APPENDIX TABLE OF CONTENTS

Case: 17-13999 Date Filed: 10/02/2018 Page: 1 of 17

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13999

D.C. Docket No. 2:15-cv-02274-JEO

THE ESTATE OF MARQUETTE F. CUMMINGS, JR.,

Plaintiff-Appellee,

versus

CARTER DAVENPORT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(October 2, 2018)

Before WILLIAM PRYOR, MARTIN, and BALDOCK,* Circuit Judges:

---

* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

WILLIAM PRYOR, Circuit Judge:

This interlocutory appeal of the partial denial of Carter Davenport's motion to dismiss the amended complaint by the estate of Marquette F. Cummings Jr. requires us to decide whether Davenport, a prison warden, satisfied his threshold burden of establishing entitlement to qualified immunity. Cummings, a prisoner, was stabbed by a fellow inmate, was transported to a hospital, and died the next day. His estate filed a civil-rights complaint, *see* 42 U.S.C. § 1983, that Davenport violated the Eighth and Fourteenth Amendments to the Constitution by illegally interfering with Cummings's end-of-life medical care with deliberate indifference to his serious medical needs, *see Estelle v. Gamble*, 429 U.S. 97 (1976). Davenport invoked qualified immunity, but the district court ruled that he failed to establish that his alleged actions—which included the entry of a do-not-resuscitate order and the decision to remove Cummings from artificial life support—fell within the scope of his discretionary authority, his threshold burden for qualified immunity. Because Alabama law establishes that Davenport's discretionary authority did not extend to the alleged actions, we affirm.

I. BACKGROUND

We divide our discussion of the background in three parts. First, we describe the facts about Cummings's death. Second, we describe the factual allegations that form the basis of the estate's claim of deliberate indifference against Davenport. Third, we relate the proceedings in the district court. Of course,

for purposes of this appeal from the partial denial of a motion to dismiss, "we accept as true the facts alleged in the complaint, drawing all reasonable inferences in [the] plaintiff's favor." *Bailey v. Wheeler*, 843 F.3d 473, 480 (11th Cir. 2016).

A. Cummings's Death

Cummings was an inmate at the St. Clair Correctional Facility in Springville, Alabama. At about 7:40 a.m. on January 6, 2014, another inmate stabbed Cummings in the eye with a weapon commonly known as a "shank." Several other inmates helped Cummings to the prison infirmary, and, at about 8:00 a.m., he was airlifted to the University of Alabama at Birmingham Hospital. The University Hospital received him in the emergency room and transferred him to the Intensive Care Unit. Later that day, a University Hospital spokeswoman said Cummings was in "critical condition."

Angela Gaines, Cummings's mother, learned of the attack on her son that morning. She called the prison to "verify" that her son had been stabbed, but her calls were unanswered. That afternoon, Warden Davenport called her back to tell her that Cummings had indeed been stabbed and that he was being transported to a hospital. When Gaines asked Davenport for the name of the hospital, he stated he could not say but promised to call back with more information. Several hours later, he told Gaines that Cummings was at the University Hospital.

Gaines went to the University Hospital and asked to see her son, but the staff told her she would have to wait at least 90 minutes. At some point, the hospital staff told Gaines that "Cummings had been stabbed in the eye and that, due to his injuries, he was only operating with 10% of normal brain functioning." But Gaines believed that Cummings was responsive to her "verbal cues," such as "blink if you can hear me."

Cummings never left the University Hospital. On January 7, 2014, Cummings was removed from life support, and he stopped breathing at 7:05 p.m. that evening.

B. Davenport's Alleged Misdeeds

The estate alleges that the University Hospital's staff "declared Cummings a non-survivor shortly after his arrival," that his papers included an instruction from Davenport that "'no heroic measures' would be taken to save his life," and that this instruction came from Davenport. Dr. Sherry Melton, at Davenport's instruction, entered a do-not-resuscitate order for Cummings at about 9:17 p.m. "Melton relied upon the statements of Defendant Davenport, a non-family member and not a legal guardian, to place Cummings on [the order]." Gaines and other family members were at the hospital at the time.

At some point, "medical personnel informed Ms. Gaines that Warden Davenport authorized [them] to stop giving Cummings medication and to disconnect the life support machine." Gaines protested that she wanted Cummings to stay on life support because "he

was still breathing and responding to verbal commands." But the University Hospital staff "repeatedly conveyed that 'it was not her (Ms. Gaines'[s]) call' because the State had legal custody over Cummings and that the decision to let her son die was the Warden's decision." The estate alleges that Cummings's removal from life support was "[b]ased on this directive from Warden Davenport."

C. The Proceedings in the District Court

After Cummings's death, his estate and Gaines filed a complaint against the Alabama Department of Corrections, the University Hospital, and several Department and University Hospital employees, including Davenport. The estate and Gaines asserted federal claims under section 1983 as well as state-law claims of wrongful death, outrage, and negligence. The defendants moved to dismiss the complaint, and the district court dismissed all claims except for one against Davenport.

The district court denied Davenport's motion to dismiss the estate's claim of deliberate indifference based on qualified immunity. Although Davenport "den[ied] that [he] violated any of [Cummings's] rights" and contended that the estate had not identified a violation of clearly established constitutional law, the district court ruled both that the complaint stated a claim of deliberate indifference to serious medical needs and that Davenport could not invoke qualified immunity because he had not established that his alleged actions were within his "discretionary authority" as a state official.

After the district court issued its memorandum opinion granting the motions to dismiss in part, the estate and Gaines filed an amended complaint. Davenport moved to dismiss the amended complaint and again asserted qualified immunity, this time in less conclusory fashion. He argued that his alleged actions fell within his discretionary authority because, as a prison warden, it was his responsibility to "supervis[e] and control[] the care and custody of inmates including their medical care." He argued that the amended complaint failed to state a claim of deliberate indifference because it focused on whether "the proper person" had made medical decisions for Cummings, not on any denial of medical care. And he maintained that no authority clearly established that Davenport's actions were unconstitutional.

The district court again dismissed all claims except the estate's claim of deliberate indifference against Davenport. It reasoned that Davenport had not "cite[d] any authority suggesting that a warden's authority to make [medical] decisions . . . for inmates extends to making end-of-life decisions." And it concluded, based on Alabama law, that a warden must either have an advance directive from the patient or be a court-appointed guardian to make those decisions. The district court concluded that Davenport had not met his burden of establishing that the alleged acts were within his discretionary authority, so he could not claim qualified immunity.

