

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001208-MR

CARON LEONHARDT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE  
ACTION NO. 09-CI-00910

CELESA GAIL SIMMONS, as executrix  
and next friend of the Estate of  
CELESA M. STONE; and THERESA  
WHITE, as legal guardian and next  
friend of ELIJAH X. STONE, a minor,  
and ROMAN STONE, a minor

APPELLEES

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

MOORE, JUDGE: Celesa M. Stone was an inmate at the Community Corrections  
Center (CCC), a facility operated by the Louisville Metro Department of

Corrections. At approximately 7 p.m. on Wednesday, February 6, 2008, she returned to the facility from either a work release or an Alcoholics Anonymous meeting. At approximately 7 a.m. on Thursday, February 7, 2008, she was discovered dead in her bunk from a drug overdose.

The above-captioned Appellees (who we refer to collectively as the “Estate”) filed an action in Jefferson Circuit Court alleging that Officer Caron Leonhardt of the Louisville Department of Corrections, in her individual capacity, negligently supervised Stone at CCC during this period of time and that Leonhardt’s alleged negligence was a proximate cause of Stone’s death. Leonhardt moved to dismiss the Estate’s action on the basis of qualified official immunity, a defense which immunizes public officers or employees from liability for negligence provided that the negligence in question arises from “(1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.” *James v. Wilson*, 95 S.W.3d 875, 905 (Ky. App. 2002) (internal citations omitted). “Once the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act [was in bad faith].” *Rowan County v. Sloas*, 201 S.W.3d 469, 476 (Ky. 2006) (citing *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001)).

With that said, the circuit court denied Leonhardt's motion to dismiss solely upon its determination that Leonhardt's allegedly negligent acts giving rise to liability in this matter were ministerial rather than discretionary; the only arguments offered by the Estate on appeal relate to the issue of whether Leonhardt's duties at issue herein were ministerial; and, therefore, only the first element of Leonhardt's qualified immunity defense is at issue in this appeal.<sup>1</sup> After careful review, we affirm in part, reverse in part, and remand for additional findings.

### **I. RELEVANT FACTUAL HISTORY**

Leonhardt testified that when Stone returned to CCC at 7 p.m. on Wednesday, February 6, 2008, she strip searched Stone. Pursuant to CCC policy, this strip search did not include a body cavity search. Leonhardt also testified that she escorted Stone back to Stone's assigned dormitory following the strip search and then returned to her duties elsewhere.

CCC houses female inmates in two separate dormitories respectively named "one south one" and "one south two." Stone resided in one south two, along with Christy Brooks who was present in the dormitory when Stone arrived that evening. In a February 7, 2008 sworn statement, Brooks averred that Stone looked "high" when she arrived at one south two. She described that Stone was

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<sup>1</sup> Appellate courts of Kentucky have jurisdiction to consider appeals from interlocutory orders denying motions for dismissal or summary judgment where such motions are premised, as in the case at bar, on the movant's claim of absolute immunity. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009)

“sweating profusely” and that when Stone walked in the door, she “took two steps, eyes rolled back and she pretty much fell asleep standing up.”

Marie Reeves, another inmate, represented that she was also present at that time. According to her sworn statement, Reeves has worked as a nurse, informed Leonhardt of that fact, and her assessment of Stone’s condition was similar to Brooks’s assessment:

Wednesday night Celesa came in and she was very, very overdosed. She was breathing very rapidly, she was sweating profusely, she uh, her heart rate I felt it, it was at least 180, uh, her respirations were very irregular and labored. She, she had a shiny appearance of oil coming through her pores, face was very red, I could only guess that her blood pressure was very high because her face was so red.

. . . .

[Stone] was out of it. At that point I went back to Officer Leonhardt, I told Officer Leonhardt I was very concerned about [Stone’s] health. I did not feel that she would make it through the night. Officer Leonhardt again said don’t worry about it, just you know, make sure she lays down and gets some sleep, she’ll sleep it off.

. . . .

