

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000264-MR

JANET A. DAVIS, ADMINISTRATRIX
OF THE ESTATE OF ANTHONY
DWAYNE DAVIS, DECEASED

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 12-CI-00519

RONALD L. BISHOP,
INDIVIDUALLY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, KRAMER AND MAZE, JUDGES.

KRAMER, JUDGE: Anthony Dwayne Davis became an inmate at the Fayette County Detention Center (FCDC) on June 19, 2011. On the evening of June 25, 2011, he was transported from FCDC to the University of Kentucky Hospital, where he was pronounced dead shortly thereafter due to what the Fayette County

Coroner noted on his death certificate were “complications of congenital heart disease (D-transposition of the great arteries).” The Coroner also noted “[o]ther conditions contributing to death” were Davis’s “history of chronic drug illicit (cocaine, marijuana) & prescription (benzodiazepins, opiates) abuse and alcohol.”

Subsequently, Janet A. Davis, Administratrix of the Estate of Anthony Dwayne Davis (the “Estate”), asserted a wrongful death claim in Fayette Circuit Court, naming appellee Ronald L. Bishop as a defendant in his individual capacity.¹ Bishop was the director of FCDC during the period of Davis’s incarceration. In its complaint, the Estate asserted Davis died from longstanding cardiac issues because he had not been given an adequate supply of his prescription heart medication (Sotalol) while at FCDC or otherwise provided with adequate medical care because of Bishop’s negligence. Specifically, it asserted Bishop had failed to properly (1) supervise employees of the FCDC; (2) ensure the health, welfare, and safety of the inmates at the facility; and (3) enforce compliance with policies and procedures applicable to the medical treatment of inmates.

Following a period of discovery, Bishop moved for summary judgment on grounds of qualified immunity, along with what he contended was the Estate’s failure to prove for purposes of negligence that he had either breached any duty owed to Davis or proximately caused Davis’s death. The circuit court

¹ Bishop was one of several defendants the Estate named in its suit.

ultimately granted Bishop's motion based on qualified immunity, and the Estate now appeals. Upon review, we affirm.

Appellate review of a summary judgment involves only questions of law and a determination of whether a disputed material issue of fact exists.

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991).

Therefore, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citation omitted). Likewise, whether an individual is entitled to qualified official immunity is a question of law reviewed *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006). Summary judgment is proper only "if 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." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest*, 807 S.W.2d at 480.

On appeal, the Estate argues the circuit court erred by dismissing its suit against Bishop based on qualified immunity. We disagree. Thus, we have no need to address Bishop's alternative argument that dismissal was nevertheless proper because the Estate also failed to demonstrate he acted negligently.

We begin our analysis by outlining a few relevant legal principles. FCDC is a state agency; Bishop was at all relevant times its employee; and when employees of state agencies are sued in their individual capacities, they may be entitled to qualified official immunity from suit. *Bolin v. Davis*, 283 S.W.3d 752, 757 (Ky. App. 2008). Qualified immunity shields employees of state agencies from negligence suits based upon acts or omissions which are: (1) discretionary, rather than ministerial; (2) made in good faith; and (3) within the scope of the employee's authority. *See Yanero v. Davis*, 65 S.W.3d 510, 522-23 (Ky. 2001).

Addressing those factors in reverse order, there is no dispute in this matter that it was within the scope of Bishop's authority as FCDC director to supervise employees of the FCDC; to ensure the health, welfare, and safety of the inmates; and to enforce compliance with policies and procedures applicable to the medical treatment of inmates. Moreover, the Estate does not assert that Bishop's performance or nonperformance of those duties was indicative of bad faith.² The Estate's sole contention is that Bishop was not entitled to qualified immunity because those duties were *ministerial*, not discretionary.

For Bishop, however, those duties were *not* ministerial.

² If the duty that was allegedly breached was discretionary rather than ministerial, it is the burden of the plaintiff to demonstrate by direct or circumstantial evidence that the discretionary act was not performed in good faith. *See Yanero*, 65 S.W.3d at 523.

While the Estate styles its claim against Bishop as a failure “to enforce” various rules, the substance of its claim is that Bishop is liable because he bore responsibility for *generally supervising* the FCDC personnel who initially processed and later monitored Davis as an inmate at FCDC. The Estate believes Bishop did so improperly and that consequently FCDC personnel failed to follow various rules that related to recognizing, assessing, monitoring, or treating inmate medical conditions. In its appellate brief, the Estate describes the circumstances of Davis’s death as follows:

On June 19, 2011, Anthony was arrested and lodged in the FCDC. During the intake process, he was flagged due to his cardiac problem and assessed as a risk for opiate withdrawal. At that time, Anthony informed FCDC staff that he took heart medication, and signed a release of information for them to obtain a list of his current medications from Kroger on Alexandria Drive. A request was faxed to Kroger the next day, but no response was received and no further effort was made to determine what medications he needed. In fact, Anthony did not receive his heart medication until his mother brought it to the FCDC on the evening of June 24, 2011.