II. JURISDICTION AND STANDARD OF REVIEW

Although we ordinarily have jurisdiction to review only "final decisions of the district courts," 28 U.S.C. § 1291, "a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a 'final decision' within the meaning of [section] 1291." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). Under the collateral-order doctrine, "pretrial orders denying qualified immunity" are immediately appealable "because such orders conclusively determine whether the defendant is entitled to immunity from suit," the immunity "is both important and completely separate from the merits of the action," and an erroneous denial of immunity "could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014). "We review *de novo* a district court's denial of qualified immunity on a motion to dismiss. . . . In doing so, we accept as true the facts alleged in the complaint, drawing all reasonable inferences in a plaintiff's favor." *Bailey*, 843 F.3d at 480.

III. DISCUSSION

We divide our discussion in two parts. First, we explain that Davenport is not entitled to qualified immunity because Alabama law establishes that his alleged actions were not within his discretionary authority. Second, we explain that we lack jurisdiction to consider whether the amended

complaint states a claim of deliberate indifference to serious medical needs.

A. Davenport Is Not Entitled to Qualified Immunity Because His Alleged Actions Were Not Within His Discretionary Authority.

The district court ruled, and we agree, that Davenport is not entitled to qualified immunity because he failed to establish that his alleged actions were within his discretionary authority. Davenport has the initial burden of raising the defense of qualified immunity by proving that his discretionary authority extended to his alleged actions. Because Alabama law establishes that a prison warden does not have the discretionary authority to control a dying inmate's end-of-life decisions, Davenport cannot satisfy that burden and is not entitled to qualified immunity.

"[G]overnment officials performing discretionary functions[] generally are shielded from liability [or suit] for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (explaining that qualified immunity is an immunity from suit, not just liability). The "breathing room" afforded by qualified immunity is generous; within its scope, "it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Although qualified immunity provides government officials with a formidable shield, their entitlement to raise that shield is not automatic. We have explained that the official bears the initial burden of raising the defense of qualified immunity by proving that he was acting within his authority:

> To establish the defense of qualified immunity, the burden is first on the defendant to establish that the allegedly unconstitutional conduct occurred while he was acting within the scope of his discretionary authority. If, *and only if*, the defendant does that will the burden shift to the plaintiff to establish that the defendant violated clearly established law.

Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1281 (11th Cir. 1998) (emphasis added) (citation omitted).

"To establish that the challenged actions were within the scope of his discretionary authority, a defendant must show that those actions were (1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority." *Id.* at 1282. In other words, "[w]e ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004). "In applying each prong of this test, we look to the general nature of the defendant's action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Mikko*

v. City of Atlanta, 857 F.3d 1136, 1144 (11th Cir. 2017) (quoting *Holloman*, 370 F.3d at 1266)). "[A] government official can prove he acted within the scope of his discretionary authority by showing 'objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.'" *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988) (quoting *Barker v. Norman*, 651 F.2d 1107, 1121 (5th Cir. Unit A July 1981)). A "bald assertion by the defendant that the complained-of actions were . . . within the scope of his discretionary authority" is insufficient. *Barker*, 651 F.2d at 1124–25.

We look to state law to determine the scope of a state official's discretionary authority, as our decisions in *Harbert International* and *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995), illustrate. In *Harbert International*, we examined Alabama law and the terms of a state contract to determine that directors of the Alabama Department of Transportation had the authority to withhold liquidated damages from a contractor. *See* 157 F.3d at 1283. And in *Lenz*, we held that a Florida guardian ad litem lacked the authority to enter a home and retrieve a child's possessions because Florida law established that the defendant's role was to be the child's "legal representative, not . . . the child's caretaker or guardian." 51 F.3d at 1547 (emphasis omitted).

The district court correctly looked to Alabama law to determine whether Davenport's alleged actions were within his authority. And it correctly held that

they were not. The Alabama Natural Death Act, Ala. Code § 22-8A-1 *et seq.*, compels the conclusion that the office of a prison warden grants no authority to enter a do-not-resuscitate order or to order the withdrawal of artificial life support on behalf of a dying inmate.

The Act establishes a comprehensive legislative scheme for end-of-life medical decisions, including the decisions to enter a do-not-resuscitate order, *see id.* § 22-8A-3(7), and to withdraw artificial life support, *see id.* § 22-8A-3(2), (10). Based on the legislative finding that "competent adult persons have the right to control the decisions relating to . . . the decision to have medical procedures, life-sustaining treatment, and artificially provided nutrition and hydration provided, withheld, or withdrawn," *id.* § 22-8A-2, the Act empowers any competent adult to execute a living will that directs his end-of-life care or to designate another competent adult to make decisions for him as his health-care proxy, *see id.* §§ 228A-4, -6.

For permanently incapacitated patients who have neither executed a living will nor designated a health-care proxy, the Act establishes a comprehensive scheme that specifies who may make end-of-life decisions. *See id.* § 22-8A-11(a), (d). The highest-priority surrogate is "[a] judicially appointed guardian, provided the appointment specifically authorizes the guardian to make decisions regarding the withholding of life-sustaining treatment or artificially provided nutrition and hydration." *Id.* § 22-8A-11(d)(1). The patient's spouse, adult children, parents, adult siblings, and other adult relatives follow respectively. *See id.* § 22-8A-11(d)(2)–(6). If the

patient has no known relatives, a committee of medical professionals may act as a surrogate. *See id.* § 22-8A-11(d)(7).

The Act establishes that Davenport lacked the discretionary authority to instruct the University Hospital to enter a do-not-resuscitate order for Cummings or to withdraw his artificial life support. Under the Act, only an authorized surrogate can consent to a do-not-resuscitate order, *id.* § 22-8A-3(7), or "determine whether to provide, withdraw, or withhold life-sustaining treatment or artificially provided nutrition and hydration," *id.* § 22-8A-11(a). Nothing in the Act empowered Davenport, as a prison warden, to act as the surrogate of a dying inmate. Davenport could outrank Cummings's relatives in the hierarchy of priority—or figure in the hierarchy at all—only if a court appointed him Cummings's guardian and "specifically authorize[d] [him] to make decisions regarding the withholding of life-sustaining treatment or artificially provided nutrition and hydration," *id.* § 22-8A-11(d)(1). And Davenport has never suggested that he received such an appointment.

