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Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001874-MR

A.H. AND H.H., THE MINOR CHILDREN
OF JAMES HATCHER, BY AND THROUGH
HEIDI GALLO, THEIR MOTHER, NEXT
FRIEND, AND GUARDIAN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 09-CI-001990

LOUISVILLE METRO GOVERNMENT;
TOM CAMPBELL, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS
ACTING JAILER AND DIRECTOR OF
LOUISVILLE METRO DEPARTMENT OF
CORRECTIONS; CORIZON, LLC,
FORMERLY KNOWN AS CORIZON, INC.,
FORMERLY KNOWN AS CORRECTIONAL
MEDICAL SERVICES, INC.; LORIE
HATCHER; AND JAMES REESE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

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

LAMBERT, J., JUDGE: A.H. and H.H., through their mother, next friend, and guardian Heidi Gallo (hereinafter, collectively, Gallo), have appealed from several orders of the Jefferson Circuit Court finding the Louisville Metro Department of Corrections and Director Tom Campbell were immune from suit and dismissing their claims against them seeking damages related to the death of their father, James Hatcher, while he was in their custody. We affirm.

This action began with the filing of a complaint in the Jefferson Circuit Court on February 25, 2009, by Gallo as the administratrix of Hatcher's estate and as the next friend and mother of his minor children. As defendants, Gallo named Louisville Metro Government (LMG); Correctional Medical Services, Inc. (CMS); Tom Campbell, individually and in his official capacity as the acting jailer¹ and Director of the Louisville Metro Department of Corrections (LMDOC); nurses Lorie Hatcher and Jennifer Reese; and guards Wayne Mumford, Edward Dugan, William McFarland, Royce Standard, Chad Puente, and Ron Anthony. The complaint alleges that Hatcher entered the jail at 11:00 am on February 21, 2008. After showing signs of a medical issue, Hatcher passed away the following day. In a 2012 order, the circuit court more specifically described the circumstances as follows:

Plaintiffs allege that at the time of his death, Mr. Hatcher was being detained on charges of civil contempt for failure to fully honor his child support obligations. While being detained at the Louisville Metro Corrections

¹ The appellees dispute the accuracy of this title, which shall be addressed later in the opinion.

Department, Mr. Hatcher became disoriented, and he was isolated into a single cell. Corrections officers who were present during this time believed his deteriorating condition while in the cell was caused by him “detoxing”. Plaintiffs allege that the corrections officers did not give Mr. Hatcher any medication because there is a policy at the facility to deny detainees all medications that can be habit forming. After a period of time, the officers notified a nurse of Mr. Hatcher’s deteriorating condition, however, Mr. Hatcher passed away.

Gallo alleged that the guards and nurses were both aware of Hatcher’s condition and ignored the threat to his safety and health, which resulted in his death. She alleged that the defendants’ conduct was intentional, reckless, deliberate, and wanton and/or malicious, and that it was indicative of their deliberate disregard for Hatcher’s life and his rights. She also alleged that reasonable discovery would show that this type of treatment by the defendants was not unusual but was part of a continuing pattern of willful and deliberate ignoring of inmates’ medical needs in the jail and that this was a result of the custom and practices of LMG and CMS that were applied to everyone who exhibited medical conditions or problems while in the jail. On the basis of these allegations, Gallo sought compensatory and punitive damages for violations of Kentucky Revised Statutes (KRS) 71.040, negligence and gross negligence, outrage, malpractice on the part of the nurses, being subjected to cruel and unusual punishment under § 17 of the Kentucky Constitution and the 8th and 14th Amendments to the United States Constitution, and loss of companionship for the minor children.

CMS and the nurse defendants filed an answer raising statute of limitations and immunity defenses. Three guards filed handwritten answers related to observing signs of detox by Hatcher and stating they and the staff had responded properly once it was determined that he had a more serious condition. LMG and the guards filed a formal answer also raising statute of limitations and immunity defenses.

Shortly thereafter, the defendants notified the circuit court that they had filed a notice of removal to the United States District Court, Western District of Kentucky, in March 2009 (No. 3:09CV-223-H). This removal was based upon federal question jurisdiction. Over the course of the federal proceedings, Gallo dismissed her federal claims as well as claims against defendants McFarland and LMG. Gallo then moved to remand the case to state court because only state law claims remained to be decided. While in federal court, the other defendants sought a partial summary judgment to dismiss the claims against them and opposed the motion to remand. In its ruling, the federal court noted that significant discovery had taken place since 2009 and motions for partial summary judgment had been submitted, but it nevertheless granted the motion to remand based upon the significant court involvement expected in the future and the possible raising of a novel issue of state law related to the application of KRS 71.040. Therefore, the district court remanded the remaining claims to the circuit court.

