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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000513-MR

NICOLE PETERSON,
ADMINISTRATRIX OF THE
ESTATE OF PEGGY MCWHORTER,
DECEASED; AND WANDA RUSSELL,
GUARDIAN AND NEXT FRIEND OF
D.M.M. AND E.H.M., MINOR
CHILDREN OF PEGGY GAIL
MCWHORTER — APPELLANTS

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD JR., JUDGE
ACTION NO. 12-CI-00191

BOBBY DUNBAR; BETHANY
FOLEY; MICHAEL CLARK;
CHARLES GRIDER; BRENDA
HUDSON; DENNIS GRAYUM;
DEBBIE GRAYUM; SCOTT
HADLEY; JANICE SIMPSON;
AND KEVIN BOOTH — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, JUDGE: The issue we must decide in this case is whether the Russell Circuit Court erred in granting summary judgment in favor of Bobby Dunbar, the Russell County Jailer, and his deputies who were on duty when Peggy McWhorter was admitted to the Russell County Detention Center and died of an overdose due to drugs she had ingested prior to her reporting to the detention center. We hold the circuit court did not err and therefore affirm.[1]

I. FACTS AND PROCEDURE

In October 2011, McWhorter was arrested for Driving Under the Influence—Alcohol/Drugs, Second Offense, among other offenses. McWhorter pleaded guilty on November 28, 2011, and received a jail sentence of 60 days, to serve seven days, with the balance probated over a two-year period. The district court ordered her to serve her sentence on consecutive weekends, beginning December 9, 2011.

McWhorter served the first weekend without incident, although she slept nearly the entire time, snoring loudly.

She reported for the second weekend at 5:51 p.m., on Friday, December 16, 2011. At least three deputy jailers spoke with McWhorter as part of the booking process: Bethany Foley, Brenda Hudson, and Charles Grider. McWhorter requested a dinner tray, which Hudson provided, even though the

[1] The Notice of Appeal listed ten appellees; however, the appellant's brief only requests relief against six: Bethany Foley, Dennis Grayum, Debbie Grayum, Scott Hadley, Janice Simpson, and Kevin Booth.

detention center had already finished serving dinner to the other prisoners. Grider interacted with McWhorter, asking her why she was serving time, and counseling her to get her life together. Foley booked McWhorter, informing her how to gain access to medical care and asking her standard questions including whether she had ingested potentially dangerous levels of drugs or alcohol, whether McWhorter understood she could request a health care provider at any time, and whether McWhorter had provided detention center staff with all information of which she wanted them to be aware. McWhorter denied having taken any dangerous level or mixture of drugs or alcohol. She also announced her intention to "sleep off her weekend."

Although typical jail procedure is for an inmate to be showered before being taken to her cell, McWhorter was not showered. Foley admits that the shower would have given the deputies additional time to observe McWhorter for signs of intoxication. However, Foley, Grider, and Hudson all testified that, throughout the intake process, McWhorter did not appear intoxicated, and that she answered questions clearly and coherently.

At approximately 6:30 p.m., Foley escorted McWhorter to what was referred to as a detox cell, since the detention center routinely placed prisoners serving weekends in those cells, rather than in the general population. Two other women were initially in the cell with McWhorter; they were prisoners Jamie Brock and Minnie Peterson.[2] McWhorter walked to her cell under her own power,

[2] Minnie Peterson is not related to Nicole Peterson, McWhorter's daughter and the administratrix of McWhorter's estate.

entered the cell, soon lay down on her side and promptly fell asleep despite the continuous bright lighting in the cell. Except for moving her arm a few hours later, she did not change her sleeping position. McWhorter's cellmate, Minnie, later said she believed McWhorter was intoxicated and even joked about it with one of the deputies. Minnie heard McWhorter loudly snoring until "about 2:00 or 3:00 a.m.[,]" more than six hours after she lay down.

In accordance with jail procedures, various deputy jailers observed the prisoners in the cell as frequently as at least once per hour. At approximately 7:00 p.m., a shift change occurred, and Foley, Hudson, and Grider checked out (Dunbar had left before McWhorter arrived); deputy jailers Dennis and Debbie Grayum, Janice Simpson, and Scott Hadley checked in. All of the deputy jailers signed the log at the door of McWhorter's cell noting that they had checked on all three prisoners in the cell. The deputy jailers interacted with the other two women several times, opening the door of the cell to speak with Brock, again for several minutes to take Minnie to shower and return to the cell, and to bring bags of chips to the women, placing McWhorter's chips next to her on the floor. McWhorter's sleeping position remained unchanged, even when the deputies opened the door to the cell several times to speak with the other women.