The Act is fatal to Davenport's defense of qualified immunity. Davenport argues that his alleged actions were within his discretionary authority because an inmate "is in the legal custody of the warden," *Ex parte Rogers*, 82 So. 785, 785 (Ala. Ct. App. 1919), and "[d]ecision-making related to the provision of medical care for inmates . . . [falls] soundly within [prison officials'] discretion," *Edwards v. Ala. Dep't of Corr.*, 81 F. Supp. 2d 1242, 1252 (M.D. Ala. 2000). We have no quarrel with

these firmly established legal principles. But they do not "compel the conclusion," *Barker*, 651 F.2d at 1121, that an Alabama warden has the authority to enter a do-not-resuscitate order or to consent to the withdrawal of artificial life support on behalf of a dying inmate. And the Act makes clear that an Alabama warden does not in fact have that authority.

Davenport contends that the Act "ha[s] no application to the facts of this case," but he misunderstands the relevance of the Act to this appeal. He argues that the provisions of the Act had not "become operative in Cummings'[s] case" because the amended complaint does not allege that Cummings executed a living will or designated a health-care proxy or that Gaines was ever "made" a surrogate. But the Act controls this appeal not because it tells us the limits of Gaines's authority, but because it tells us the limits of Davenport's. The Act specifies, in order of priority, who may make end-of-life decisions on behalf of a permanently incapacitated patient, and a prison warden is nowhere on the list. *See* Ala. Code § 22-8A-11.

It is a familiar canon that "[t]he expression of one thing implies the exclusion of others." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10, at 107 (2012) (emphasis omitted). And the Act's list of potential surrogates includes not just "one thing," but a range of specific possibilities that include a court-appointed guardian, any member of the patient's family, and a medical committee. *See* Ala. Code § 22-8A-11(d)(1)–(7). The conclusion that "the expression of" all of these

possible surrogates "implies the exclusion of others"—including a prison warden—is inescapable. *See* Scalia & Garner, *Reading Law* § 10, at 107 (emphasis omitted) (explaining that the "negative-implication canon" applies when the inclusions "can reasonably be thought to be an expression of all that shares in the grant or prohibition involved").

The principle that we "look to the general nature of the defendant's action" to determine whether an official was acting within his discretionary authority does not change our conclusion. *Mikko*, 857 F.3d at 1144 (quoting *Holloman*, 370 F.3d at 1266)). Davenport argues that he is entitled to qualified immunity because he had some general authority to make medical decisions for inmates, but this argument misunderstands our precedents. The reason we take care not to "assess the defendant's act at too high a level of generality," *Holloman*, 370 F.3d at 1266, is not to give officials additional slack; it is to avoid the "tautology" of asking whether a defendant had the authority to violate the law, *Harbert Int'l*, 157 F.3d at 1282. What we strip away from the defendant's allegedly unconstitutional action to isolate its "general nature" is nothing more than its alleged unconstitutionality: "that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Holloman*, 370 F.3d at 1266; *see also id.* ("[W]e consider a government official's actions at the minimum level of generality necessary to remove the constitutional taint.").

If Davenport categorically lacked the authority to enter a do-not-resuscitate order or to withdraw Cummings's life support, we cannot hold that he is entitled to qualified immunity simply because he had some authority to make *other* medical decisions. That shift in the level of generality would be more generous to Davenport than is "necessary to remove the constitutional taint," *id.* If Alabama *did* empower prison wardens to make end-of-life decisions for permanently incapacitated inmates, then we would have to decide whether Davenport's exercise of that authority violated clearly established constitutional law. But the Act makes clear that Alabama has not given prison wardens that authority, and our recognition that Davenport's alleged actions were outside his discretionary authority says nothing about the merits of the estate's constitutional claim.

Finally, contrary to our precedents, Davenport suggests that the discretionary-authority requirement is not part of the qualified-immunity analysis. He asserts that "[w]hile the requirement . . . is ubiquitous in Eleventh Circuit authority, interestingly, such a requirement is nowhere to be found in Supreme Court qualified immunity cases." True, the Supreme Court has never addressed the scope of an official's burden to establish that a suit against him is based on actions taken within his authority, but Davenport is wrong to suggest that Supreme Court precedent offers no support for such a requirement. On the contrary, the Court has explained that "[t]he conception animating the qualified immunity doctrine . . . is that '*where an official's duties legitimately require action* in which clearly established rights are not implicated, the

public interest may be better served by action taken with independence and without fear of consequences.'" *Mitchell*, 472 U.S. at 525 (emphasis added) (some internal quotation marks omitted) (quoting *Harlow*, 457 U.S. at 819); *see also Harlow*, 457 U.S. at 819 (emphasizing that qualified immunity "provide[s] no license to lawless conduct"). And recent precedent reiterates that "[g]overnment officials are entitled to qualified immunity with respect to '*discretionary functions*' *performed in their official capacities*." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

We acknowledge that not every circuit court has formulated the discretionary-authority requirement as part of its qualified-immunity analysis, *see, e.g.*, *Stanley v. Gallegos*, 852 F.3d 1210, 1214–16 (10th Cir. 2017) (opinion of Hartz, J.) (collecting cases and discussing pros and cons of the requirement); *id.* at 1225–27 (Holmes, J., concurring in the judgment) (arguing that Tenth Circuit precedent forecloses the requirement), and we acknowledge that not all of those that have formulated it apply it in precisely the same way as this Court, *see In re Allen*, 119 F.3d 1129, 1132 (4th Cir. 1997) (Motz, J., concurring in the denial of rehearing en banc). But these ambiguities, however potentially fascinating to legal scholars, are of no help to Davenport in this appeal.

As Davenport concedes, we are bound by "ubiquitous" circuit precedent to apply the discretionary-authority requirement. And we are bound to hold, based on the comprehensive Alabama law that governs end-of-life decisions, that

Davenport acted beyond the scope of his discretionary authority when he allegedly instructed the University Hospital to enter a do-not-resuscitate order for Cummings and to remove him from artificial life support. We affirm the denial of qualified immunity.