Best I can remember upon the return to the dorm, I had take [sic], I had asked for cleaning equipment ‘cause I noticed there was blood all in the bathroom. And uh, [Stone] had blood all over her, she had been sitting on the toilet. We decided we [*i.e.*, Reeves and Brooks] were going to get [Stone] in the shower to get the blood cleaned off of her. She went to the shower room, she was very combative, very argumentative, she was not herself, she didn’t realize we were trying to help her. I went out to get the cleaning supplies, I again told Officer Leonhardt that this was a medical emergency, that I felt that [Stone] would not make it through the night, that she was very combative, we were going to try and get her

cleaned up, we were going to try and clean up the dorm, but I felt that she should be sent out for medical evaluation and treatment and again Officer Leonhardt refused.

Assuming Reeves's statement is true, there is nothing in the record demonstrating that Leonhardt acted upon it, documented it, or related it to anyone.

Shortly afterward, Leonhardt was in one south one assisting the on-duty nurse with distributing prescribed medications to inmates, a process she refers to as "sick call," when the "shower incident" occurred. It is difficult to determine the time of this event because Leonhardt's sworn statement recites that it began at 9:05 p.m.; the estimate she later provided in her deposition was that it ended between 8:30 p.m. and 9 p.m.; and, the inmates' estimates, which differ somewhat, are qualified by the fact that their dormitories have no clocks. In relevant part, Leonhardt's sworn statement describes the shower incident as follows:

LEONHARDT: I was called down to that dorm by Rosemary Scott, she stepped out of one south two, and said they had a medical emergency and the nurse and I, I think his last name is Holley, he's new, went down to one south two. He stood in the door while I went in the shower area 'cause he didn't know if the girl was decent, and they, Rosemary Scott was saying there was blood everything, there was, it's tracking here and that an they was trying to clean some of it up but I didn't see anything. The girl Celesa Stone was in the shower just crying and being hysterical and the girls were nitpicking about the blood and this and that and she was telling them just to leave her alone, she was trying to get cleaned up, she was trying to wash her stuff off and uh.

INTERVIEWING OFFICER: What stuff?

LEONHARDT: Like uh, she had like a purse, what else did she have.

INTERVIEWING OFFICER: What kind of purse?

LEONHARDT: I think, was it uh, it was a dark blue maybe, kind of like uh, satchel looking purse, it's hard to explain with two handles and I think the other thing she had was like a big Ziploc bag of makeup and it was, everything was wet. I didn't see any blood but everything was wet and the nurse hollered in there to see if everything was okay and [Brooks] said [Stone] had just started her period.

. . . .

And uh, Celesa Stone tried to calm down a little bit and I asked her what was going on and she said everybody is yelling and screaming at her and fussing for making a mess and saying she's getting blood everywhere and said she couldn't help it, that she had just started and she was just crying and I asked her if she was okay and she said she was fine. I told everybody to calm down and you know just try to help her. Even Rosemary Scott that was fussing about it being nasty and stuff was also helping and uh, everything was fine, had calmed down, went back to the one south one to try and start sick call again and we hadn't been standing there but like, I think a minute or two and I heard Rosemary Scott yelling and screaming and she said, she said "say something, say it again and see what happens, just say it again," and I could hear Celesa Stone she was crying, I couldn't hear what she was saying though, they were fussing back and forth, I went down there and as I was trying to go in the door and try to calm them down I was calling for the sergeant, I couldn't even hear on my radio, if they answered me or not, so I keyed it up and just while I had it keyed up I was like, you know, you all need to calm down, you need to stop, you need to stop and I said you need to come out here with me, talking to Rosemary Scott, she had uh, one of those mops, it's like a long handled scrub brush.

INTERVIEWING OFFICER: Okay.

LEONHARDT: Is basically what it is and she was just standing there facing the shower across the room, she just resting it standing it on the end while she was yelling and screaming and I took that from her and when she came out of the dorm, I don't know if she was threatening or not, but I set the stick on this side and me and her went that way, but by the time we was coming out of the dorm the, you know, the backup was coming 'cause they could hear, 'cause I keyed it up and they knew where I was at.

. . . .

I didn't even get to see who actually put Rosemary Scott in one of the visiting booths 'cause they lock and we can keep her, you know, secured and uh, let me think, the sergeant Goldsmith, Sgt. Goldsmith,<sup>[2]</sup> asked me what happened and I kind of gave him a rundown of basically what I just said and uh, he told me to go ahead and finish sick call and they went. I don't even know if Celesa Stone was out of the shower yet.

. . . .

