IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

LINDA MICHELLE WARE, in her individual capacity, in her capacity as the surviving natural mother and next of kin of DEMONTAE TYRONE WARE, and in her capacity as Administratrix of the ESTATE OF DEMONTAE TYRONE WARE, Plaintiff	*	CIVIL ACTION 2016CV278728
	*	JUDGE MCBURNEY
vs.	*	
THEODORE JACKSON, NAYMAN TAYLOR, ASHLEE ALLEN, KOURTNEY KING, TERRENCE WHALEY, SHAIMIKA JONES, MONSURU KOTUN, AUDREY PAYTON, and LACHONDA JOHNSON, Defendants	*	

ORDER ON DEFENDANTS TAYLOR, KING, WHALEY, JONES, KOTUN, AND PAYTON'S MOTIONS FOR SUMMARY JUDGMENT

DeMontae Ware was murdered by his cellmate Bobby Wynn in the county jail in 2014, days after Ware should have been released from custody. This suit, brought by Ware's mother and Ware's estate, followed. Plaintiff sued then-Sheriff Ted Jackson, along with a number of his employees. Before the Court are motions for summary judgment from six of the Sheriff's employees: Defendants Nayman Taylor, Kourtney King, Terrence Whaley, Shaimika Jones, Monsuru Kotun, and Audrey Payton (collectively "Officer Defendants"). The Officer Defendants seek summary judgment as to all of Plaintiff's claims on the ground that they are protected by qualified immunity (a/k/a official immunity). They also seek summary judgment on Plaintiff's wrongful death claim on the ground that Wynn's criminal act was the superseding proximate cause of Plaintiff's fatal

injuries.[1] Finally, they seek summary judgment as to Plaintiff's punitive damages claim. For the reasons set forth below, the Court GRANTS in part and DENIES in part the Officer Defendants' motions for summary judgment.

Factual Overview

On the night of Ware's murder, the Officer Defendants were working on the third floor of the jail, where Ware and Wynn were housed. Ware and Wynn were both being held in Zone 200 North, an area of the third floor reserved for inmates with serious mental health issues. Taylor, King, Whaley, Defendant Ashlee Allen,[2] and another unnamed cadet worked the evening shift from 3:00 p.m. to 11:00 p.m. Taylor was the supervisor for that shift. Whaley only worked part of the evening shift, arriving shortly before shift change and staying in service for the following shift.

At the outset of the evening shift, Wynn was housed in cell 205 with inmate Andre Williams. At some point during the shift, Defendant Allen received a report from an unknown source that Wynn and Williams had been involved in an altercation. Based on this report, Allen and another cadet took Williams out of cell 205 and moved him into an administrative area. Allen brought the altercation to Taylor's attention and recommended that Wynn be moved to a different cell. Taylor agreed.

King was not on the floor at the time that Wynn and Williams were separated. She was stationed in the control tower. Allen later told King about the altercation and King assisted with moving Wynn to a new cell: Ware's cell. That location was selected after

[1] Defendants Taylor and Payton separately argue for summary judgment on Plaintiff's failure to train and supervise claims against them, claiming they are protected by qualified immunity and that proximate cause issues foil Plaintiff's claims.

[2] Defendant Allen is not one of the Officer Defendants; she is represented by separate counsel and did not join in the motion for summary judgment filed collectively by the Officer Defendants through the County Attorney.

Allen and King reviewed background information for all of the inmates in Zone 200. The pair determined there were no empty cells to which Wynn could be transferred. After examining the available cells in the Zone for a suitable landing spot for Wynn, Allen and King decided to place Wynn with Ware in cell 202. The jail's Classification Unit -- responsible for assessing the suitability of transfers -- was never contacted about the move.

Whaley, at Taylor's direction, joined Allen and King in physically relocating Wynn. Wynn was not happy about the move. Indeed, Allen at one point felt it necessary to draw her taser to prompt Wynn along.[3] After the transfer, Allen informed Taylor that Wynn had been moved. No incident report was completed and no jail roster correction or cell location change forms were prepared.

The shift changed at 11:00 p.m. The overnight shift ran from 11:00 p.m. to 7:00 a.m. Whaley stayed on for the overnight shift; he was joined by Jones and Payton and eventually Kotun, who arrived late for his shift due to illness. There was no dedicated floor supervisor on duty for this shift, as Taylor had departed when the evening shift ended. Payton did serve in a supervisory role, but, as unit commander that night, she was assigned to cover multiple floors.

