor Monica. The logs reflect that Monica was not checked on every 20 minutes, even after the call to Kelso.

Despite documentation to the contrary, Lumpkins and Miller claim that Monica did not complain about any medical problems until around 3:00 a.m. on June 17 when they immediately called Kelso, who authorized calling an ambulance. Monica was taken by ambulance to Saint Joseph's Hospital where she was placed on life support and had fluid evacuated from around her spine. As a result of the epidural abscess, Monica is now a quadriplegic. According to Monica

and Michael's expert physician, had Monica received earlier treatment for her abscess, her prognosis would likely have been improved.

On May 31, 2012, Monica and Michael Allen filed their initial complaint asserting claims against Three Forks, Janice Kelso, and Harvey Pelfrey, alleging violation of Monica's 17th Amendment rights under the Kentucky Constitution, negligence/medical malpractice, loss of consortium, and intentional infliction of emotional distress ("IIED") related to medical treatment Monica received between June 13 and June 16, 2011.[1] On January 30, 2013, the trial court granted Appellants' motion to dismiss, dismissing all claims against Lee County, Wolfe County, and Owsley County and their respective fiscal courts, all official capacity claims, and all claims against Three Forks Regional Jail Authority. Claims remained individually against Janice Kelso, Harvey Pelfrey, Keith Combs, Brittany Lumpkins, and Brenda Miller.[2] On January 26, 2015, the trial court denied Appellants' motion for summary judgment on various grounds including qualified immunity.

The trial court found that while establishing the contents of a jail's emergency medical services policy is within a jailer's discretionary functions, a jail

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[1] Monica filed her first amended complaint, naming Harvey Pelfrey, Lee County, Wolfe County and Owsley County in their official capacities, on July 9, 2012. She then filed a second amended complaint, adding Brittany Lumpkins and Brenda Miller in their individual and official capacities.

[2] Keith Combs was dismissed as a defendant by an order in which the parties agreed he was not liable.

employee's actions in following the directives of an emergency medical services policy were ministerial. From that order, the Appellants appeal.

II. **Standard of Review**

CR[3] 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.,* 319 S.W.3d 366, 370-71 (Ky. 2010).

"The general rule under CR 56.03 is that a denial of a motion for summary judgment is . . . not appealable because of its interlocutory nature[.]" *Transp. Cabinet, Bureau of Highways v. Leneave*, 751 S.W.2d 36, 37 (Ky. App. 1988). However,

> [i]n the context of qualified official immunity, "[s]ummary judgments play an especially important role", as the defense renders one immune not just from liability, but also from suit itself. Here, the material facts have been resolved, and thus our review is one of law, focusing on whether the moving party [] was entitled to the defense of qualified official immunity and, consequently, judgment as a matter of law.

[3] Kentucky Rules of Civil Procedure.

Haney v. Monsky, 311 S.W.3d 235, 240 (Ky. 2010) (internal citations omitted). Accordingly, our review of the trial court's denial of the Appellants' motion for summary judgment on qualified immunity grounds is proper, and the decision is reviewed *de novo*.

III. <u>Argument</u>

First and foremost, Kelso, Pelfrey, Lumpkins, and Miller submit that they should, in their individual capacities, be dismissed as defendants on grounds of qualified immunity. Despite the fact that the parties both allocated significant portions of their briefs to arguments concerning the merits of the Allens' claims and other issues, our review is limited to the issue of qualified immunity since the denial of a motion for summary judgment on other grounds is not ripe for appeal. Accordingly, we will only address the qualified immunity argument.

The Kentucky Supreme Court addressed qualified immunity for public officers being sued in their individual capacities in *Yanero v. Davis*:

> when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled, as discussed in Part II of this opinion, supra. But when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. 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.
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> . . . .
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> Conversely, an 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.

65 S.W.3d 510, 522 (Ky. 2001) (internal citations omitted).

More recently, the Supreme Court expanded upon the definition of a ministerial act, stating,

> an act is not necessarily outside the ministerial realm "just because the officer performing it has some discretion with respect to the means or method to be employed." In reality, a ministerial act or function is one that the government employee must do "without regard to his or her own judgment or opinion concerning the propriety of the act to be performed." In other words, if the employee has no choice but to do the act, it is ministerial.