It was probably like five officers down there and uh, they, they, while we were down at two, I believe is when maybe Celesa was getting dressed or something, but they pulled her out and they secured her somewhere else so they could get the two separate stories of what happened and they talked to them, but I was still doing sick call at one south two and then when I finished with the nurse they asked me what happened, and uh, I don't, Rosemary Scott was having a bad day, she has some issues and she was a little, I use her as a work aide a lot but I didn't yesterday 'cause she was a little I don't even know how to explain it, she wasn't in a good mood but uh, we, I ended up doing disciplinary on her and wrote her up and we sent her [to another jail facility] because of the nature of the incident and she said something about she was, Rosemary Scott said that Celesa Stone when we had Rosemary Scott locked in the corner cell, said something about she was digging in her pants and it was nasty and that's why she came out there and told me, by the time, I

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<sup>2</sup> At all relevant times during this matter, Sergeant Michael Lewis Goldsmith was Leonhardt's supervisor.

can't remember exactly how long Rosemary Scott was down there, but by the time we got her property and you know I had to hurry up and finish the write up, when we was getting her to go she was getting mad, she said she was going to report me, that this was wrong, that the other girl is back there high all the time and nobody is doing anything to her, nobody is piss testing her is what she said.

INTERVIEWING OFFICER: Which other girl?

LEONHARDT: Celesa Stone and she said but I'm the one getting in trouble and I'm getting sent back and uh, when Goldsmith came down there you know she said kind of the same thing to him but he said but when we came down there and when Ms. Leonhardt, me, when I keyed up the radio, he said everybody in the building that had a radio heard you yelling and screaming, so. Oh what happened after that, when she was talking to Goldsmith after that she said that she told me that [Stone] was digging in her crotch to pull pills out, I believe she said pills, not drugs and that's how blood got everywhere. I talked to Miller, Donald Miller, which is the union steward, we were talking about the incident.

INTERVIEWING OFFICER: Did he come down there?

LEONHARDT: Yes he did and he was working the front desk, so uh, the next time I went to search a female is when I seen him and we were talking about the incident and I don't know if he ever e-mailed me back but he, we was talking about what Rosemary Scott said about the digging and the pills and it was the end of the shift and he said you know, you ought to tell Goldsmith, you ought to go ahead and test her and I don't remember, I don't remember exactly what the reason was, I'll probably remember in a minute but what ended up happening is maybe it was at the end of the shift 'cause I know we have to give them three hours, but it can be carried to the next shift, it's not that big of a deal about urine testing Celesa Stone. What Miller told me we should do is wait for a few days, because if [Stone] thinks she's in trouble now, it doesn't make sense to me really but, but he,



didn't come back until Monday, but he was going to e-mail me to remind me when I come back Saturday to catch her off guard and urine test her.

. . . .

INTERVIEWING OFFICER: Okay, now, did anybody go back and search [Stone] or try to find any drugs or do anything like that, at that point?

LEONHARDT: No.

INTERVIEWING OFFICER: Do you know why?

LEONHARDT: Actually sir I don't, I really don't.

Leonhardt's account of the shower incident is largely corroborated by the sworn statements and depositions of other witnesses, but a few points of it warrant further discussion. First, according to the record before us, Leonhardt is the only corrections officer who admits any knowledge of Scott's allegation that Stone was smuggling pills into CCC. Goldsmith, who was the only other corrections officer to give any kind of statement in this matter, recalled only that Scott had accused Stone of being intoxicated.

Second, nothing in the record, aside from Leonhardt's testimony, reflects that Leonhardt told anyone about Scott's accusation that Stone was smuggling pills into CCC. In his own deposition, Goldsmith specifically denied that Leonhardt told him anything to this effect.

Third, Goldsmith and Leonhardt both testified that Germane Holley, the nurse who had accompanied Leonhardt on sick call, evaluated Stone at some point during the shower incident. Goldsmith assumed that Holley was evaluating

Stone for signs of possible intoxication. Yet, Goldsmith and Leonhardt both admitted that as far as they knew no one had informed Holley that Stone could have been intoxicated or was exhibiting signs of intoxication. Goldsmith admitted that Holley's purpose in evaluating Stone "wasn't as much for the drugs as it was that the nurse is standing there, [Stone] had claimed she had been bleeding; she was a little upset. You've got a medical person standing there; why not have her checked out." And, aside from Leonhardt's testimony that part of Holley's evaluation involved Holley offering Stone some Motrin and a piece of paper to write on (which Leonhardt presumes was for the purpose of documenting Stone's need for tampons or sanitary pads), nothing in the record documents Holley's evaluation or impression of Stone. Moreover, Leonhardt represented in her sworn statement that Holley was "a new nurse and he gets confused[.]"