In October 2011, the defendants moved the circuit court on remand for summary judgment seeking dismissal of all claims against Campbell in his

official capacity and all claims against the individual defendants (including Campbell). This was the motion that had been pending before the federal district court. By way of background, the defendants explained that in the federal action, two stipulations of dismissal were entered in January 2011, in which all federal claims for federal constitutional or statutory violations and all claims against McFarland and LMG were dismissed. The January 31, 2011, stipulation of partial dismissal stated that Gallo dismissed her claims against McFarland and LMG, but it specified that “this should not be construed as a dismissal of any claims against Defendant Tom Campbell for any liability in his official capacity while acting as the defacto [sic] county jailer if the claim must be asserted against the county entity.” Gallo also dismissed her claims “for violations of the Constitution of the United States and/or any federal statute.” An amended complaint was filed the following month to conform to the stipulation of dismissal and no longer contained any allegations related to violations of § 17 of the Kentucky Constitution or any unspecified state statutes. In the state action, the defendants sought summary judgment from the circuit court on the basis of qualified official immunity, citing *Bryant v. Pulaski County Detention Center*, 330 S.W.3d 461 (Ky. 2011), as well as official immunity for Campbell in his official capacity. In the alternative, the defendants argued that Gallo failed to state a cause of action under Count 1 for a violation of KRS 71.040, as that statute cannot be used to seek damages from individual LMG employees.

Following a status conference,² the defendants moved the court to order Gallo to amend the complaint to conform to the rulings and stipulations made in the federal action and to properly identify the remaining parties. The court granted the motion by order entered October 7, 2011, and noted that the amended complaint was filed in open court that day. The amended complaint omitted Gallo's claims for federal constitutional or statutory violations. Gallo included additional information about LMG's policy related to medical issues exhibited at the jail:

Specifically, through a long standing policy of Tom Campbell, LMG and CMS all individuals detained at the Jail were denied lawfully prescribed narcotic and psychotropic medications if they had the potential for abuse. This blanket denial had the foreseeable effect of producing hundreds of inmates going through detoxification with the commensurate resulting seizure activity and as a consequence both the Defendant Guards and Defendant Nurses became desensitized to seeing inmates in physical distress, which resulted in an extraordinary delay in providing Mr. Hatcher with medical care resulting in his death.

In their answer, the LMG defendants again asserted statute of limitations and immunity defenses. They also noted that pursuant to the stipulation of dismissal in the federal action, Gallo had dropped all claims against LMG and McFarland. Corizon, Inc., (formerly CMS) and the nurses raised similar defenses in their answer.

The LMG defendants renewed their motion for summary judgment in February 2012. They sought a complete dismissal of the claims against McFarland

² None of the court hearings or conferences were included in the record on appeal.

based upon abandonment pursuant to the stipulation of dismissal as well as dismissal of the KRS 71.040 statutory claims in Count I and the constitutional violation claims in Count IV. They also argued all remaining claims against LMG should be dismissed based upon abandonment, and that all state claims against LMG and Campbell, in his official capacity, should be dismissed based upon sovereign immunity. Finally, they argued that Campbell and the defendant guards should be dismissed based upon qualified official immunity. In response, Gallo argued that issues of material fact precluded the entry of summary judgment.

The court entered an order on September 12, 2012, ruling on the LMG defendants' motions. The court determined that Gallo had abandoned her claims against McFarland and granted summary judgment in McFarland's favor as to all claims against him. The court next considered whether the defendant guards were entitled to a complete dismissal for alleged violations of KRS 71.040 under Count I for failure to state a claim upon which relief could be granted. The court determined that Gallo could bring a private action under KRS 446.070 if the defendants violated KRS 71.040, but it ultimately held that the individual defendants could not be held personally liable for such violations pursuant to KRS 67B.030(2). The court rejected Gallo's argument that KRS 67B.030(2) was an unconstitutional exercise of legislative authority that violated the jural rights doctrine. Therefore, it granted summary judgment in favor of Campbell and the guards for the claims brought against them individually. The court next determined that Gallo's claims for constitutional violations under Count IV had to

be dismissed based upon alternative means for monetary relief, citing *St. Luke Hosp., Inc., v. Straub*, 354 S.W.3d 529 (Ky. 2011). The court did not find that Gallo had abandoned her remaining state claims against LMG. And finally, the court determined that issues of material fact remained as to the individual capacity claims regarding whether the conduct constituted ministerial or discretionary acts. Therefore, the court denied summary judgment on the issues of sovereign immunity and qualified official immunity for the individual defendants.