Anthony was placed in the medical unit, Unit A, for observation. On June 21, 2011, at approximately 14:00 hours, he was cleared for general population by Shanna M. Meyers, APRN. He was transferred to Unit D.

The next morning, at 03:24 hours, Anthony complained of pain above his right armpit. He was assessed and briefly transferred back to Unit A for treatment of an abscess. At 10:36 hours Anthony was cleared to go back to general population, and was transferred back to Unit

D. On June 23, 2011, at approximately 14:22 hours, he was transferred to Unit JJ.

While in Unit JJ, Anthony began to act strangely. On June 25, 2011, at approximately 01:41 hours, Officer Richard Frans noticed Anthony was talking to himself. Anthony then pressed the intercom and told Officer Frans that “his dog was around back and he needed to contact animal control.” He informed Officer Frans that he wanted to be relocated to medical because he did not want to be around anyone in his subday room. Officer Frans eventually offered to relocate Anthony. After he repeatedly refused to follow Officer Frans’s directives and relocate, he was transferred to the segregation unit, Unit F. Officer Frans questioned the other occupants of the subday room, and was informed that Anthony had been “acting that way” since he came in on June 23rd.

At 03:37 hours, Anthony arrived in Unit F, where his erratic behavior continued. He continued to request help finding his dog, took the stuffing out of his mattress, and said he was “ready to go home.” According to Officer John Rucker, he went to take Anthony out for a visit at approximately 15:00 hours, but Anthony was not lucid or coherent. Officer Rucker notified comprehensive care. However, they did not arrive to assess him until approximately 17:34 hours. Anthony was then transferred back to Unit A.

At 20:42 hours, Officer Levodis Meadows was asked to bring Anthony to the nurse’s station. Upon entering the cell, she found Anthony lying on his bunk unresponsive. According to Officer Meadows, his eyes were fixated and his skin was cool to the touch. Anthony was transported from the FCDC to the University of Kentucky emergency room, where he was pronounced dead at 21:15 hours.

(Record citations omitted).

The Estate then describes how, in its view, the negligence of FCDC personnel substantially contributed to Davis's death:

FCDC Operational Order 9.1-3(2) requires that inmates be given their medications. However, Anthony was not given his medication for more than five (5) days.^[3]

In addition, FCDC Procedure 120 and 501 KAR^[4] 3:060, sec. 2 require wellness checks every twenty (20) minutes of inmates like Anthony who are mentally or emotionally disturbed or in detox. The FCDC Policy and Procedure Manual defines a wellness check as "an observation of the inmate to check for obvious signs of life, including movement and sound."

However, Officer Meadows testified that, when conducting observations she could not remember seeing Anthony. Moreover, if an inmate was in his bunk, an officer walking by could observe very little of the inmate. Because Anthony was cool to the touch when he was found, it is unlikely that the officers observed obvious signs of life when doing the wellness checks.

With that said, the reason Bishop's duties to supervise his staff were *discretionary*, as opposed to ministerial, is largely explained by analogy to a principal's duties of supervision in the context of public schools as set forth in *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014). *Marson* involved a school custodian's failure to perform a ministerial duty to properly extend bleachers; a student injuring himself by falling from the bleachers; a teacher's alleged

³ While Bishop disputes this point, it is irrelevant considering our disposition of this appeal.

⁴ Kentucky Administrative Regulation.

negligence in failing to prevent the student's injuries; and an assertion that the principal of the school was likewise negligent for breaching ministerial duties to supervise and otherwise provide a safe school environment. And in *Marson*, the Kentucky Supreme Court rejected the notion that a principal's duty to provide a safe school environment – a duty that arguably encompassed *all* the circumstances surrounding and leading up to the student's injuries – was ministerial, rather than discretionary:

Principal Martin herself never performed the specific task of pulling out the bleachers. As a principal, she is hired to administer the running of the school, not to personally perform each and every task that must be done in the course of a day. One of her tasks is to direct various school employees in their job performance by assigning job duties and to generally supervise them. She testified that she did so in regard to getting the gym prepared for the students in the mornings. The acts required by her job do not include actually performing tasks that she has assigned to others. Nor is she required to follow behind the custodians every time they extend the bleachers to see that the bleachers are properly extended, even though she has general supervision duties. That is the kind of job detail a supervisor cannot be responsible for.

There is a qualitative difference in actually extending the bleachers and assigning someone to fulfill that task. Actually extending the bleachers is a certain and required task for the custodians to whom the task is assigned, and is thus ministerial to them. It is not a task that is assigned to the principals, and is not a ministerial task as to them. Principals do have a duty to provide a safe school environment, but they are not insurers of children's safety. They must only be reasonably diligent in this task. Because that task is so situation specific, and

because it requires judgment rather than a fixed, routine performance, looking out for children's safety is a discretionary function for a principal, exercised most often by establishing and implementing safety policies and procedures.