Fourth, in their depositions and sworn statements, both Goldsmith and Leonhardt each stated that they had an opportunity to evaluate and interact with Stone and that in their opinions Stone gave no appearance of intoxication. Their statements conflict with those given by Brooks and Reeves, who also observed Stone at this time. Brooks stated, "I mean it was obvious by looking at her, I mean you couldn't not know that [Stone] was really messed up." Brooks averred that during the shower incident she also told the responding officers that she believed Stone was "high on something." To the same effect, Reeves stated:

I was surprised when they brought Celesa back to the dorm, as a matter of fact I told the other ladies in the dorm, she had been out there, Celesa had been out there

with the officers at least an hour, surely they would have evaluated her medical status and taken her to the hospital at that point, the girl couldn't even talk, she couldn't walk, she couldn't breathe hardly.

According to Leonhardt, the shower incident lasted approximately 45 minutes from beginning to end. It culminated in Scott's removal from CCC and Stone's return to one south two. Leonhardt remained in the area as the floor supervisor of Stone's dormitory. She testified that she regularly checked on the inmates until about 11:15 p.m. and that she eventually clocked out and went home at about 11:30 p.m. She testified that during that time, she had another opportunity to observe Stone. She testified that she noticed only that Stone "looked worn out, she just, you could tell she had been crying, but I mean she wasn't like still crying or you know, whiney you know or anything like that." She testified that she specifically asked Stone if she was feeling any better and that Stone responded by saying that she was fine. Additionally, Leonhardt's sworn statement provides:

LEONHARDT: The only thing [Stone's fellow inmates] said is [Stone] needed to lay her ass down 'cause she was sitting up and she's in that top bunk, but I mean they, they didn't say anything except she needs to lay her ass down, but she said "I am, I am."

INVESTIGATING OFFICER: Was she causing any problems or?

LEONHARDT: No.

INVESTIGATING OFFICER: Okay.

LEONHARDT: She wasn't, actually when I came in there, poked my head in and just you know, regular talk to them you know not about the incident but she was

sitting up and was awake and that's when they were telling me she needed to lay her ass down and she just says, you know even back to her I guess nice personality, "I am, I am, I'm going, I'm laying down right now" and I told her you better stay laying down.

However, this differs significantly from Brooks's and Reeves's recollections. Brooks described that when Stone returned to the dormitory following the shower incident, her breathing was "raspy" and "very, very un-normal." Brooks recalled an inmate telling Leonhardt that Stone was going to fall off of her bunk, and further recalled that Leonhardt had replied by instructing the inmates to "just put a bunch of mats around her in case she falls." Similarly, Reeves stated:

Throughout the night, I kept checking on [Stone]. Again, she'd sit up and, on her bunk, everybody in the dorm was concerned 'cause she'd sit up and almost fall off the bunk. Again we got Officer Leonhardt, we told Officer Leonhardt we were concerned that she was going to fall off of her bunk and crack her skull wide open and Officer Leonhardt said just lay her down, so of course we kept laying her down every time she would sit up, but at that point she had started Cheyne-Stoking,<sup>3</sup> I don't know if you know what that is, it's the type of labored breathing, it's called the death rattle, every nurse knows it.

. . . .

[Stone] would sit straight up in bed so that she could breathe and when Officer Leonhardt told us to make her lay down, we went over and stretched her out, I don't remember who that was, I think it was Leonhardt who came over and stretched her out and laid her down. Immediately, her breathing again got bad, but when she

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<sup>3</sup> "Cheyne-Stokes respiration" is defined as "An abnormal pattern of breathing characterized by a gradual increase in depth and sometimes in rate to a maximum depth, followed by a decrease resulting in apnea, usually seen in comatose individuals having diseased nervous centers of respiration." THE AMERICAN HERITAGE STEDMAN'S MEDICAL DICTIONARY 148 (2001).

would sit up so she could breathe, she would keep tipping over and almost falling out of bed.