B. We Lack Jurisdiction to Consider Whether the Amended Complaint States a Claim.

Davenport also contends that we should reverse because the amended complaint fails to state a claim, but we lack jurisdiction to do so. Although Davenport is right that "[s]tating a constitutional claim is a precondition . . . to defeat[ing] the qualified immunity defense," this correct statement of law presupposes a defendant who, unlike Davenport, has satisfied his burden. "To establish the defense of qualified immunity, the burden is first on the defendant to establish that the allegedly unconstitutional conduct occurred . . . within the scope of his discretionary authority," and "only if[] the defendant does that will the burden shift to the plaintiff." *Harbert Int'l*, 157 F.3d at 1281; *see also Rich*, 841 F.2d at 1563–64 (explaining the "two-step framework" of our qualified-immunity analysis). Davenport failed to satisfy his threshold burden, so there is no defense for the estate to "defeat," and the district court did not err when it denied qualified immunity. This holding exhausts our jurisdiction under the collateral-order doctrine.

We can review the district court's "pretrial order[] denying qualified immunity" only because an official's potential immunity from suit "is both important and completely separate from the merits of the action," is

"conclusively determine[d]" by an adverse order, and is "irretrievably lost" by the time it could be "reviewed on appeal from a[n adverse] judgment." *Plumhoff*, 134 S. Ct. at 2019. We have concluded that the district court did not err when it "determine[d]" that Davenport failed to establish the defense of qualified immunity, so he has not "irretrievably lost" anything to which he was entitled. As a result, for us to consider whether the amended complaint states a claim would be an inappropriate adventure into "the merits of the action," which are "completely separate" from this interlocutory appeal. Davenport's argument that the district court erred when it ruled that the amended complaint states a claim must await adjudication on appeal from a final judgment.

IV. CONCLUSION

We **AFFIRM** the order denying Davenport qualified immunity.

Case 2:15-cv-02274-JEO Document 35
Filed 07/31/17 Page 1 of 22

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE ESTATE OF MARQUETTE F. CUMMINGS, JR. and ANGELA GAINES,	)	
Plaintiffs,	)	
v.	)	Case No. 2:15-cv-02274-JEO
CARTER DAVENPORT, in his official and individual capacities,	)	
Defendant.	)	

MEMORANDUM OPINION[1]

This action arises from the death of Marquette F. Cummings, Jr., who was an inmate at St. Clair Correctional Facility. (Doc. 29 "Am. Compl."). Plaintiffs, the Estate of Marquette F. Cummings,

[1] In accordance with the provisions of 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73, the parties have voluntarily consented to have a United States Magistrate Judge conduct any and all proceedings, including trial and the entry of final judgment. (Doc. 25).

Jr., by and through its Executor, Victor Revill, (the "Estate") and Angela Gaines, Mr. Cummings's mother, (collectively, "Plaintiffs") assert various state and federal claims against Carter Davenport, the former warden of St. Clair Correctional Facility ("Warden Davenport"), in his official and individual capacities. (*Id.*). Currently pending before the court is Warden Davenport's Motion to Dismiss the Amended Complaint. (Doc. 32). The parties have briefed the motion. (Docs. 32 & 34). Upon consideration, and as discussed below, the court finds the Estate's § 1983 claim against Warden Davenport based on deliberate indifference to Cummings's serious medical needs in violation of the Eighth Amendment survives the Warden's motion to dismiss, and this claim may proceed. All of Plaintiffs' remaining claims are due to be dismissed.

I. PROCEDURAL POSTURE

Plaintiffs initiated this action on December 15, 2015, asserting various federal and state claims against the following defendants: Kim Thomas and Jefferson Dunn, Commissioners for the Alabama Department of Corrections ("ADOC"); Warden Davenport; the University of Alabama at Birmingham Hospital ("UAB Hospital"); Dr. Sherry Melton, a medical supervisor at UAB Hospital; and various unnamed defendants associated with the ADOC or UAB Hospital. (Doc. 1). In their Complaint, Plaintiffs asserted the following claims against Warden Davenport in his individual and official capacities: (1) § 1983 claims for deliberate indifference in violation of the Eighth Amendment; (2) a § 1983 claim for failure to train and negligent

supervision based on the failure to protect Cummings from harm; and (3) a state law wrongful death claim. (Doc. 1).

The original defendants in this action filed motions to dismiss Plaintiffs' claims against them. (Docs. 8, 12 & 14). For his part, Warden Davenport argued that the claims against him were due to be dismissed under rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure because Plaintiffs failed to state plausible claims against him and because the claims were barred by sovereign immunity and qualified immunity. (Doc. 8).

Upon consideration of the defendants' motion, the court found that all of Plaintiffs' claims were due to be dismissed, with the exception of the Estate's § 1983 claim against Warden Davenport in his individual capacity based on deliberate indifference to Mr. Cummings's serious medical needs. (Doc. 28). Accordingly, the court entered an order granting in part and denying in part the ADOC defendants' motion to dismiss, and dismissing the following claims asserted against Warden Davenport: (1) all of the claims asserted by Ms. Gaines; (2) all of the claims asserted against the Warden in his official capacity; (3) a § 1983 claim for deliberate indifference in violation of the Eighth Amendment based on the failure to protect Cummings from harm; (4) a § 1983 claim for failure to train and negligent supervision based on the failure to protect Cummings from harm; and (5) a state law wrongful death claim. (*See id.*).

After the court entered its order dismissing most of Plaintiffs' claims, Plaintiffs filed an Amended Complaint on October 5, 2016, asserting claims

against only Warden Davenport. (Doc. 29). The Amended Complaint includes several new allegations regarding ADOC policies and Warden Davenport's knowledge of a threat to Cummings's safety. (*See id.*, ¶¶ 5-6, 29-30, 36, 38). In the Amended Complaint, Plaintiffs reassert claims against the warden that the court previously dismissed with prejudice pursuant to Rules 12(b)(1) and 12(b)(6).[2] (*See* Docs. 28 & 29). Thus, Plaintiffs' Amended Complaint implicitly seeks partial relief from, or reconsideration of, the court's Memorandum Opinion and Order granting in part and denying in part the ADOC Defendants' motion to dismiss. Therefore, to the extent that Plaintiffs' Amended Complaint includes new allegations and reasserts claims against Warden Davenport that were previously dismissed with prejudice, the court construes the Amended Complaint as a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure and treats the new allegations as newly-discovered evidence. On that basis, the court will reconsider the issues raised by Warden Davenport's motion to dismiss and Plaintiffs' opposition to the motion.