A little after 6:00 a.m. on the following morning, Simpson entered the cell to serve breakfast, and verbally tried to wake McWhorter. When she could not be wakened, Simpson physically tried to rouse her and felt that McWhorter was cold to the touch. She exited the cell and called for Deputy Kevin Booth, who had

received EMT training. He testified that when he tried to check her pulse, she was cold and stiff, and he could tell that she was dead. The EMS and Coroner were called. An autopsy later indicated that McWhorter died of the combined effects of hydrocodone, an opiate, and alprazolam and lorazepam, both prescribed benzodiazepines that were present only at therapeutic levels. The hydrocodone was therefore primarily responsible for McWhorter's death. A hydrocodone overdose can lead from sleep to coma and respiratory failure, which was the cause of death in this case.

Peterson, as administratix of McWhorter's estate, filed this action in May 2012. After discovery, Dunbar and the defendants moved for summary judgment on the grounds that the jailer and his deputies were entitled to the protections of qualified official immunity, or alternatively, that Peterson had not satisfied the burden to establish negligence. The circuit court granted the motion, and denied Peterson's subsequent CR[3] 59.05 motion to alter, amend, or vacate. This appeal follows.

II. STANDARD OF REVIEW

In *Hoke v. Cullinan*, our Supreme Court clearly said:

> Contrary to the view of some, our decision in *Steelvest, Inc. v. Scansteel Service Ctr.,* Ky., 807 S.W.2d 476 (1991), does not preclude summary judgment. Provided litigants are given an opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate.

[3] Kentucky Rules of Civil Procedure.

914 S.W.2d 335, 337 (Ky. 1995).

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 party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest,* 807 S.W.2d at 480-82). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Id.* at 436 (citing *Steelvest,* 807 S.W.2d at 482). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest,* 807 S.W.2d at 480. The word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis,* 56 S.W.3d at 436 (citing *Perkins v. Hausladen,* 828 S.W.2d 652, 654 (Ky. 1992)). "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." *Id.* at 436.

In 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. *Rowan County v. Sloas,* 201 S.W.3d 469, 474 (Ky. 2006) (*citing Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Here, the material facts have been resolved, and thus our review is one of law, focusing on whether the moving parties were entitled to the defense of qualified official immunity and, consequently, judgment as a matter of law. *See Pile v. City of Brandenburg*, 215 S.W.3d 36, 39-40 (Ky. 2006); *Sloas*, 201 S.W.3d at 475. *See also Haney v. Monsky*, 311 S.W.3d 235, 239-40 (Ky. 2010).

III. ANALYSIS

Peterson argues the circuit court erred in granting summary judgment. Specifically, Peterson claims the deputy jailers were not entitled to qualified immunity because they failed in their duty – a duty Peterson asserts is ministerial – to check on McWhorter, an intoxicated prisoner, frequently enough and sufficiently enough to have prevented her death. We do not agree that the deputies failed in their assigned duties.

The duties of government officials fall into two general categories – ministerial and discretionary.

An official's satisfaction of a ministerial duty "require[s] '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.'" *Haney*, 311 S.W.3d at 240 (citing *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001)). Not surprisingly then, "it has always been the case that the negligent performance of a ministerial act by an official or employee enjoys *no* immunity[.]" *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011).

Satisfaction of a discretionary duty "require[s] the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney*, 311 S.W.3d at 240. "If [a government official is] sued individually, and he is acting in a discretionary manner, in good faith, and within the scope of his employment, then he enjoys qualified official immunity." *Forte*, 337 S.W.3d at 621.

Both the Complaint and First and Second Amended Complaints claim that appellees' "treatment of McWhorter violated 501 KAR[4] 3:090." The only pertinent portions of that regulation establishing a duty for non-medical staff during prisoner intake are Section 1, subsections (7) and (9), which say:

> (7) Prisoners shall be informed verbally and in writing at the time of admission the methods of gaining access to medical care within the jail.
>
> . . . .
>
> (9) Medical screening shall be performed by the receiving jail personnel on all prisoners upon their admission to the jail and before their placement in prisoner living areas. The findings of this medical screening shall be recorded on a printed screening form approved by the medical authority. The medical screening inquiry shall include:

[4] Kentucky Administrative Regulations.