Records show a security round was completed in Ware's Zone at 1:55am. This was the last round conducted before the murder. At approximately 3:00 a.m., Whaley spoke to Wynn while making a status check in preparation for breakfast. Wynn told Whaley that he had killed Ware. Ware was found unresponsive on the floor of his cell and later pronounced dead. Wynn was subsequently tried for and convicted of Ware's murder.

[3] It appears from the record that Allen never activated or "fired" her taser; no use of force report was completed.

Standard of Review

Summary judgment is proper "when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Navy Fed. Credit Union v. McCrea*, 337 Ga. App. 103, 105 (2016) (quotation marks and citation omitted); O.C.G.A. § 9-11-56(c). When the movant has made such a showing, the opposing party "cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." *Sheffield v. Conair Corp.*, 348 Ga. App. 6, 7 (2018) (citation omitted). The Court must view all the facts and reasonable inferences from those facts in a light most favorable to the non-moving party. *Richards v. Robinson*, 339 Ga. App. 729, 730 (2016).

Qualified Immunity

Qualified immunity "protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without wilfulness, malice, or corruption." *McDowell v. Smith*, 285 Ga. 592, 593 (2009) (citation and punctuation omitted); *see also* Ga. Const. Art. 1, § 2, ¶ IX (d); O.C.G.A. § 50-21-24(2). "Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or an intent to injure." *McDowell*, 285 Ga. at 593 (citation and punctuation omitted). This protection extends to the Sheriff's employees. *See generally Schmidt v. Adams*, 211 Ga. App. 156, 156-57 (1993).

"A ministerial act is commonly one that is simple, absolute, and definite… requiring merely the execution of a specific duty." *Hicks v. McGee*, 289 Ga. 573, 575 (2011) (citation and punctuation omitted). In contrast, a discretionary act is one that "calls for the exercise of personal deliberation and judgment, which in turn entails

examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." *Id.* at 575-76 (citation and punctuation omitted).

Evidence sufficient to establish a ministerial duty may include "a written policy, an unwritten policy, a supervisor's specific directive, or a statute." *Wyno v. Lowndes County*, 305 Ga. 523, 527-28 (2019) (citation and punctuation omitted); *see also Roper v. Greenway*, 294 Ga. 112, 114-15 (2013). Procedures or instructions purporting to create a ministerial act "must be so clear, definite, and certain as merely to require the execution of a relatively simple, specific duty." *Wyno,* 305 Ga. at 528 (citation and punctuation omitted). Finally, "[t]he determination of whether an action is [ministerial or discretionary] depends on the character of the specific actions complained of, not the general nature of the job, and is to be made on a case-by-case basis." *McDowell*, 285 Ga. at 594-95 (citation and punctuation omitted).

The determination of whether a public agent is entitled to qualified immunity is usually a question of law for the court. *Wyno*, 305 Ga. at 527. However, "where the relevant facts pertaining to immunity are in dispute, the trial court is without authority to resolve those factual issues on a motion for summary judgment." *Glass v. Gates*, 311 Ga. App. 563, 575 (2011) (citation omitted). Rather, a jury must resolve the factual issues, after which the trial court can make a determination as to whether the complained-of acts (or omissions) were discretionary or ministerial. *Id.*

Here, there is neither allegation nor evidence that the Officer Defendants acted with malice or engaged in intentional misconduct. Consequently, the qualified immunity issue hinges on whether the actions or omissions forming the basis of Plaintiff's claims were ministerial or discretionary in nature. If ministerial, the Officer Defendants are not entitled to the protections of qualified immunity.

Plaintiff claims the Officer Defendants failed to execute a number of ministerial duties, including the following:

(1) completing an incident report of Wynn's supposed altercation with Williams;

(2) preparing notification of charges against Wynn;

(3) investigating Wynn's attack on Williams (including obtaining witness statements);

(4) taking both Wynn and Williams to the Medical Unit to be evaluated for injuries;

(5) conveying information about the altercation to the overnight shift;

(6) completing a use of force report;

(7) completing a cell location change form;

(8) obtaining approval from the Classification Unit prior to moving Wynn and notifying the Classification Unit of his move; and

(9) ensuring that two security rounds were conducted each hour during the shift.

Duties (1) through (8) were the responsibilities of the evening shift Officer Defendants (Taylor, King, and Whaley), while duty (9) pertains to the overnight shift Officer Defendants (Whaley, Jones, Kotun, and Payton).

The Officer Defendants contend that all of these duties were discretionary and thus trigger the protections of qualified immunity. The Court disagrees and finds, for the reasons discussed below, that none of the Officer Defendants is entitled to summary judgment on the ground of qualified immunity.