II. STANDARD OF REVIEW

Rule 8(a)(2) of the Federal Rules of Civil Procedure states that a complaint must contain "a

[2] Warden Davenport moved to dismiss all of the claims asserted against him in the Amended Complaint, but he did not raise a specific objection to the assertion of claims that the court previously dismissed with prejudice. (*See* Doc. 32).

short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Pleadings that contain nothing more than "a formulaic recitation of the element of a cause of action" do not meet Rule 8 standards, nor do pleadings suffice that are based merely upon "labels and conclusions" or "naked assertion[s]" without supporting factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 & 557 (2007).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To meet the requirements of Rule 8(a)(2) and survive a motion to dismiss, "a complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Adinolfe v. United Tech. Corp.*, 786 F.3d 1161, 1169 (11th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555 & 570). "Specific facts are not necessary; the statement needs only 'give the defendant fair notice of the claim . . . and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555). When deciding a motion to dismiss, the court must assume the truth of the factual allegations in the complaint and give the plaintiff the benefit of all reasonable factual inferences. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Hazewood v. Found. Fin. Grp., LLC*, 551 F.3d 1223, 1224 (11th Cir. 2008). Legal conclusions couched as factual allegations are not entitled to the same assumption of veracity. *Iqbal*, 556 U.S. at 678.

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for the dismissal of an action

when the court finds that it does not have subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). "Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction can be asserted on either facial or factual grounds." *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009) (citing *Morrison v. Amway Corp.*, 323 F.3d 920, 925 n.5 (11th Cir. 2003). Facial challenges to subject matter jurisdiction, such as the challenges presented in this action, are based solely on the allegations in the complaint. *Id.* "When considering such challenges, the court must, as with a Rule 12(b)(6) motion, take the complaint's allegations as true." *Id.*

Finally, the decision to alter or amend a judgment pursuant to Rule 59(e) is within the sound discretion of the district court. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (citing *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006). "While, as a rule, parties are not entitled to two bites at the apple, there are occasions in which reconsideration should be entertained." *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990) (quotation and internal quotation marks omitted). "The only grounds for granting a rule 59 motion are newly-discovered evidence or manifest errors of law or fact." *Arthur*, 500 F.3d at 1343 (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999) (alteration in original omitted).

III. FACTUAL BACKGROUND

Marquette F. Cummings, Jr. was an inmate at St. Clair Correctional Facility in Springville,

Alabama ("St. Clair"). (Am. Compl. ¶ 3). During the weekend of January 3-5, 2014, Cummings witnessed "a physical altercation" between Timothy Gayle[3] and another inmate at St. Clair. (*Id.* ¶ 4). "Following that altercation, Cummings and Gayle were involved in an incident that required that both inmates [to] be separated by St. Clair Correctional Officers." (*Id.*).

Plaintiffs allege that pursuant to ADOC Administrative Regulation 300 ("AR-300") and ADOC Administrative Regulation 302 ("AR-302"), officers completed a report about the first altercation involving Gayle and a report about the altercation between Cummings and Gayle. (*Id.* ¶ 5). According to Plaintiffs, both reports were given to Warden Davenport immediately after the altercations. (*Id.*). Plaintiffs also allege that after the altercations and "administratively required reporting," Gayle and Cummings were not put into protective custody, put in separate dorms, or otherwise separated from one another. (*Id.* ¶ 6).

Following the weekend incident or altercation, Gayle stabbed Cummings in the eye with a shank at approximately 7:40 a.m. on Monday, January 6, 2014, causing Cummings to bleed profusely. (*Id.* ¶ 7; Doc. 29-1 at 1). Other inmates helped Cummings to the infirmary at St. Clair, and he was quickly airlifted to UAB Hospital for treatment. (*Id.*). After Angela Gaines learned her son had been stabbed and where he was taken for treatment, she went to UAB

---

[3] Timothy Gayle is an inmate at St. Clair who was convicted of murder. (*See* Doc. 29-1 at 1).

Hospital to be with Cummings sometime during the afternoon of January 6. (*See id.* ¶¶ 9-13).

Dr. Sherry Melton, a medical supervisor at UAB Hospital, changed Cummings's code status to Do Not Resuscitate ("DNR") at about 9:17 p.m. on January 6, 2014 without authorization from Gaines or any other family member and without notifying Gaines and Cummings's family of the decision. (*Id.* ¶ 17; Doc. 1 ¶ 3(h)). Plaintiffs allege that Dr. Melton relied upon statements from Warden Davenport to change Cummings's code status to DNR even though Gaines and several other family members were at the hospital. (Am. Compl. ¶¶ 18 & 20). Plaintiffs further allege that "Warden Davenport authorized UAB medical personnel to stop giving Cummings medication and to disconnect the life support machine." (*Id.* ¶ 21).

Plaintiffs allege that contrary to Gaines's wishes, and "[b]ased on [the] directive from Warden Davenport, Cummings was taken off of life support . . . ." (*Id.* ¶ 24). Cummings passed away at 7:05 p.m. on January 7, 2014, just hours after UAB medical personnel removed his life support. (*Id.* ¶¶ 24-25).

IV. ANALYSIS

Based on the facts set forth above, Plaintiffs assert the following claims against Warden Davenport in both his individual and official capacities: (1) § 1983 claims for deliberate indifference in violation of the Eighth Amendment; (2) a § 1983 claim for failure to train and negligent supervision based on the failure to protect Cummings from Gayle; and (3) a state law wrongful

death claim. (Am. Compl.). Warden Davenport asks this court to dismiss each of the claims against him pursuant to Rules 12(b)(1) and 12(b)(6), arguing that the claims are barred by sovereign and qualified immunity and that Plaintiffs failed to state plausible claims against him. (Doc. 32).