Officer Leonhardt testified that when she clocked out for the night at approximately 11:30 p.m., she was relieved by another corrections officer. There is no indication from the record that any other corrections officer checked on the inmates of one south two for the remainder of the night or was required to do so after Leonhardt left. And, as noted previously, Stone was discovered dead in her bunk at 7 a.m. the next morning from what the record describes as “mixed drug intoxication.”

## **II. STANDARD OF LAW**

Leonhardt asserted the defense of qualified official immunity by way of a motion to dismiss pursuant to Kentucky Rule(s) of Civil Procedure (CR) 12.02(f), but the trial court considered several matters outside the pleadings in rendering its decision on this motion. As such, Leonhardt’s motion to dismiss was converted into a motion for summary judgment. *See Cabinet for Human Resources v. Women’s Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994); *see also Pearce v. Courier-Journal*, 683 S.W.2d 633, 635 (Ky. App. 1985).

Summary judgment serves to terminate litigation where “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. It is well established that a party responding to a properly

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

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

questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

### III. ANALYSIS

The Estate essentially contends that Leonhardt breached her duty to supervise Stone in two different ways. First, the Estate alleges that Leonhardt failed to follow a mandatory reporting policy that CCC has instituted regarding inmate intoxication and withdrawal. Second, it alleges that Leonhardt failed to follow what it asserts is a mandatory contraband search procedure that was triggered when Leonhardt heard Scott accuse Stone of smuggling pills into the facility. The Estate alleges that Leonhardt’s failure to follow these procedures was a substantial factor in causing Stone’s death. According to the Estate, both of these procedures qualified as ministerial duties, rather than discretionary duties. Therefore, the Estate reasons that if Leonhardt breached either of these duties, Leonhardt is not entitled to assert qualified immunity as a defense against the Estate’s wrongful death action.

#### **A. CCC’s reporting procedure regarding inmate intoxication and withdrawal**

We begin with the Estate’s argument and the circuit court’s conclusion that Leonhardt’s alleged failure to follow a mandatory reporting policy that CCC has instituted regarding inmate intoxication and withdrawal qualified as a breach of a ministerial duty. In relevant part, that policy provides:

#### **I. POLICY**

Louisville Metro Department of Corrections (LDMC) shall ensure detoxification from alcohol, drugs and other sedative hypnotic drugs be conducted under medical supervision in accordance to local, state and federal laws. Inmates with a history of drug and/or alcohol abuse shall be identified during medical screening upon intake.

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### III. DEFINITIONS

. . . .

Detoxification: The treatment of a person who is demonstrating symptoms of intoxication or withdrawal and/or the process of gradually withdrawing alcohol or drugs from a person who is chemically dependent.

. . . .

### V. APPLICABILITY

This policy is applicable to staff and inmates of Louisville Metro Department of Corrections.

### IV. [sic] PROTOCOL

A. There are specific guidelines that shall be followed for the treatment and observation of inmates manifesting mild or moderate symptoms of intoxication or withdrawal from alcohol and other drugs.

B. Once medical is notified that an inmate has been observed exhibiting signs of alcohol or drug withdrawal, the inmate shall be examined immediately by medical staff and transferred to the 2<sup>nd</sup> floor Medical Unit.

C. The following are symptoms of withdrawal:



1. Hallucinations;
2. Sweating;
3. Fever;
4. Confusion and disorientation  
in relation to time, place and  
person (name);
5. Rapid heart rate;
6. Rapid respiratory rate;
7. Tremors; and
8. Seizure activity

. . . .

G. Inmates experiencing severe, life-threatening intoxication (an overdose) or withdrawal shall be transferred under appropriate security conditions to a hospital for further treatment.

The language of this policy describes a mandatory duty (*i.e.*, notifying “medical”). This duty is triggered by an assessment of whether an inmate is exhibiting “signs” of withdrawal or intoxication. The policy’s apparent use of “withdrawal” and “intoxication” as interchangeable terms is somewhat confusing, as is its institutional use of passive voice (*see, e.g.*, provision IV(B): “Once medical is notified that an inmate has been observed exhibiting signs of alcohol or drug withdrawal . . .”). However, provision “I” clearly places the onus of following and enforcing this policy—and thus assessing whether symptoms of intoxication are present—upon LDMC staff. The circuit court specifically determined that this policy applied to Leonhardt’s supervision of Stone, and there was no contrary argument offered below.