First, with respect to the evening shift Officer Defendants, there are material facts in dispute for duties (1) through (5). Specifically, there is a factual dispute about the nature of the altercation between Wynn and Williams. The evening shift Officer Defendants contend, in unison, that the "fight" between Wynn and Williams was verbal. Plaintiff on the other hand points to evidence in the record that the altercation was

physical, and that the evening shift Officer Defendants knew it was so. A physical altercation would trigger duties (1) through (5).

Plaintiff specifically relies on a statement given by Williams during the investigation of Ware's murder.[4] In that 11 September 2014 statement, just a few days after the murder, Williams said that Wynn had hit him in the face five times. Williams said his eye was blackened and he was bloodied from the assault. Williams also reported that, when he was pulled out of his cell, he told the detention officers that he wanted to be taken to the medical unit (he never was). Plaintiff argues that the Officer Defendants may have classified the incident as verbal to avoid many of the non-discretionary duties enumerated above. For example, Defendant Allen in her deposition testified that it was common for officers to forgo incident reports, especially if the incident happened near the end of a shift when the officers were ready to go home, as completing these reports would greatly delay their departure.[5] Indeed, Defendant Taylor testified that it could take several hours to complete solely the incident report (duty (1) above).[6]

Plaintiff's evidence raises factual questions as to the nature of the altercation between Wynn and Williams and the Officer Defendants' knowledge of same. Again, if the altercation was physical, it would automatically trigger duties (1) through (5); the Officer Defendants would have no discretion as to whether or not to perform those steps. The Court is without authority to resolve this material factual issue on a motion for summary judgment. *Glass*, 311 Ga. App. at 575; *Nichols v. Prather*, 286 Ga. App. 889

[4] Plaintiff's Exhibit 53.

[5] Deposition of Ashlee Allen, 27-28. Plaintiff contends -- and the current record evidence supports -- that the move happened immediately before the shift change.

[6] Deposition of Nayman Taylor, 28-29.

(2007) (factual dispute as to what deputy was doing at the time his vehicle collided with decedent precluded summary judgment on the basis of qualified immunity). Therefore, the evening shift Officer Defendants are not entitled to summary judgment on the defense of qualified immunity.[7]

With respect to the overnight shift Officer Defendants, the evidence supports Plaintiff's contention that the lone job responsibility at issue -- duty (9): the duty to ensure two security rounds were conducted each hour during the shift -- was a ministerial duty that was not executed. Both a written policy (FCSO Policy 1500-18)[8] and the testimony of the Fulton County Sheriff's Office[9] demonstrate that this was a non-discretionary, straightforward ministerial duty. Nevertheless, the overnight shift Officer Defendants argue that this was a discretionary role because they had some flexibility as to when the rounds were performed. Legally, this claim is questionable: that there exists some discretion in when to perform a duty does not make the duty non-ministerial. *See, e.g., Lincoln Cty. v. Edmond*, 231 Ga. App. 871, 874 (1998) (removal of tree from county road constituted ministerial duty regardless of elements of discretion that might be present during execution of the mandatory job). Put differently, the fact that detention officers may have had the discretion to walk their rounds clockwise one time and counterclockwise the next -- or space the patrols apart by 40 minutes on one shift and by

[7] Given this finding, it is not necessary for the Court to address the remaining evening shift duties, duties (6) through (8). However, even a cursory analysis of those responsibilities suggests that they, too, were ministerial. For instance, with respect to duty (7) (cell location change form), the testimony of the Fulton County Sheriff's Office, supports the finding that it was a mandatory ministerial duty that was not executed.

[8] Plaintiff's Exhibit 19.

[9] Deposition of Fulton County Sheriff's Office, 162-163.

30 minutes the next -- did not make the non-discretionary job (*i.e.*, the requirement of performing two patrols per hour) a discretionary one.

More fundamentally, this is a material factual question that is disputed -- precisely what this Court should not decide in the context of a motion for summary judgment. Plaintiff insists the role was ministerial and the overnight shift Officer Defendants say it was not. What is clear is that a security round before Ware's murder was missed.[10] What a jury must decide are the consequences for the overnight shift Officer Defendants for this failure to perform. The overnight shift Officer Defendants, like the evening shift Officer Defendants, are not entitled to summary judgment on the defense of qualified immunity.[11]

Wrongful Death

The Officer Defendants also move for summary judgment on Plaintiff's wrongful death claim. They argue that they did not proximately cause Ware's death.