A. Plaintiffs' Standing to Assert their Claims

This Court previously dismissed the § 1983 claims and wrongful death claims asserted by Gaines against Warden Davenport because she lacks standing to assert the claims. (Doc. 28 at 67, 10 & 25-26). Nothing alleged in Plaintiffs' Amended Complaint changes Gaines's lack of standing to assert the claims in this action. Instead, for the reasons discussed in the court's prior order, the pending § 1983 and wrongful death claims can only be asserted by the Estate. *See Estate of Gilliam v. City of Prattville*, 639 F.3d 1041, 1043 (11th Cir. 2011); *Brown v. Mounger*, 541 So.2d 463, 463-64 (Ala. 1989) (citing Ala. Code § 6-5-410); *see also* (Doc. 28 at 6-7). Thus, to the extent Plaintiffs' claims are asserted by Gaines, they are due to be dismissed.

B. Official Capacity Claims Against Warden Davenport

The court previously dismissed the official claims asserted against Warden Davenport on the basis of sovereign immunity under the Eleventh Amendment to the United States Constitution and Article I, § 14 of the Alabama Constitution of 1901. (Doc. 28 at 8-9, 25-26). In response to Warden Davenport's motion to dismiss the amended complaint, the Estate now argues that sovereign immunity does not apply in

this case because the warden acted in bad faith and because the State waived its Eleventh Amendment Immunity. (Doc. 34 at 15-17). The court is not persuaded.

The Estate asserts that its claims against Warden Davenport fall within an exception to the State's sovereign immunity. (Doc. 34 at 15-16). Specifically, the Estate argues that sovereign immunity does not apply to claims for damages against a state official when the official "acted fraudulently, in bad faith, beyond [his] authority, or in a mistaken interpretation of law." (*Id.* at 16 (quoting *Drummond Company v. Alabama Department of Transportation*, 937 So.2d 56 (Ala. 2006)). However, the "exception" to the State's sovereign immunity that the Estate relies upon only applies to actions for injunctive relief against a state official in his official capacity or to actions for damages against a state official in their individual capacity; it does not apply to actions for damages against a state official in his official capacity. *See Ex parte Moulton*, 116 So. 3d 1119, 1141 (Ala. 2013).[4] Indeed, "it is well established that actions

[4] In *Ex parte Moulton*, the Supreme Court of Alabama clarified and restated the exception to State immunity that it set forth in *Drummond* by holding that the "exception" applies only to: "(a) actions for injunction brought against State officials in their representative capacity where it is alleged that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law, . . . and (b) actions for damages brought against State officials in their individual capacity where it is alleged that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law, subject to the limitation that the action not be, in effect, one against the state." 116 So. 3d at 1141.

for damages against State agents in their official or representative capacities are considered actions to recover money from the State and are barred by State immunity under [Article I,] § 14" of the Alabama Constitution of 1901. *Id.* at 1140 (citations omitted). In this action, the Estate seeks monetary damages against Warden Davenport, *see* Am. Compl. at 11-12; thus, the claims asserted against Warden Davenport in his official capacity are barred by the State's sovereign immunity.

Moreover, the State of Alabama has not waived its immunity under the Eleventh Amendment. The Estate argues that the State has consented to suit or waived its immunity based on Alabama Code § 41-9-74, which provides that the State will pay final judgments awarded against members of the Board of Corrections and its employees for acts related to their official duties on behalf of the State. (Doc. 34 at 17). However, § 41-9-74(c) expressly states that "[n]othing in this section shall be deemed to waive the sovereign immunity of the state . . . ." Ala. Code § 41-9-74(c) (1975). After evaluating the language of § 41-9-74, the Eleventh Circuit found that the statute did not express any intent by the State to waive its sovereign immunity and held that the State's sovereign immunity bars suits against Board of Corrections employees in their official capacities. *Williams v. Bennett*, 689 F.2d 1370, 1377-78 (11th Cir. 1982). Therefore, the Estate's argument regarding waiver of Eleventh Amendment immunity is contrary to binding precedent.

Based on the foregoing, and for the reasons stated in the court's prior Memorandum Opinion and Order,

the Estate's claims against Warden Davenport in his official capacity are barred by the Eleventh Amendment and due to be dismissed under Federal Rule of Civil Procedure 12(b)(1).

C. Individual Capacity Claims Against Warden Davenport

Plaintiffs assert multiple claims against Warden Davenport in his individual capacity under § 1983 and state law.[5] (Am. Compl. at 6-11). For the reasons discussed below and in the court's prior Memorandum Opinion and Order, the court concludes the Estate has stated a plausible § 1983 claim against Warden Davenport based upon an alleged Eighth Amendment violation for interfering with Cummings's medical care, and this claim may proceed. The remaining claims against the warden in his individual capacity are due to be dismissed.

1. Claims Based on the Failure to Protect Cummings from Gayle

The Estate asserts several § 1983 claims against Warden Davenport in his individual capacity for deliberate indifference based on the failure to protect Cummings from Gayle. (Doc. 29 at 6-11). This court previously dismissed those claims pursuant to Rule 12(b)(6) because the Estate did not

---

[5] 42 U.S.C. § 1983 provides a civil action against any person who, "acting under color of state law, committed acts that deprived [Plaintiffs] of some right, privilege, or immunity protected by the Constitution or laws of the United States." *Easley v. Dept. of Corrections*, 590 F. App'x 860, 868 (11th Cir. 2014) (per curiam) (citing 42 U.S.C. § 1983).

allege any facts to show (1) Warden Davenport had subjective knowledge of a substantial risk of serious harm to Cummings, (2) the warden directed correctional officers to act unlawfully or knew they would act unlawfully, (3) a history of widespread abuse that put the warden on notice of a need to correct a constitutional violation, or (4) the existence of a custom or policy that caused the alleged Eighth Amendment violation. (Doc. 28 at 11-17). After the court entered its order dismissing the claims, Plaintiffs filed their Amended Complaint, which includes new allegations regarding ADOC policies and Warden Davenport's knowledge of a threat to Cummings's safety. (*See* Doc. 29). As discussed below, the court finds that even when the new allegations against Warden Davenport are considered, the Estate still has not stated plausible § 1983 claims against the Warden based on the failure to protect Cummings from Gayle.