The circuit court’s conclusion that that this policy implicated a ministerial duty was based in part upon Goldsmith’s deposition testimony:

COUNSEL: If someone is groggy and sitting up in a bed and about to fall off the top bunk, is there some sort of procedure or protocol they should—should they call you at that point?

GOLDSMITH: [The corrections officer] should have [the inmate] either removed, have her step out and talk to her, see if she is okay. And, again, have a nurse check on her.

COUNSEL: Okay. And that is part of your training?

GOLDSMITH: Yes.

COUNSEL: And part of the requirements and protocol that you need to do as an officer. Is that correct?

GOLDSMITH: That's part of [the corrections officers'] on-the-job training.

On appeal, Leonhardt argues that the assessment of whether an inmate is exhibiting signs of withdrawal or intoxication, pursuant to the above policy, is a discretionary rather than ministerial act and that it entitled her to assert qualified immunity. We disagree.

The general duty that corrections officers owe to inmates “undoubtedly includes summoning necessary medical care or assistance for instances of serious medical need.” *Webb v. Jessamine County Fiscal Court*, 802 F.Supp.2d 870, 888 (E.D. Ky. 2011) (discussing Kentucky Revised Statute(s) (KRS) 71.040). CCC policy and Leonhardt’s training specified Leonhardt’s duty under the circumstances of this case. While the policy did not authorize Leonhardt to diagnose intoxication or withdrawal, it mandated that she use her training to recognize, anticipate, and report specific signs and symptoms of intoxication and

withdrawal in inmates in order to prevent them from sustaining injuries due to intoxication and withdrawal. And, “[m]inisterial training is where you are mandated to train to avoid the event that occurred.” *Sloas*, 201 S.W.3d at 481.

Obviously, some subjective determinations need to be made in deciding whether an inmate is exhibiting symptoms of withdrawal or intoxication necessitating transport to a medical facility. Nevertheless, “[t]he administration of medical care is a ministerial function by employees, including doctors.” *Gould v. O’Bannon*, 770 S.W.2d 220, 222 (Ky. 1989).<sup>4</sup> “[T]hat a necessity may exist for the ascertainment of . . . facts does not operate to convert the act into one discretionary in nature,” *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (internal citation omitted), and, in any event, portions of investigative responsibilities as set out in policies and regulations, which are particular in their directive (as they are in the above policy), are nevertheless ministerial. *Sloas*, 201 S.W.3d at 479; *see also Jones v. Lathram*, 150 S.W.3d 50, 53 (Ky. 2004) (“Trooper Lathram undertook a *ministerial act* in responding to an emergency call for assistance from a fellow

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<sup>4</sup> As recognized in *Smith v. Franklin County*, 227 F.Supp.2d 667, 681 at n. 15 (E.D. Ky. 2002),

*Gould* was distinguished by the Kentucky Supreme Court in the case of *Franklin County v. Malone*, [957 S.W.2d 195 (Ky. 1997)]. *Malone*, 957 S.W.2d at 203 (holding that government officers or employees acting within the scope of her employment would always be immune from liability for negligent performance of official responsibilities). However, *Yanero* has since overruled *Malone* in a move by the Kentucky Supreme Court that overhauled the approach to the doctrine of official immunity. *Yanero*, 65 S.W.3d at 523. Neither *Malone* nor *Yanero* directly or indirectly addressed the issue of whether administration of medical care is a ministerial or a discretionary function. Accordingly, this rule of law, as stated in *Gould*, is presumed to remain in force as it has not been expressly overruled[.]

officer. Responding, *he assessed the facts based on his training as a police officer and upon other applicable standards.*”) (Emphasis added).