"It is well established that to recover for injuries caused by another's negligence, a plaintiff must show four elements: a duty, a breach of that duty, causation and damages." *Goldstein, Garber & Salama v. J. B.*, 300 Ga. 840, 841 (2017) (citation and punctuation omitted). With respect to causation, a plaintiff must prove that a defendant's negligence was both the "cause in fact" and the "proximate cause" of the injury. *Reed v. Carolina*

[10] Investigator Sergeant Starling Johnson, lead investigator into Ware's death, confirmed the required number of security rounds were not performed during that hour of that shift. (Fulton County Sheriff's Office deposition; 236-237; Plaintiff's Exhibit 76).

[11] Critical factual questions also remain as to what roles Defendants Kotun and Payton had with respect to the security rounds given that Kotun was at times located off the floor in the "tower" and Payton was responsible for overseeing more than one floor. Plaintiff points to Kotun's duty to perform rounds before he went to the tower, as well as questions as to when Kotun was in the tower, as well as Kotun's separate duties to ensure that rounds were performed and documented if he was in the tower. Likewise, Plaintiff challenges that Payton was absolved from security rounds given her supervisory role. These are questions for a jury. *See Roberts v. Mulkey*, 343 Ga. App. 685, 689 (2017) (if relevant facts pertaining to immunity are in dispute, the trial court is without authority to resolve those factual issues on a motion for summary judgment).

Cas. Ins. Co., 327 Ga. App. 130, 132 (2014). To show that a defendant's conduct was the cause in fact of a plaintiff's injuries, the plaintiff ordinarily must prove that, "but for this conduct, [plaintiff] would not have sustained the injury." *Strength v. Lovett*, 311 Ga. App. 35, 43-44 (2011). To show proximate cause, on the other hand, "the question is not whether the defendant's conduct caused the injury, but whether the causal connection between the defendant's conduct and the injury resulting therefrom is too remote to be the basis of a recovery." *Reed*, 327 Ga. App. at 132 (citation and punctuation omitted). "The requirement of proximate cause constitutes a limit on legal liability; it is a policy decision that, for a variety of reasons . . . the defendant's conduct and the plaintiff's injury are too remote for the law to countenance recovery." *Id.* (citation and punctuation omitted).

Generally speaking, "an intervening and independent wrongful act of a third person producing the injury, and without which [the injury] would not have occurred, should be treated as the proximate cause, insulating and excluding the negligence of the defendant." *Goldstein, Garber & Salama*, 300 Ga. at 841. But in order for the intervening act to become the sole proximate cause of a plaintiff's injuries, it "must not have been foreseeable by the defendant, must not have been triggered by the defendant's act, and must have been sufficient by itself to cause the injury." *Zaldivar v. Prickett*, 297 Ga. 589, 601 (2015) (citation and punctuation omitted.). As further explained by the Supreme Court,

> if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act.

Goldstein, Garber & Salama, 300 Ga. at 842 (citation and punctuation omitted). Stated a different way, "[o]ne is not bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and *slightly* probable." *Dowdell v. Wilhelm*, 305 Ga. App. 102, 105 (2010) (citation and punctuation omitted; emphasis in original). Normally, questions of proximate cause are for the jury. *Id.* at 104. However, plain and indisputable cases may be decided by the trial court as a matter of law. *Id.*

It is undisputed that Wynn's criminal acts intervened between any breach of duty by the Officer Defendants and Ware's death, and that Ware's death would not have occurred absent those criminal acts. Thus, the relevant question is whether Wynn's criminal act of murdering Ware was a foreseeable consequence of the Officer Defendants' alleged negligence in failing to execute their duties.

The Court does not find this to be an easy question to answer -- *i.e.*, plain and indisputable -- with respect to the evening shift Officer Defendants. Significantly, there are unanswered questions about the nature of Wynn's altercation with Williams and the evening shift Officer Defendants' knowledge of same. These questions cloud the foreseeability analysis to the point that the Court would be speculating on an answer that must, at this procedural juncture, be obvious. If the Officer Defendants knew that the altercation was physical, if they observed Williams' bloodied face, and they knew Wynn was unhappy with the move to Ware's cell, was the end result foreseeable? Because the question of proximate cause is not plain and indisputable, it should go to a jury.

