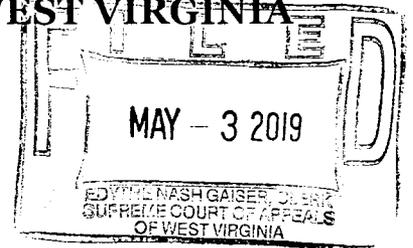


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-1076



THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY,
DEFENDANT BELOW, PETITIONER,

Vs.

THE ESTATE OF CODY LAWRENCE GROVE,
PLAINTIFF BELOW, RESPONDENT.

RESPONDENT'S BRIEF

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Estate of Cody L. Grove
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STATEMENT OF THE CASE

1. Procedural history

Except as set forth below, Respondent generally agrees with the procedural history of this case set forth in Petitioner's brief and as supported by the record. However, Respondent points out that very limited discovery has taken place prior to this appeal.¹

2. Additional facts relevant to the assignments of error

As documented in the Supplemental Appendix,² Petitioner omits critical and relevant facts from its version of the statement of the case which strip both Co-Petitioner Zombro³ and Petitioner Regional Jail Authority (RJA) (by operation of the doctrine of respondeat superior) of qualified immunity, if they were ever protected by qualified immunity in the first place, to-wit:

A. The Supplemental Appendix as a whole provides compelling substantiation of the claims in the First Amended Complaint and bases for additional claims.

B. The continuing incompetence and recklessness of Co-Petitioner Zombro in the attempted performance of his ministerial duties (Supp.App.Pg. 5-9), Zombro's knowledge that his acts and omissions violated the law, and Zombro's criminal and fraudulent attempts at a "cover up" after Respondent's death by suicide. Supp. App. Pg. 13-16.

C. Co-Petitioner Zombro's refusal and / or failure to perform his official duties before

¹ At this early stage of the proceedings it is impossible to identify all facts supporting Plaintiff's complaint without a full course of discovery.

² The Supplemental Appendix is an attachment to Respondent's Motion to File Supplemental Appendix filed contemporaneously with this brief.

³ Co-Petitioner Zombro's related appeal bears this court's docket no. 18-1083.

Cody Grove's death constitutes a crime and is independently actionable.⁴

D. Co-Petitioner Zombro's alteration of a public record as a public officer after Cody Grove's death in a failed attempt to cover up his reckless incompetence is a misdemeanor.⁵ Supp.App.Pg. 16. Further, forgery of a writing is a felony.⁶

E. Zombro's spoliation of evidence is independently actionable.

F. The incompetence and recklessness of Petitioner RJA's continued employment of Zombro, despite clear indications of Zombro's own incompetence and recklessness, and calls for his suspension. Supp.App.Pg. 5-9.

The Supplemental Appendix also demonstrates the disingenuousness of the claims of

⁴ WV Code §61-5-28 makes Co-Petitioner Zombro's failure or refusal to perform the duties required of him by law (and his oath of office found at Supp. App. Pg. 2) a misdemeanor, and is independently actionable under WV Code §55-7-9.

WV Code §61-5-28. Failure to perform official duties. "Any person holding any office or appointment in this State, who shall wilfully fail or refuse to perform any duty required of him by law, shall be guilty of a misdemeanor, and upon conviction thereof, shall, if no other punishment be prescribed by law therefor, be fined not exceeding one hundred dollars."

WV Code §55-7-9. Violation of statutes. "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."

⁵ WV Code § 61-5-22. Alteration, concealment or destruction of public record by officer. "If any... public officer fraudulently make a false entry, or erase, alter, or destroy any record in his keeping and belonging to his office, ... he shall be guilty of a misdemeanor..." See Supp. App. Pg. 16.

⁶ WV Code §61-4-5 Forging or uttering other writing; "If any person forge any writing... to the prejudice of another's right, or utter or attempt to employ as true such forged writing, knowing it to be forged, he shall be guilty of a felony." See Supp. App. Pg. 16.

both Petitioner Zombro and Petitioner RJA that:

- I. the first amended complaint fails to set forth claims for relief.
- ii. Petitioners are entitled to qualified immunity in light of the limited discovery to date.
- iii. They don't know why they've been sued.

SUMMARY OF ARGUMENT

The circuit court was correct to deny Petitioner's Rule 12(b)(6) motion to dismiss for failure to state a claim and conclude that Petitioner was not protected by qualified immunity.

Petitioner's claim that the Circuit Court was incorrect in its analysis rings hollow when the reader considers that Petitioner never filed a Rule 12(e) motion for more definite statement. Such a motion would have pointed "...out the defects complained of and the details desired." Instead, the circuit court, and this reviewing court, are left to guess at what would address petitioner's objection. Petitioner wants this court to do Petitioner's job when the specific clarification Petitioner desires could have easily been sought through a Rule 12(e) motion.

Because of Co-Petitioner Zombro's failure to perform a safety check of Respondent Grove's welfare, Grove was given ample time to hang himself while on heightened monitoring in the medical wing of the Eastern Regional Jail. Co-Petitioner Zombro's omission of this non-discretionary, ministerial act is not protected by qualified immunity. Petitioner RJA is liable for Co-Petitioner Zombro's failures through the doctrine of respondeat superior.