(a) Current illnesses and health problems;

(b) Medications taken and special health requirements;

(c) Screening of other health problems designated by the medical authority;

(d) Behavioral observation, state of consciousness, and mental status;

(e) Notation of body deformities, markings, bruises, lesions, jaundice, ease of movement, and other distinguishing characteristics;

(f) Condition of skin and body orifices, including rashes and infestations; and

(g) Disposition and referral of prisoners to qualified medical personnel on an emergency basis.

501 KAR 3:090 § 1(7), (9).

The duties established by 501 KAR 3:090(7) and (9) are ministerial. Appellees presented evidence, including documentary proof signed by McWhorter, establishing that they satisfied both their duty to inform McWhorter how to gain access to medical care and their duty to conduct a medical screening. This proof, which Peterson did not counter, makes inapposite one part of the case Peterson says "closely mirrors the facts" of McWhorter's case – *Hedgepath v. Pelphrey*, 520 Fed. Appx. 385 (6th Cir. 2013).

In *Hedgepath*, the federal court identified the deputies' duty under 501 KAR 3:090 (without actually citing the regulation) "of asking [the prisoner] questions from a standard medical screening form and obtaining [his] signature on his

booking documents" but concluded the deputies "failed to perform either task[.]" *Id.* at 387. The facts of *Hedgepath* demonstrate a violation of the ministerial duty established by 501 KAR 3:090. The facts of the case before us today do not. Nor does any part of the record create a genuine issue of material fact regarding the breach of the duty created by 501 KAR 3:090 by any appellee at the time of prisoner McWhorter's intake.

Later in the course of litigation, in response to the appellees' summary judgment motion in the circuit court, Peterson refashioned her claim in terms of a different duty, stating that, having placed McWhorter in a detox cell, "the Deputies failed to adhere to their . . . duty . . . to perform live, in-person checks of Peggy McWhorter . . . every twenty minutes." (R. 229). That claim, not asserted in any pleading,[5] implicates a different regulation. That regulation is 501 KAR 3:060 § 2(2).

Like 501 KAR 3:090, this regulation creates a ministerial duty. It requires that "[j]ail personnel shall conduct and document direct in-person surveillance on an irregular schedule, at least every twenty (20) minutes on the following classes of prisoners: (a) Suicidal; (b) Mentally or emotionally disturbed, if housed in a single cell; or (c) In detox cell." 501 KAR 3:060 § 2(2). If McWhorter was among

[5] "CR 7.01 sets forth an *inclusive* list of documents that constitute 'pleadings' within the context of our civil rules." *Fratzke v. Murphy*, 12 S.W.3d 269, 272 (Ky. 1999). CR 7.01 says: "There shall be a complaint and an answer; a reply to counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

any of the three classes of prisoners intended to be protected by especially frequent surveillance, then the jailer's and his deputies' ministerial duty under 501 KAR 3:060 § 2(2) would have been to check on her at least every twenty minutes.

As we discuss below, there is no genuine issue of material fact weighing upon the determination of whether this regulation applies to McWhorter. Applying this regulation to the facts about which there is no genuine issue, we conclude that McWhorter was not among the prisoners intended to be surveilled on an especially frequent basis.

Peterson directs us to the uncontroverted fact that McWhorter was placed in a cell referred to as a detox cell, and she argues that fact is sufficient to have brought McWhorter within the protection of increased surveillance under 501 KAR 3:060 § 2(2)(c). We do not agree with Peterson's interpretation of the regulation.

"[I]n the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation. . . , to give them meaning, with each section construed to be in accord with the statute as a whole." *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 520 (Ky. App. 1998) (citations and internal quotation marks omitted). "[O]ur utmost duty is to 'effectuate the intent of the legislature.'" *Brewer v. Commonwealth*, 478 S.W.3d 363, 371 (Ky. 2015) (quoting *Stephenson v. Woodward*, 182 S.W.3d 162, 170 (Ky. 2005)). "[N]othing requires a statute's [or regulation's] subsection to be read in a vacuum rather than in the context of the

entire statute or [regulation]." *Falk v. Alliance Coal, LLC*, 461 S.W.3d 760, 764 (Ky. 2015).