Taking the evidence of record in the light most favorable to the Estate, we will paraphrase the reasoning of *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003): a reasonable jury could conclude that Leonhardt should have been aware, following the shower incident, that Stone was exhibiting signs of intoxication; the obvious danger to Stone from that fact should have been foreseen, thus triggering Leonhardt’s affirmative duty to contact medical, as mandated by CCC policy; and, a reasonable jury could further conclude that Leonhardt’s failure to follow the CCC policy was a substantial factor in causing Stone’s death. Whether Leonhardt was negligent in assessing Stone’s condition, with due regard being given to all the facts and circumstances, is a question for resolution by the trier of fact. Therefore, we agree with the circuit court’s decision to deny Leonhardt qualified immunity on this point.

#### **B. CCC’s contraband search procedure**

The summary judgment evidence shows that Officer Leonhardt strip searched Stone when Stone returned to CCC. The evidence also shows that at the time of Stone’s death, Stone had ingested drugs qualifying as contraband. The Estate argues that Officer Leonhardt’s failure to find the contraband prior to Stone’s ingesting it violated a ministerial duty because LDMC had a policy requiring that any contraband in the possession of an inmate be seized by the corrections officers. It argues that because the officer has no discretion as to

whether to seize the contraband, Officer Leonhardt violated her ministerial duty by not seizing the contraband. While we agree that if Officer Leonhardt had found the contraband when she strip searched Stone she would have had a ministerial duty to seize it, the record establishes that Officer Leonhardt was not aware that Stone was hiding any drugs when she strip searched Stone upon Stone's return to CCC. No party alleges that Leonhardt should have been aware at that time, or that Leonhardt's search of Stone was otherwise negligent. Thus, Leonhardt's ministerial duty to seize the drugs could not have arisen at that point.

The Estate further argues, however, that CCC has a policy that mandates an *additional* contraband search of an inmate if, following the inmate's admission to the facility, any other inmate accuses that inmate of smuggling in contraband. Leonhardt, on the other hand, argues that she had the discretion to ignore Rosemary Scott, the only inmate to accuse Stone of smuggling drugs, because Scott had a history of disciplinary problems and a history of making false accusations after finding herself in trouble (as Scott found herself following the shower incident). Therefore, we focus on whether an additional search that could have led to the discovery of the contraband involved ministerial as opposed to discretionary duties.

If CCC has a written policy specifying a mandatory procedure for conducting contraband searches following admission, that policy is not in the record before us, nor was it relied upon by the circuit court. In concluding that searching inmates for contraband at CCC (after a prior strip search has already

been conducted) was a ministerial act for the purpose of qualified immunity, the circuit court instead relied upon its interpretation of three pages of deposition testimony given by Leonhardt and Goldsmith regarding their subjective recollections and understandings of that policy. Goldsmith testified:

COUNSEL: If an officer becomes aware, let's say, later on in the night, okay? Let's say an officer becomes aware, or is told, or just on observing, becomes aware that someone is intoxicated, what do they need to do at that point?

GOLDSMITH: Have them call the sergeant.

COUNSEL: Okay. Now, are they required to call the sergeant?

GOLDSMITH: That would be part of their job function.

COUNSEL: Okay. In other words, that's not left up to them to choose. You know, if they are told, hey, this lady's got contraband, they need to call the sergeant at that point. Is that correct?

GOLDSMITH: If they are told that lady has got contraband, they would remove that person from the dorm then so they wouldn't have a chance to get rid of it. And then they would call the sergeant saying, hey, the inmates are telling me this person has contraband. And the sergeant would more likely respond to the area and have her searched.

COUNSEL: Okay. And there was something I was going to ask you about, the Louisville Metro Department of Corrections Policies and Procedures, that's part of the policy and procedure that, if they become aware that there is contraband, that they remove that person from the general population?

GOLDSMITH: It's been a while since I read the policies and procedures. It might be a post order. It's part of

your training, yes, if somebody has contraband, you remove them. You were trained to do so.

This testimony reflects that if a corrections officer becomes “aware” through his own observations that an inmate is carrying contraband, he must take measures to remove that contraband and has no discretion to allow the inmate to keep it. The circuit court further interpreted this testimony to mean that if any inmate told a corrections officer that another inmate had contraband, the corrections officer must instead defer to and immediately act upon the *inmate’s* observations. However, Goldsmith’s statement that “It’s been a while since I read the policies and procedures” calls the veracity of this interpretation into question, as does the fact that Goldsmith was responding to a series of compound questions that repeatedly referenced the corrections officer’s subjective awareness.