As discussed in the court's prior order, to state a § 1983 claim for deliberate indifference based on a prison official's failure to protect an inmate from harm, a plaintiff must allege facts showing a prison official had actual knowledge of a substantial risk of serious harm to an inmate and disregarded that risk. (Doc. 28 at 12-13). In the Amended Complaint, the Estate alleges the following facts relating to Warden Davenport's knowledge of a risk to Cummings's safety:

(1) Cummings witnessed a physical altercation between Gayle, who was convicted of murder, and another inmate. Then, Cummings was involved in an "incident" or

"altercation" with Gayle that required correctional officers to separate the two inmates.

(2) Pursuant to AR-302 and AR-300, correctional officers filled out a report about the altercation or incident between Gayle and Cummings and a report about the earlier altercation between Gayle and another inmate. "Immediately following these incidents, those reports were produced to Warden Davenport pursuant to AR-302 and subsequently to Investigation and Intelligence Division pursuant to AR-300."[6]

(3) "After these incidents and following the administratively required reporting, Gayle and Cummings were never put into protective custody, put in separate dorms, nor was a plan implemented, or even formed, to physically separate each inmate away from the other, as required when put on notice through the reporting of violent incidents."

---

[6] The court notes that the Index of Administrative Regulations available on the ADOC website does not include AR-302, nor is AR-302 available from the ADOC website listing the department's administrative regulations. *See* ADOC Index of Administrative Regulations (March 25, 2014), http://www.doc.state.al.us/docs/AdminRegs/AR01external.pdf; *see also* Administrative Regulations, http://www.doc.state.al.us/Regulations.aspx (last visited June 14, 2017).

(4) Warden Davenport "had both objective and subjective knowledge that [Gayle] posed a significant risk of danger to Cummings due to the required reporting that corrections officers must make pursuant to AR-302."

(5) "Every violent incident triggers [AR-300] (Investigation and Intelligence Division and [AR-302] (Incident Reporting). The policies were followed by the officers, and the reports were made and disclosed to the Warden pursuant to the policy."

(Doc. 29 ¶¶ 4-6, 29-30). Even accepting those allegations as true and giving Plaintiffs the benefit of all reasonable factual inferences, the court finds that the Estate has not alleged facts sufficient to show that Warden Davenport had subjective knowledge of a substantial risk to Cummings's safety.

As an initial matter, the allegation that the warden had "objective and subjective knowledge that [Gayle] posed a significant risk of danger to Cummings due to the required reporting" is merely a conclusory statement of an element of the Estate's § 1983 claim for deliberate indifference. *See Bowen v. Warden Baldwin State Prison*, 826 F.3d 1312, 1320 (11th Cir. 2016) (citations omitted); *see also* Am. Compl. ¶ 30. Therefore, the court does not have to accept the allegation as true, and it does not help support the claims against Warden Davenport. *See Iqbal*, 556 U.S. at 678.

Next, the Estate's allegations regarding the weekend "incident" or "altercation" between Gayle and Cummings are not sufficient to show that Gayle

posed a substantial risk of serious harm to Cummings. Although the Estate alleges that the incident required correctional officers to separate Gayle and Cummings, that allegation does not show that Gayle posed a continuing risk to Cummings once the inmates were separated. (*See* Am. Compl. ¶ 4). The Estate's allegations also do not indicate whether the weekend incident or altercation between Gayle and Cummings was physical or verbal, if Gayle instigated the incident or altercation, or if Gayle threatened Cummings with more harm. (*See id.*). As a result, the Estate's allegations are not sufficient to show that Warden Davenport has subjective knowledge of a substantial risk of serious harm to Cummings even if the warden received and reviewed a report of the incident or altercation between Cummings and Gayle. Therefore, the Estate fails to state plausible § 1983 claims for deliberate indifference based upon Warden Davenport's alleged failure to protect Cummings from Gayle in violation of the Eighth Amendment.

Likewise, the Estate fails to state a plausible § 1983 claim against Warden Davenport for failure to train and negligent supervision even when the new allegations in the Amended Complaint are considered. The Estate alleges that the ADOC has regulations "designed to prevent violence and death for inmates like Cummings," and it further alleges that "[e]ither those policies were followed resulting in the Warden being put on notice [of the weekend incident between Cummings and Gayle], or the policies were not followed resulting in the systemic failure of oversight tantamount to the deliberate indifference to the rights of Mr. Cummings." (Doc. 29,

¶¶ 36). However, as discussed above, the Estate's allegations regarding the incident between Cummings and Gayle are not sufficient to show that Gayle posed a substantial risk of serious harm to Cummings, and, therefore, the Estate's new allegations are not sufficient to save their § 1983 claim for failure to train and negligent supervision based on the failure to protect Cummings from Gayle.

Moreover, just as in the original Complaint, in the Amended Complaint, the Estate does not allege a history of widespread abuse, and the allegations regarding the handling of a single, weekend incident or altercation between Cummings and Gayle is not sufficient to show a history of widespread abuse or the existence of a custom or policy.[7] (*See* Am. Compl.); *see also Doe v. School Bd. of Broward County, Fla.*, 604 F.3d 1248, 1266 (11th Cir. 2010) (quotation omitted). Additionally, the Estate did not allege any facts to suggest that Warden Davenport directed correctional officers to act unlawfully or knew they would act unlawfully. Accordingly, the Estate has not alleged facts sufficient to state a plausible § 1983 claim based upon supervisory liability or for failure to train.

---

[7] The Estate includes statements regarding previous incidents and a history of violence at St. Clair in its brief in response to Warden Davenport's motion to dismiss, but the Estate did not include any allegations regarding those incidents in its Amended Complaint and did not ask for leave to further amend its complaint. (*See* Doc. 34 at 3-4).

Based on the foregoing, and for the reasons stated in the court's prior Memorandum Opinion and Order, the Estate's § 1983 claims against Warden Davenport in his individual capacity based upon the failure to protect Cummings from Gayle are due to be dismissed pursuant to Rule 12(b)(6).

D. Deliberate Indifference to Cummings's Medical Needs

The Estate asserts a § 1983 claim against Warden Davenport based on the Warden's alleged deliberate indifference to Cummings's medical needs in violation of the Eighth Amendment. (Am. Compl. ¶ 33). The court previously found that the Estate's allegations are sufficient to state a plausible § 1983 claim on this basis and, therefore, denied Warden Davenport's prior motion to dismiss as to the § 1983 claim for deliberate indifference to Cummings's serious medical needs. (Doc. 28 at 18-20, 25).