Subsections (a) and (b) of 501 KAR 3:060 § 2(2) address the legitimate concern for the health of a prisoner who is suicidal or mentally or emotionally unstable. We conclude that the promulgators of the regulation intended that subsection (c) address the same concern for individuals whose mental or emotional state has been altered by alcohol or drugs. Subsection (c) is not concerned with the type or nature of the cell, but with the mental and physical health of the prisoner. It was intended to assure more frequent monitoring of certain prisoners because they are undergoing detoxification, not merely because they occupy a particular cell. Therefore, we conclude that a prisoner occupying a "detox cell" for purposes other than drug or alcohol detoxification, and who is neither suicidal nor mentally or emotionally disturbed, is not the intended subject of "direct in-person surveillance . . . every twenty (20) minutes[.]" 501 KAR 3:060 § 2(2).

There is no genuine issue of fact that McWhorter was placed in a cell referred to as a detox cell. However, that fact is not material to this case. What makes 510 KAR 3:060 § 2(2) inapplicable here are the following material facts about which there is no genuine issue: (1) McWhorter was not placed in the detox cell for the purpose of detoxing (although, as we later discuss, Peterson argues she should have been); and (2) this cell was routinely used for purposes other than

detoxing a prisoner, including weekend incarceration for prisoners like McWhorter. Under such facts, 501 KAR 3:060 § 2(2) does not apply.

When § 2(2) of the regulation does not apply, § 2(1) does. Section 2(1), like § 2(2), establishes a ministerial duty, but it states that "[j]ail personnel shall conduct and document direct in-person surveillance of each prisoner on an irregular schedule, at least every sixty (60) minutes." 501 KAR 3:060 § 2(1). Therefore, to satisfy the ministerial duty owed to an inmate not undergoing detoxification (and not suicidal or mentally or emotionally disturbed), a jailer and his deputies must engage in surveillance of the prisoner not less frequently than "every sixty (60) minutes" regardless of what cell they occupy. *Id.* That was the duty owed to McWhorter by the Russell County jailer and his deputies here.

In viewing the record most favorably to Peterson, we agree with the circuit court that Peterson cannot produce evidence which would induce a reasonable jury to find that the jailer or his deputies failed to satisfy this duty. The record shows, and Peterson does not dispute, the fact that the jailers "observed McWhorter 27 times in the 11 hours and 40 minutes she was held in the Detention Center." (Appellant's Reply Brief, p. 2). Indeed, the video surveillance and the "Russell County Detention Center Detox Isolation Log" show that the deputies looked into the cell and signed the log more frequently than every hour, as required by 501 KAR 3:060 § 2(1).[6] This is more than what is required by the regulation

[6] In addition to unlogged observations, the log contains 15 entries beginning at 1830 hours when McWhorter was checked in, with the notation "OK," and ends at 6:10 a.m. with "No Response." Every other entry noted "Asleep."

and, even under the standard of *Steelvest*, it is sufficient to justify summary judgment on the basis that the jailer and his deputies adequately performed the ministerial duty in question.

Notwithstanding our analysis above, and referencing the jailers' interaction with McWhorter during her prior incarceration that revealed a drug abuse problem, Peterson argues that the deputies should have treated McWhorter as a prisoner undergoing detoxification. But that claim implicates yet another regulation not cited by Peterson in her pleadings. That regulation is 501 KAR 3:110.

Specifically, 501 KAR 3:110 § 1(2)(d) requires the jailer to "provide for separation of the . . . [c]hemically incapacitated prisoner[.]" Additionally, the jailer and his deputies must "assess prisoners for the purpose of . . . [p]roviding an acceptable level of health care services[.]" 501 KAR 3:110 § 2(1)(b). In determining the proper classification based on "prisoner risk and need," the jailer should consider, among other elements, the prisoner's "[n]eed for medical care [and r]ecord of previous institutional behavior[.]" 501 KAR 3:110 § 2(2)(a), (h).

As earlier noted, Peterson did not cite this regulation as having been violated when arguing her case before the circuit court. However, even if we read Peterson's claims in a light so favorable to her as to consider hers a claim for breach of the duty interposed by 501 KAR 3:110, summary judgment would still be proper.