Furthermore, Leonhardt’s deposition testimony, as cited by the circuit court in its judgment, tends to undermine the conclusion that the contraband search policy implicated a ministerial duty rather than a discretionary one:

COUNSEL: Well, I guess what I’m asking is, I mean, if you have reason to believe that somebody has smuggled contraband into CCC, what do you do?

LEONHARDT: Are you—

COUNSEL: What are you required to do *if you have reason to believe, or a reasonable suspicion* that someone has smuggled something in?

LEONHARDT: Okay. I’m trying to understand. So you are saying, maybe if somebody else searched them, and I’m on that floor, *and then I maybe believe or think that the person is doing that*, what I would do?

COUNSEL: Yes.

LEONHARDT: Okay. We call the sergeant and let them know.

We have no doubt that CCC has an explicit, written policy regarding contraband searches; although it was never entered into the record in this matter nor relied upon or analyzed by the circuit court, there are allusions to this policy throughout Goldsmith's and Leonhardt's depositions. Moreover, we have little doubt that a corrections officer's decision to strip search<sup>5</sup> or to direct a medical professional to perform a body cavity search<sup>6</sup> of an inmate is typically a discretionary function involving judgment, deliberation, and the consideration of several factors.

It is alleged, however, that a mere search of Stone's belongings or a simple pat-down might have uncovered the drugs that Stone ultimately died from ingesting. It is alleged that the mere allegation of an inmate is enough to trigger a specific protocol warranting such a search. And, we do not completely discount

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<sup>5</sup> See, e.g., 501 Kentucky Administrative Regulation(s) (KAR) 3:120 § 3(1)(b) and 501 KAR 7:120 § 3(1)(b), each providing in relevant part:

A prisoner *may* be strip searched only on *reasonable suspicion* that is based upon the existence of objective information that may predict the likelihood of the presence of a weapon, drugs, or other item of contraband concealed on a particular prisoner.

(Emphasis added). Notably, both of these regulations list "reliable information" as one of several bases for a "reasonable suspicion." See 501 KAR 3:120 § 3(1)(b)(2); 501 KAR 7:120 § 3(1)(b)(2).

<sup>6</sup> See, e.g., 501 KAR 3:120 § 3(1)(e)(1) and 501 KAR 7:120 § 3(1)(e)(1), each providing in relevant part:

Probing of body cavities shall . . . [n]ot be done *unless there is reasonable suspicion* to believe that the prisoner is carrying contraband in a body cavity[.]



this proposition because Goldsmith indicated in his deposition that no reasonable suspicion was necessary for a corrections officer to conduct these cursory types of searches and that they may be done simply as a matter of course. For example, his deposition provides:

COUNSEL: Do [the inmates] have their own little private—do they have places they can, you know, keep their own stuff?

GOLDSMITH: They have a little box or a bin that they put up underneath their beds.

COUNSEL: Are they locked at all? Or are they just—do they have their own little—

GOLDSMITH: No, they are not locked.

COUNSEL: And are they—I suppose are they subject to—if Officer Leonhardt or any other officer wants to stroll in during the course of their work and inspect what's in those boxes, they can do that, can't they?

GOLDSMITH: Oh, absolutely.

The written contraband search policy would qualify as evidence and we could meaningfully review this part of the circuit court's judgment if we had that policy before us. But, we are left to interpret the provisions of that policy based solely upon speculation and supposition—namely, Goldsmith's and Leonhardt's conflicting subjective beliefs, recollections, and hints about that policy—rather than the policy itself. As a basic rule, “speculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to

surmise and speculation.” *Cave*, 202 S.W.3d at 588. It necessarily follows that when a circuit court is called upon to make an ultimate determination of whether a duty specified in a written policy is ministerial or discretionary, and it bases its ultimate determination of that issue solely upon speculation and supposition about the written policy rather than the language of the written policy itself, the circuit court’s finding must be reversed and the matter must be remanded. We deem this to be the proper course of action here. Upon remand, the parties shall produce the policy in question, and the circuit court shall rely upon and analyze that policy as it revisits this issue.

#### **IV. CONCLUSION**

For these reasons, the Jefferson Circuit Court’s judgment is affirmed in part and reversed in part, and this matter is remanded for further proceedings not inconsistent with this opinion.

ALL CONCUR.

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