Warden Davenport argues that qualified immunity bars the Estate's Eighth Amendment claim against him. (Doc. 32 at 8-12). Qualified immunity shields a government official from "liability for civil damages if [his] actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "To receive qualified immunity, [a] government official must first prove that he was acting within his discretionary authority." *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090 1098 (11th Cir. 2014). "Once it is established that the defendant was acting within [his] discretionary authority, 'the

burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Durruthy v. Pastor*, 351 F.3d 1080, 1087 (11th Cir. 2003). However, "if a government official is acting wholly outside the scope of his discretionary authority, he is not entitled to qualified immunity regardless of whether the law in a given area was clearly established." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir. 1998) (citations omitted).

"'To establish that the challenged actions were within the scope of his discretionary authority, [a government official] must show that those actions were (1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority.' [] To that end, 'a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duty.'" *Gray v. Bostic*, 458 F.3d 1295, 1303 (11th Cir. 2006) (quoting *Harbert Int'l, Inc.*, 157 F.3d at 1282). Here, Warden Davenport asserts that he was acting within his discretionary authority with regards to all of his "dealings" with Cummings because "making decisions about the health care of an inmate is a duty normally associated with what correctional officials do . . . ." (Doc. 32 at 10). On the other hand, the Estate contends Warden Davenport acted outside of the scope of his authority.[8] (*See* Doc. 34 at 8).

---

[8] Qualified immunity is an affirmative defense to the Estate's § 1983 claim against Warden Davenport, *see, e.g., Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003); the Estate is not required to negate the defense in its complaint. *La Grasta v First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir.

While decisions regarding the provision of medical care for inmates may fall under the Warden's scope of authority, *see Edwards v. Alabama Dept. of Corrections*, 81 F.Supp. 2d 1242, 1252 (M.D. Ala. 2000), Warden Davenport did not cite any authority suggesting that a warden's authority to make decisions regarding the provision of medical care for inmates extends to making end-of-life decisions for inmates. (*See* Doc. 32 at 8-12). Moreover, the court has found no such authority. Instead, Alabama statutes indicate that making end-of-life decisions for an inmate is not within a warden's scope of authority, unless an inmate has an advance directive that designates the warden as a health care proxy with the power to make end-of-life decisions, or if the warden is a judicially-appointed a guardian for the inmate and "the appointment specifically authorizes [him] to make decisions regarding the withholding of life-sustaining treatment . . . ." *See* Ala. Code §§ 22-8A-4, 6 & 11(d)(1).[9] There is nothing before the court

---

2004) (quoting *Tregenza v. Great Am. Comm. Co.*, 12 F.3d 717, 718 (7th Cir. 1993)).

[9] Alabama Code § 22-8A-4 addresses living wills and advance directives for health care and provides, among other things, that "[a] competent adult may execute [] a living will that includes a written health care proxy designation appointing another competent adult to make decisions regarding the providing, withholding, or withdrawal of life-sustaining treatment . . . ." *Id.* at § 22-8A-4(b). Next, Alabama Code § 22-8A-6 provides that a designated health care proxy shall make decisions regarding the withholding or withdrawing of life-sustaining treatment "according to the specific instructions or directions given to him . . . by the individual making the designation, [or] [i]n the absence of specific directions or guidance, the designated proxy shall make those decisions that conform as closely as possible to what the patient would have

to indicate that Cummings had an advance directive designating Warden Davenport as his health care proxy or that the warden was a judicially-appointed guardian for Cummings. As a result, the court finds that Warden Davenport has not met his burden of showing that he was acting within the scope of his authority when he allegedly authorized or directed UAB Hospital to remove Cummings's life support. Therefore, at this stage of the case, Warden Davenport has not shown he is entitled to qualified immunity.

Based on the foregoing, and for the reasons stated in the court's prior Memorandum Opinion and Order, Warden Davenport's motion to dismiss is denied as to the Estate's § 1983 claim based on Warden Davenport's alleged deliberate indifference to Cummings's serious medical need in violation of the Eighth Amendment.

E. Wrongful Death

The Estate asserts a state law wrongful death claim against Warden Davenport based on based on allegations that (1) he failed to protect Cummings from Gayle despite having actual knowledge from the incident report that Gayle posed a threat to Cummings's safety and (2) he adopted a policy of not adequately responding to incidents that occur over

---

done or intended under the circumstances . . . ." *Id.* Finally, Alabama Code § 22-8A-11 provides that in the absence of an advance directive or designated health care proxy, a surrogate may be designated to make decisions regarding the withholding or withdrawing of life-sustaining treatment if certain conditions are met. *Id.*

the weekend. (*See* Am. Compl. ¶ 38). As discussed above, the allegations regarding the weekend incident or altercation between Cummings and Gayle are not sufficient to demonstrate that Warden Davenport knew Gayle posed a substantial risk to Cummings's safety. (*See* pp. 13-16, *supra*). Additionally, the allegations in the Amended Complaint are not sufficient to show a policy or custom of not adequately responding to incidents that occur on weekends. (*See* Am. Compl.). As a result, and for the reasons discussed in the court's prior Memorandum Opinion and Order, the Estate has not stated a plausible wrongful death claim, and the claim is due to be dismissed pursuant to Rule 12(b)(6).

V. CONCLUSION

Based on the foregoing, and for the reasons stated in the court's prior Memorandum Opinion and Order (Doc. 28), Warden Davenport's motion to dismiss, (Doc. 32), is due to be **DENIED IN PART and GRANTED IN PART**. The warden's motion is due to be denied as to the Estate's § 1983 claim based on deliberate indifference for interfering with Cummings's serious medical needs in violation of the Eighth Amendment, and this claim may proceed. The balance of Warden Davenport's motion to dismiss is due to be granted, and Plaintiffs' remaining claims against Warden Davenport are due to be dismissed. An order consistent with the court's findings will be entered.

DATED this 31st day of July, 2017.

JOHN E. OTT
Chief United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13999-EE

THE ESTATE OF MARQUETTE F. CUMMINGS, JR.,

Plaintiff-Appellee,

versus

CARTER DAVENPORT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, MARTIN, and BALDOCK,* Circuit Judges.

PER CURIAM:

---

* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s / WILLIAM H. PRYOR
UNITED STATES CIRCUIT JUDGE