Unlike the previously discussed ministerial duties, the duty to classify prisoners under 501 KAR 3:110 is discretionary. When a different panel of this Court, addressing this very regulation, reversed a trial court's denial of summary judgment based on qualified immunity, the Court said:

> While [a jailer's] duties under 501 KAR 3:110 [to *create* a classification system] are mandatory, his decisions on how to enforce the system involve the use of judgment and discretion in a legally uncertain environment. To enforce such a system requires a jailer and other employees to determine which prisoners are chemically incapacitated or potentially harmful to others. . . . Since [a jailer] retains significant discretion in the manner in which to enforce the system, a claim based on his failure to enforce the prisoner classification system implicates discretionary functions. *See Haney,* 311 S.W.3d at 243 (holding that the enforcement of a general and continuing supervisory duty which depended on constantly changing circumstances was subjective and discretionary).

Carl v. Dixon, 2010-CA-000676-MR, 2011 WL 919896, at *3 (Ky. App. Mar. 18, 2011).[7] The appellees' decision to classify McWhorter as a prisoner not needing special supervision was discretionary. There was no allegation that the appellees acted outside the scope of their employment or in bad faith when exercising that discretion. Therefore, even if Peterson could establish that the deputies were negligent in their performance of this discretionary duty, "[q]ualified 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

[7] We do not cite *Carl v. Dixon* for its value as precedent. We cite the case, instead, to assure a jurisprudential consistency that transcends the published/unpublished distinction, and because "there is no published opinion that would adequately address the issue before the court." CR 76.28(4)(c).

and judgment, or personal deliberation, decision, and judgment, . . . ; (2) in good faith; and (3) within the scope of the employee's authority." *Yanero*, 65 S.W.3d at 522 (citations omitted).

Still, Peterson argues that without regard to how often the surveillance of McWhorter was required, the surveillance was perfunctory and, therefore, legally inadequate. The regulations governing prisoner supervision do not address the manner or sufficiency of surveillance to be undertaken. Rather, 501 KAR 3:060 requires the jailer to "develop a written policy and procedure governing . . . [s]urveillance checks[.]" 501 KAR 3:060 § 1(1), (3)(g). Developing such a policy is a ministerial duty with which this jailer complied. The Russell County Jail policy for surveillance checks of prisoners is contained in Detention Center Policy VI-100.

Russell County Detention Center Policy VI-100 states, in pertinent part, as follows:

> POLICY: It is the affirmative duty to [sic] every detention officer duty [sic] to maintain regular surveillance of the inmates and their activities to ensure the safety and security to the facility, staff, and the inmates.
>
> PROCEDURE: . . . .
>
> Regular surveillance: The Detention Office on duty will conduct a visual inspection of each cell area . . . checking each inmate at least once every hour on an irregular schedule. . . .
>
> Observation: During a surveillance tour, the Detention Officer shall observe inmate's behavior and appearance

> for unusual or questionable situations and event (e.g., bruises or cuts on an inmates face arms, an inmate expressing hostility, showing signs of depression, not eating, not talking to other inmates, or any inmate not in his/her proper cell if inappropriate for that individual.)

Detention Center Policy VI-100.

There is video, documentary, and testimonial evidence establishing that no genuine issue exists regarding the surveillance and manner of the deputies' observation of McWhorter. At least once each hour, as required by 501 KAR 3:060 § 2(1), a deputy did "conduct a visual inspection of" McWhorter's cell to "observe [McWhorter's] behavior and appearance for unusual or questionable situations and event[s]" in compliance with Detention Policy VI-100. What the deputies observed, and what was observable from the videotape on review, was consistent with the deputies' legitimate perception of the circumstances of McWhorter's incarceration: the prisoner, by her own statement, had not ingested dangerous levels of drugs; she said she intended to "sleep off her weekend"; she had "slept off" the previous weekend; and she was snoring loudly as late as the early hours of the morning. There was nothing revealed by the deputies' observations to alert them to any "unusual or questionable situations [or] event" including, in particular, that McWhorter was *in extremis*. There simply were no indicators visible from the deputies' observations that revealed any distinction between a prisoner soundly sleeping, and sometimes snoring, and a prisoner in medical distress.