The LMG defendants moved the court to amend its findings or make additional findings, and to amend its opinion and order pursuant to CR 52.02. In an opinion and order entered June 5, 2014, the court declined to alter its ruling that Gallo had abandoned her claims, but it found that LMG and Campbell, in his official capacity, were entitled to governmental immunity and dismissed those claims accordingly. However, it found that Campbell and the defendant guards were performing ministerial functions in ensuring that an inmate in medical distress received medical attention and, accordingly, held they were not entitled to qualified official immunity in their individual capacities and declined to amend the previous ruling.

Campbell moved the court to alter, amend, or vacate the above order pursuant to CR 59.05, specifically the portion related to the denial of his request to be dismissed in his individual capacity. As director, his functions did not include providing proper supervision and care for inmates, as these were duties assigned to the guards. By order entered March 9, 2015, the court granted Campbell's motion,

holding that he had been improvidently grouped with the other LMG defendants and that there was not any evidence Campbell was personally aware of Hatcher's medical issues. Therefore, the court held that Campbell was entitled to qualified official immunity and dismissed all claims against him in his individual capacity.

On March 4, 2016, the parties entered an agreed order dismissing defendant guards Standard, Anthony, and Puente, with the remaining defendants waiving any claim for apportionment against them. Guard defendants Mumford and Dugan were dismissed after reaching a settlement pursuant to an agreed order entered May 24, 2016.

In 2016, LMD and Campbell moved the court to make its September 12, 2012, June 5, 2014, and April 6, 2015, orders final and appealable.³ Gallo objected to the motion, arguing that the motion was meant to derail the scheduled trial by the prosecution of an expected appeal or force her to add specific terms to the release of other defendants. On December 5, 2016, the court entered an agreed amended order in which it made final and appealable the prior orders dismissing all claims against LMG, Campbell, and the guard defendants; the orders dismissing guard defendants by agreement; the orders granting summary judgment in favor of Campbell in his official and individual capacities; and the orders dismissing all claims against LMG. This appeal by Gallo, directed at LMG and Campbell only, now follows.⁴

³ This motion is not in the record on appeal.

⁴ At the prehearing conference held in this appeal, the parties agreed that Gallo's claims against Campbell in his official capacity were redundant to her claims against LMG and therefore Gallo

Kentucky Constitution to support her position that the circuit court's interpretation of these statutes violates the jural rights doctrine. The circuit court declined to deviate from the plain language of KRS 67B.030(2) in its September 12, 2012, ruling, which we hold was the correct interpretation of the law.

KRS Chapter 71 sets forth the duties of jailers, and KRS 71.040 specifically addresses the treatment of prisoners:

At the time of booking, the jailer shall receive and keep in the jail all persons who are lawfully committed thereto, until they are lawfully discharged, unless the person is in need of emergency medical attention, in which case the arresting officer shall obtain medical attention for the person prior to delivery to the jail. The jailer shall treat them humanely and furnish them with proper food and lodging during their confinement. He shall deliver those who die in jail to their friends, if requested, or have them decently buried at the expense of the county.

In *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 479 (Ky. 2006), as corrected (Sept. 26, 2006), the Supreme Court of Kentucky recognized that:

“[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”). . . .

In this case, however, the county and city have merged to create a metro county government, and this merger affects Gallo's claims.

In 2003, Jefferson County and the City of Louisville merged to form the Louisville/Jefferson County Metro Government pursuant to KRS Chapter 67C, and the Louisville Metro Corrections Department was created pursuant to KRS 71.110 following the adoption of § 30.20(F)(2) of the Louisville Metro Code of Ordinances. The offices of the sheriff and jailer were therefore consolidated by § 105 of the Kentucky Constitution pursuant to KRS 71.110.

KRS Chapter 67B addresses the establishment of a metropolitan correctional services department, and KRS 67B.030 provides:

(1) A metropolitan correctional services department may be established or maintained by ordinance of a consolidated local government or by order of the fiscal court of any county containing a city of the first class, in which the constitutional offices of sheriff and jailer have been consolidated as provided in Section 105 of the Constitution of the Commonwealth of Kentucky. Said department shall, upon its creation or maintenance, constitute a de jure department and division of the consolidated local or county government, having and possessing all of the enumerated powers, responsibilities, and duties hereinafter specifically set forth.

(2) Upon the creation or maintenance of a metropolitan correctional services department by the consolidated local government or fiscal court of a county containing a city of the first class, in which the constitutional offices of sheriff and jailer have been consolidated pursuant to Section 105 of the Constitution of the Commonwealth of Kentucky, all of the duties, responsibilities, and liabilities of the sheriff and jailer as set forth and contained in the Kentucky Revised Statutes, with reference to the operation and maintenance of the county jail and all county correctional facilities shall immediately be vested in the department and thereupon the sheriff and jailer shall have no further responsibility, duty, and liability for the performance of said statutory duties on a personal

basis; provided, however, that said sheriff shall be required to annually inspect all county correctional facilities and render reports as hereinafter provided.