Marson v. Thomason, 438 S.W.3d 292, 297 (Ky. 2014) (internal citations omitted). Because few acts are purely discretionary or purely ministerial, the courts must look for the dominant nature of the act. *Haney*, 311 S.W.3d at 240.

Here, the trial court found that Kelso, Lumpkins, and Miller's alleged failure to follow the jail's explicit medical treatment policies, and Pelfrey's alleged failure to follow the jail's policy on hiring employees, are both ministerial acts, and

thus afforded no immunity from liability for negligent performance.[4] Appellants cite to *Noble v. Three Forks Regional Jail*, 995 F.Supp.2d 736 (E.D.Ky 2014), in which employees of Three Forks were granted qualified immunity when an inmate claimed the jail's diet and failure of jail personnel to give his medications at a certain time caused his diabetes and his eyesight to worsen.

We believe *Noble* is distinguishable since Noble did not claim that the Three Forks employees failed to follow established jail procedures in providing him medical care. Instead, Noble claimed that the jail had a policy that purposefully restricted medical care to inmates to save money and this caused the jail to provide him with his medication at times other than when prescribed by his doctor and to provide him with foods inappropriate for his diabetic condition. *Id*. at 739. The court found no evidence of such a policy, and held that the jail employees provided food and medicine to Noble according to the established policies of the jail. *Id*. at 744.[5]

Here, the Allens allege that Kelso violated the jail's policies and procedures ("P&P") Procedure II on page 44 and 501 KAR[6] 3:090(4) by acting

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[4] The Allens cite *Gould v. O'Bannon*, 770 S.W.2d 220, 221-22 (Ky. 1989), arguing that inmate medical care is always a ministerial act by employees and doctors. However, this case held that university doctors and employees treating an inmate patient, not jail employees, were not protected by the doctrine of sovereign immunity. We believe jail employees present a different situation.

[5] The court in *Noble* also found that Kelso, also a defendant in that case, acted within her discretion in providing medical care. This issue is separate from the one at hand: whether jail policies were followed.

[6] Kentucky Administrative Regulations.

outside the scope of an LPN's practice and failing to offer medical services within the scope of professional guidelines when she failed to contact the jail physician about Monica's symptoms and instead diagnosed her with anxiety and drug withdrawal symptoms. LPNs may only care for patients under the direction of a registered nurse, a licensed physician, or dentist. KRS[7] 314.011 (10). Since Kelso's duties to inmate patients were clearly prescribed by the relevant statutes, administrative regulations and jail policies, we agree with the trial court that those duties were ministerial, or duties she was required to perform without choice. Whether she performed those duties negligently is not a question properly before this court.

Next, Lumpkins and Miller were required, as the female guards on duty, to check on Monica every 20 minutes while she was in medical segregation and to log those checks pursuant to the jail's P&P on pages 26 and 27, Kentucky Jail Standards, and 501 KAR3:060 Section 2 (1) & (2). The guards are further required to provide adequate medical care pursuant to 501 KAR 3:140 Section 8 and to the jail's P&P Procedure III on page 50. We agree with the trial court that these procedures are ministerial duties, subject to little to no discretion; thus, Lumpkins and Miller are not entitled to qualified immunity for these actions.

Pelfrey was required, as the jailer, to contract with a health care provider. 501 KAR 3:090 permits the jail to hire an LPN as medical authority. However, the Allens' claims against Pelfrey assert that he hired Kelso, an LPN,

[7] Kentucky Revised Statutes.

with the expectation that she would fulfill duties beyond the scope of an LPN's permitted practice. The jail's P&P for medical services on page 43 provides "[a]ll Regional Jail inmates shall have access to 24 hour per day health care. Medical care at the facility shall be delivered under the direction of a licensed physician and through the use of trained health care personnel." We believe that Pelfrey's task, to provide the jail with a health care authority which could provide inmates access to 24 hour per day health care, was ministerial. Thus, he is not entitled to qualified immunity for his actions on that matter.

Lastly, the Allens claim that Kelso, Lumpkins, and Miller violated Monica's rights under Section 17 of the Kentucky Constitution, and thus, they acted in "bad faith" under *Rowan Cnty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006), and are not entitled to qualified immunity. *See also Yanero*, 65 S.W.3d at 523. Since the trial court did not address this bad faith claim, we will not address it on appeal.

IV. Conclusion

For the foregoing reasons, we hold that the trial court properly denied the Appellants' motion for summary judgment on qualified immunity grounds. The order of the Lee Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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