With respect to the overnight shift Defendants (excluding Whaley), the question is easier to answer. Central to Plaintiff's overall negligence claim against the County actors is the assertion that the evening shift failed to properly notify the overnight shift of Wynn's situation (including the altercation). Without this information, there is no clear reason

for Jones, Kotun, and Payton to have been especially concerned about Ware or Wynn. While these three may have missed security rounds, the evidence does not support that Jones, Kotun, and Payton had any reason to think that Wynn might attack Ware, let alone kill him. It simply was not probable that a missed security round would lead to Ware's murder. Possible? Yes. Probable, no. *See Harvey v. Nichols*, 260 Ga. App. 187 (2003) (inmate's suicide was not a probable consequence of officers' failure to perform surveillance protocol where there was no evidence showing anything out of the ordinary had occurred), *disapproved on other grounds by City of Richmond Hill v. Maia*, 301 Ga. 257 (2017). There is also nothing in the record to suggest that if that last security round had been performed, Wynn would not have been able to kill Ware. Any assertion that Wynn's efforts to kill Ware would have been unsuccessful if procedure had been followed is pure speculation. The Court thus concludes as a matter of law that the failure of Jones, Kotun, and Payton to perform the second rounds, while a dereliction of duty, was not the proximate cause of Ware's death. Wynn's assault was an intervening event that severed any causal connection between the Officers' conduct and Ware's murder. Thus, the three Officers are not liable for Ware's wrongful death.[12]

[12] Plaintiff argues that summary judgment on this claim is improper given the "special relationship" between a jailer and detainee. But beyond invoking the special relationship doctrine -- about which there is very little case law -- Plaintiff does not articulate how this special relationship exception operates to preclude summary judgment in this case. The Georgia Supreme Court recognized the special relationship between a jailer and his prisoner in *City of Richmond Hill v. Maia*, 301 Ga. 257, 260 (2017). In that case, the Court noted the general rule that suicide absolves an alleged tortfeasor of liability. However, the Court held that there can be a deviation from that general rule in cases involving a special relationship between the tortfeasor and the decedent, including that of jailer-detainee. This case, however, involves a homicide and Plaintiff has not explained why or how this special-relationship exception applies outside of the suicide context. Based on the record before the Court, the Court finds that such an exception does not apply to the facts of this case as they have thus far been developed.

In sum, the Court denies summary judgment to King, Taylor, and Whaley on the wrongful death claim and grants summary judgment to Jones, Kotun, and Payton on the wrongful death claim.

Failure to Train/Supervise Claims against Taylor and Payton

Taylor and Payton seek summary judgment on Plaintiff's failure to train and supervise claims against them. The Court of Appeals has provided fairly specific guidance on this question, having addressed Plaintiff's similar failure to train and supervise claim against Sheriff Jackson and found those acts to be discretionary -- thus falling within the scope of the Sheriff's qualified immunity. *Ware v. Jackson*, 357 Ga. App. 470, 474-75 (2020). The "operation of a police department, including the degree of training and supervision to be provided its officers, is a discretionary governmental function as opposed to a ministerial, proprietary, or administratively routine function." *Harvey*, 260 Ga. App. at 191. Like Jackson, Taylor and Payton enjoy the protection of qualified immunity for these claims. And, even assuming they did not, any failure to train and supervise on the part of Taylor and Payton would be too remote to serve as the proximate cause of Ware's injuries here.

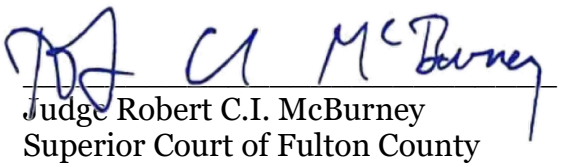
Punitive Damages

Finally, the Officer Defendants seek summary judgment on Plaintiff's claim for punitive damages. Given that the wrongful death claim remains as to the evening shift Defendants, the Court will preserve this claim as to King, Taylor, and Whaley. Since no such claims remain against Jones, Kotun, and Payton, Plaintiff's punitive damages claim against them fails. "A claim for punitive damages is derivative in nature and will not lie in the absence of a finding of compensatory damages on an underlying claim." *Ratliff v. McDonald*, 326 Ga. App. 306, 314 (2014) (quotation marks and citation omitted).

Conclusion

In summary, none of the Officer Defendants enjoys a blanket protection of qualified immunity. Further, Plaintiff's wrongful death and punitive damages claims survive as to King, Taylor, and Whaley, as well as non-moving Defendant Allen. And Plaintiff's false imprisonment claim against Johnson is also still pending. However, no claims survive as to Jones, Kotun, Payton, and Sheriff Jackson. The parties are to submit a consolidated pre-trial order by 26 April 2021. The case will likely be calendared for trial in late May or early June.

SO ORDERED this 2nd day of April 2021.



Judge Robert C.I. McBurney
Superior Court of Fulton County