Peterson contends that "it is necessary to check for breathing when performing these hourly checks." (Appellant's brief, p. 23). As support for this proposition, Peterson cites *Coleman v. Smith*, 405 S.W.3d 487 (Ky. App. 2012), a case in which this Court, addressing another prisoner death, observed that the record indicated "[j]ail employees checked on [the prisoner] every twenty minutes to ensure she was breathing, she had not hurt herself, and she had not done anything out of the ordinary." *Id.* at 491. Peterson takes this comment out of context.

In *Coleman*, this Court reversed the circuit court's denial of the jailers' motion for summary judgment on qualified immunity grounds and remanded for further fact-finding.[8] Unlike McWhorter, the prisoner in *Coleman* was clearly intoxicated at intake and, as a consequence, the jailer classified her as undergoing detoxification; therefore, she was subject to surveillance every twenty minutes. But the main issue in *Coleman* was whether the prisoner was so intoxicated that the jailer violated a detention center policy prohibiting jailers from incarcerating prisoners who are experiencing "serious illness, injury, [or] drug overdose[,]" requiring, instead, that they be sent to a medical facility. *Id.* at 491. While Peterson correctly notes that this Court stated that "[j]ail employees checked on [the prisoner] . . . to ensure she was breathing," *id.*, she fails to note that we were

[8] The case focused on the actions of two deputy jailers performing separate duties. Regarding the first deputy, we held the duty was discretionary and remanded to determine whether the deputy's actions were undertaken in good faith. As for the other deputy and his separate duty, the question was what regulation or prison policy, if any, established the duty the deputy was alleged to have breached. *Coleman*, 405 S.W.3d at 495, 497.

merely describing the conduct of the deputies and not declaring it a deputy's duty to ensure a prisoner is breathing. She also fails to point out the manner in which the jailers in *Coleman* observed for evidence of breathing. We revealed that in the succeeding sentence when we noted: "The employees performing the cell checks would physically walk to the door or window of the cell, look in, and check on the person, looking for anything out of the ordinary." *Id.* That is precisely what the deputies in the case before us did during most of the hourly checks. During others, the deputies entered the cell. McWhorter was observed to be breathing several times as she was heard snoring by three different persons, two deputies and inmate Minnie Peterson, as late as eight or nine hours after she was admitted to the jail.

In order to justify reversal, we would have to superimpose additional responsibilities on jailers not already contained in the regulation. For example, Peterson suggests that because the prisoner's offense (committed weeks earlier) was drug-related, the jailers should have doubted the veracity of the prisoner's denial that she had taken dangerous amounts of drugs. But the importance of her answering this question honestly was emphasized by the deputy and by a prominent sign in the jail that says: "If you have ingested dangerous levels of **Drugs or Alcohol** please tell us. It could save your life." (Emphasis in original). Just how responsible must we make jailers for the bad decisions of prisoners? If we start requiring jailers to doubt the representations of prisoners, then why ask them the question in the first place? Unless the prisoner is so incoherent that no

one but a fool would ask the question (and that is not this case), the jailer must be allowed to rely on the prisoner's response.

We agree with the federal judge in the case that addressed the same parties and same incident that this Court addressed in *Coleman*. That federal judge said, "Simply put, the officers are not required to be mind readers. They are not required to guess what, if any, drugs individuals took. And, they cannot predict that someone may have mixed a lethal combination of drugs." *Smith v. Pike County, Ky.*, CIV.A. 06-257-ART, 2008 WL 3884331, at *12 (E.D. Ky. Aug. 18, 2008), *aff'd sub nom. Smith v. Pike County, Kentucky*, 338 Fed. Appx. 481 (6th Cir. 2009).

Peterson also suggests that existing regulations and prison policies require deputies to do more than mere observation to assure a sleeping prisoner is breathing, even when the prisoner is not suicidal, mentally or emotionally disturbed, or undergoing detoxification. But she does not suggest how that is to be done. Should we require jailers to wake a prisoner every hour, or take their pulse, or place a mirror under their nose to check for respiration? More than being impractical, such an additional requirement could even be dangerous for jailers and the security of the prison. More importantly, we do not have the authority to change the regulation or supplement the policy – that would change the duty the regulators intended to establish. These are prison management and policy decisions beyond this Court's authority to declare.