A “department” is defined as “a metropolitan correctional services department created or maintained by a consolidated local government or the fiscal court of a county containing a city of the first class, where the constitutional offices of sheriff and jailer have been consolidated, pursuant to this chapter.” KRS 67B.020(1).

We find persuasive the opinion of the United States District Court, Western District of Kentucky, in *Bruederle v. Louisville Metro Government*, 3:05-CV-818-S, 2007 WL 2462630 (W.D. Ky. Aug. 27, 2007), in which the federal district court addressed an inmate’s state claim brought pursuant to KRS 71.040 for damages incurred while in the custody of LMDOC. After recognizing that this statute imposes a duty on the jailer to humanely treat prisoners, the court determined:

Meanwhile, Ky.Rev.Stat. § 446.070 “creates a private right of action for the violation of any statute,” so long as “the plaintiff belongs to the class intended to be protected by the statute.” *State Farm Mutual Automobile Ins. Co. v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1988). Bruederle is clearly a member of the class contemplated by § 71.040. Nonetheless, Defendants argue that section “71.040 cannot serve as a basis of liability against these defendants. Although KRS Chapter 67B transfers prisoner incarceration duties, previously vested in the Offices of Jailer and Sheriff, to a metropolitan correctional services department created by a consolidated local government, those duties became vested in the department, not in consolidated local government employees.” We agree.

[Statutory language of KRS 67B.030(2) omitted.]

On January 6, 2003, Jefferson County and the City of Louisville merged to form a consolidated government, Louisville Metro Government. Pursuant to Louisville Metro Ordinance § 30.20(F)(2), a Louisville Metro Corrections Department was created and the offices of Sheriff and Jailer were consolidated as provided in Section 105 of the Constitution of the Commonwealth of Kentucky pursuant to Ky.Rev.Stat. § 71.110. Thus, as Defendants argue, the duties normally imposed on the county jailer are vested in the Louisville Metro Corrections Department as required by § 67B.030(2). However, a plain reading of § 67B.030(2) fails to indicate that those duties also extend to Louisville Metro Corrections employees. As such, Bruederle has no claim against Defendants for violation of § 71.040.

Bruederle, 2007 WL 2462630, at *4. See also *Johnson v. Prison Health Services, Inc.*, CIV.A. 3:06-CV-516H, 2009 WL 3856188, at *1-2 (W.D. Ky. Nov. 17, 2009) (relying on the holding in *Bruederle* to find that KRS 71.040 did not provide the basis for a claim against a private contractor for medical care.).

Therefore, we hold that the circuit court properly concluded that Campbell in his individual capacity was not subject to liability pursuant to KRS 71.040. The merger created a consolidated government that vested the powers of the county jailer in the LMDOC, not its employees, and Campbell was never the jailer, but rather served as the Director of LMDOC. Whether Campbell believed the merger did not change anything with respect to the running of the jail is immaterial, and we reject Gallo's argument that KRS 67B.030(2) violated the jural rights doctrine. We note that the circuit court dismissed LMG and, later, Campbell in his official capacity on sovereign immunity grounds, and it did not analyze the

official capacity claims for purposes of Gallo's KRS 71.040 and KRS 67B.030(2) argument.

We also hold that the court properly concluded that LMG and Campbell in his official capacity were entitled to governmental immunity from Gallo's claims pursuant to *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009) ("governmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, *i.e.*, public acts integral in some way to state government.").

Next, Gallo argues that the circuit court improperly granted summary judgment on her constitutional claims set forth in Count VI of her amended complaint. We agree with the circuit court and LMG that Kentucky does not recognize a cause of action that arises from the violation of the state constitution. *See St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 536 (Ky. 2011) ("KRS 446.070 does not create a private right of action for violations of the state constitution because our constitution is not a statute."). Furthermore, we hold that Gallo has "adequate alternative remedies" to pursue, *id.* at 537, and therefore decline to create a *Bivens*⁵ remedy. As LMG states, Gallo has several alternative remedies to pursue, including malpractice claims against the medical and nursing providers, loss of parental consortium, personal injury, and wrongful death. And in the event we were so inclined to create a *Bivens* remedy, we agree that LMG and Campbell, for his discretionary acts in his individual capacity, would be shielded

⁵ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

by the doctrine of sovereign immunity. *See Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001) (official immunity “is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed.”).

For the foregoing reasons, the judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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