Martin's responsibility to look out for the students' safety was a general rather than a specific duty, requiring her to act in a discretionary manner by devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees. Her actions were at least at an operational level, if not a policy- or rule-setting level. Indeed, the principal ordered the custodians to prepare the gym and the teachers to watch the children and to move them around as needed in the morning.

As a principal, she did not have the specific duty to extend the bleachers properly, nor did she choose to undertake that duty. Indeed, principals are not generally required to do maintenance duties, although specific instructions could make such duties required and thus ministerial. *Whitt v. Reed*, 239 S.W.2d 489 (Ky. 1951). Instead, Martin assigned the specific duty to prepare the gym to the custodians by requiring them to get the gym ready for students. She had no specific duty to do a daily inspection of the bleachers to see if they were properly extended, but only a duty to reasonably determine if the custodians were doing their jobs. What is required by the job assigned to the governmental employee defines the nature of the acts the employee performs.

Similarly, she assigned teachers to direct and lead students getting off the buses before school. This too was discretionary decision-making at an operational level. There is no proof that Martin herself ever undertook to direct children coming off the buses or to lead them to the gym.

Martin's oversight and direction of the morning bus routine was a matter of her discretionary decision-making, not a specific directive from the school board. As such, she had to evaluate and exercise discretion in determining how that job was to be done. She assigned the specific duty of preparing the gym to the custodians, and the duty of coordinating the children's movement from the buses into the school and ultimately to the gym to the teachers on duty. Her general responsibility for students' safety was discretionary. She is therefore entitled to qualified official immunity.

Id. at 299-300.

Obviously, the setting of *Marson* was different than the setting of this case – it was a public school, not a correctional facility. Nevertheless, the same logic applies. The Estate correctly notes that Bishop agreed during his deposition that as director of FCDC, it was his “duty and responsibility to ensure the health and safety and welfare of the inmates” and that “by regulation and law, part of that overseeing of the facility [was] to ensure the health, safety and welfare of the inmates.” But, FCDC is a large correctional facility that houses many inmates who require supervision twenty-four hours a day, seven days a week. And, Bishop testified that his job did not require him to – and that he did not – participate in the supervision of Davis, or in any decision regarding Davis's healthcare.

Rather, the specifics of Bishop's duties as FCDC director were at an operational level: They included the annual review of the policies and procedures related to the healthcare of inmates; review of whether staffing levels were

appropriate to effectuate those policies and procedures; providing input during any renegotiations of healthcare vendor contracts;⁵ and, as his title implied, *directing* others to perform the day-to-day, ministerial functions of operating a jail.

To paraphrase and analogize to *Marson's* discussion of a school administrator's duties relative to custodians: The acts required by Bishop's job of FCDC director did not include actually performing tasks assigned to others, such as assessing inmates during the intake process, providing inmates with medication, or assessing and monitoring their health. Nor was he required to personally oversee the inmates. That is the kind of job detail a supervisor cannot be responsible for. There is a qualitative difference in actually supervising inmates and assigning someone to fulfill that task. Actually supervising inmates is a certain and required task for the corrections officers or nurses to whom the task is assigned and is thus ministerial to them. *See id.* at 300-301 (explaining that the teacher assigned to supervise the area in which the accident occurred had a ministerial duty to do so). It is not a task that was assigned to Bishop, as the FCDC director, and was therefore not a ministerial task as to *him*. *See Haney v. Monsky*, 311 S.W.3d 235, 243 (Ky. 2010) (holding that the enforcement of a

⁵ FCDC does not provide medical services to inmates and instead contracts those services to private entities.

general and continuing supervisory duty which depended on constantly changing circumstances was subjective and discretionary).

The Estate also insinuates that Bishop's "duty to supervise" could have been binary and ministerial in this matter because Bishop may have had "notice" of problems with FCDC staff prior to this incident. In this vein, the Estate points to a variety of newspaper articles from 2008 through 2010, which it added to the record as attachments to a CR 59.05 motion it filed after the circuit court summarily dismissed its claim. The Estate details this information at length in its appellate brief's "statement of the case."

But, the Estate fails to explain how any of that information is relevant here: One of the articles details a singular incident involving the 2010 death of an inmate due to a pulmonary embolism, while most of the articles detail hostile workplace allegations of sexual harassment and retaliation from male employees. That aside, the circuit court disregarded this information, and properly so, because a CR 59.05 motion is not a vehicle for raising arguments or introducing evidence that could and should have been presented during the proceedings before the entry of the judgment. *See Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997).

In short, the Estate sued Bishop for an alleged violation of a discretionary duty, not a ministerial one. And because the Estate offers no

contention that Bishop performed that duty in bad faith, Bishop was entitled to qualified immunity. Accordingly, we AFFIRM.

ALL CONCUR.

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