Finally, we cannot agree that comparative fault concepts have any place in our analysis of qualified official immunity. Qualified official immunity analysis – i.e., determining whether a defendant will have any liability whatsoever – must necessarily precede how liability is to be apportioned. The doctrine of comparative negligence "*does not give a party the right to apportion fault to persons whose liability has been judicially determined not to exist.*" *Morgan v. Scott*, 291 S.W.3d 622, 635 (Ky. 2009) (quoting *Jenkins v. Best*, 250 S.W.3d 680, 686 (Ky. App. 2007)).

We find no genuine issue of material fact that would justify reversal of the grant of summary judgment in this case, nor do we find sufficient merit in any of Peterson's arguments for defining the duties imposed upon jailers and their deputies by the lawfully enacted regulations and detention center policies.

IV. CONCLUSION

Accordingly, we affirm the Russell Circuit Court's January 21, 2015 order granting the appellees summary judgment.

D. LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTING. I respectfully dissent. This case is a close call. In the final analysis, however, summary judgment in favor of the jailer and his deputies involves a judicial weighing of the evidence, which is what the jury as fact finder is supposed to do. Our standard of review in cases when summary judgment has been granted is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving

party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[9] 56.03. Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 480 (Ky. 1991). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Id*. Indeed, "trial judges are to refrain from weighing evidence at the summary judgment stage." *Welch v. Am. Publ'g Co. of Ky.*, 3 S.W.3d 724, 730 (Ky. 1999). Accordingly, "[e]ven though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Steelvest*, 807 S.W.2d at 480.

"The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch*, 3 S.W.3d at 730. Consequently, a party opposing a properly supported summary judgment motion "cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482; *see also Wymer v. J.H. Props., Inc*., 50 S.W.3d 195, 199 (Ky. 2001). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.

[9] Kentucky Rules of Civil Procedure.

App. 2000). Whether a defendant is entitled to immunity is a question of law subject to *de novo* review. *Rowan Cnty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess Cnty.*, 105 S.W.3d 841, 844 (Ky. App. 2003).

If the Kentucky summary judgment standard was the same as that in the federal courts, I would agree that summary judgment in favor of the deputy jailers is appropriate. But it is not. *Compare, e.g., Johnson v. Butler Cnty.*, No. 1:13-CV-00046-GNS-HBB, 2016 WL 247578, at *2 (W.D. Ky., Jan. 20, 2016), *reconsideration denied*, No. 1:13-CV-00046-GNS-HBB, 2016 WL 1369552 (W.D. Ky., Apr. 6, 2016) *with Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368 (Ky. 2014).

No doubt McWhorter bears a portion of the blame for her unfortunate demise, perhaps a large portion; but our comparative fault jury instructions are designed to apportion fault between the parties. A careful review of the entire record, including all video surveillance, indicates, under the strict *Steelvest* standard, that summary judgment was improper. In viewing the record most favorably to Peterson, I am unable to say that Peterson cannot produce evidence which would induce a reasonable jury to find that Foley negligently performed her ministerial duties in checking McWhorter into the detention center, or that the deputy jailers on duty after 7:00 p.m. negligently performed their ministerial duty to conduct surveillance of McWhorter. Although the video surveillance and the "Russell County Detention Center Detox Isolation Log" show that the deputies did look into the cell and signed the log approximately every hour, the checks seem

perfunctory and haphazard, especially under the circumstances of her admittance: for a drug-related DUI.[10] Although McWhorter denied having taken a "dangerous" amount of drugs or alcohol, under the circumstances, especially since McWhorter was **motionless** for an excessive amount of time, a reasonable jury could find that the deputies were negligent both in the frequency and quality of surveillance. The purview of this court is not to act as the factfinder; such is the function of the jury.

I would vacate the Russell Circuit Court's judgment in favor of Bethany Foley, Dennis Grayum, Debbie Grayum, Scott Hadley, Janice Simpson, and Kevin Booth,[11] and remand for trial.

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BRIEF FOR APPELLEE:

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[10] The log contains 15 entries beginning at 18:30 when McWhorter was checked in, with the notation "OK," and ends at 6:10 a.m. with "No Response." Every other entry noted "Asleep."

[11] Peterson's Notice of Appeal listed ten appellees, however, only the appellant's brief only requests relief against six: Bethany Foley, Dennis Grayum, Debbie Grayum, Scott Hadley, Janice Simpson, and Kevin Booth. As I review the file, these deputy jailers were those who allegedly failed to properly observe McWhorter.