Even if this reviewing court concludes Co-Petitioner Zombro's omission to perform a

safety check on Grove was a discretionary act and protected by qualified immunity, Co-Petitioner Zombro lost that immunity by committing various constitutional, statutory, regulatory and policy violations in connection with Grove's death as set forth below. Petitioner RJA is liable for Zombro's failures through the doctrine of respondeat superior.

Additionally, as set forth below, Co-Petitioner Zombro's obvious incompetence in the performance of his duty strips him of qualified immunity. This raises questions as to why Petitioner RJA continued Zombro's employment.

Co-Petitioner Zombro's attempts at a cover up after Grove's death by making a false statement during an official investigation into the matter, and falsifying a log in an attempt to make it appear he competently performed his duty, is both an indication that he knew he broke the law, and is independently actionable.

Any defects in the First Amended Complaint are easily corrected by amendment to set forth a claim sufficient to proceed to trial, especially in light of the documents contained in the supplemental appendix.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent deems oral argument necessary pursuant to Rule 18(a), WV R. App. Pro., because Petitioners have requested oral argument, and the decisional process will be significantly aided by oral argument. A memorandum decision is appropriate.

Oral argument pursuant to Rule 19, WV R.App.Pro., is appropriate because this case involves a relatively narrow issue of law, and assignments of error in the application of settled law.

ARGUMENT

1. THE CIRCUIT COURT CORRECTLY APPLIED THE QUALIFIED IMMUNITY STANDARD

A. Standard of Review

A circuit court's order denying a motion to dismiss is reviewed de novo. *WV Board of Education v. Marple*, 783 SE 2d 75, 81 (WV 2015), citing Syl. Pt. 4., *Ewing v. Bd. of Education of County of Summers*, 503 SE 2d 541 (WV 1998).

B. Criteria for Deciding a Rule 12(b)(6) Motion to Dismiss

(a). "Any set of facts" doctrine

The trial court, in appraising the sufficiency of a complaint on a motion to dismiss for failure to state a claim, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief, *Chapman v Kane Transfer Company*, 160 W Va 530, 236 SE2d 207 (1997), followed in *Cantley v Lincoln County Com'n*, 221 W Va 468, 655 SE2d 490 (2007) (Per Curiam).(Emphasis added.)

(b) "Any legal theory" doctrine.

If the complaint states a claim upon which relief can be granted under any legal theory, a motion to dismiss for failure to state a claim must be denied, *John W. Lodge Distributing Co. v Texaco, Inc.*, 161 W Va 603, 245 SE2d 157 (1978), followed in *Cantley*, supra. (Emphasis added.)

(c) "Clarity, not detail" doctrine

A plaintiff is not required to set out all facts upon which the claim is based . Rule 8 requires clarity, not detail, *State Ex Rel. McGraw v Scott Runyan Pontiac-Buick*, 194 W Va

770, 461 SE2d 516 (1995). (Emphasis added). See also Rule 8(f), WV R.Civ.P., “All pleadings shall be construed as to do substantial justice.”

(d) “Plaintiff’s burden on motion to dismiss is a light one.”

The standard which Plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard and few complaints fail to meet it. *John W. Lodge*, supra. (Emphasis added)

The plaintiff’s burden in resisting a motion to dismiss is a relatively light one, *McCormick v Wal-Mart Stores*, 215 W Va 679, 672 SE2d 606 (2008).

(e) “Motions to dismiss are viewed with disfavor.”

Motions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant such motions, *Sturm v Board of Educ. of Kanawha County*, 223 W Va 277, 672 SE2d 606 (2008).

C. Argument

Petitioner cites *WV Bd. Of Educ. V. Marple*, 783 SE 2d 75 (WV 2015) and *Hutchison v. City of Huntington*, 479 SE 2d 649 (WV 1996) for the proposition that “heightened pleading” is required in a complaint where immunities are implicated.

Petitioner never explained to the circuit court, nor to this appellate court, what “heightened pleading” means in the context of this case. Indeed, Justice Cleckley, in authoring the *Hutchison* opinion notes: “ ‘heightened pleading’ ... has always been a misnomer. A plaintiff is not required to anticipate the defense of immunity in his complaint.” *Hutchison* at 660, citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923-24, 64 L. Ed. 2d 572 (1980).

Justice Cleckley goes on to opine that “we believe, in cases of qualified or statutory immunity, court ordered replies and motions for a more definite statement under Rule

12(e) can speed the judicial process.” *Hutchison* at 660.

Notably, despite relying heavily on *Hutchison* in both its Motion to Dismiss (App.Pg. 188) and appeal brief, Petitioner never filed a Rule 12(e) motion for more definite statement⁷. Had Petitioner filed such a motion, the issue would have been squarely brought to a head below. Such a motion would “...point out the defects complained of and the details desired.” Instead, the circuit court, and this court, are left with Petitioner’s vague claim that heightened pleading is required when immunities are implicated in a case without any guidance or suggestion from Petitioner of what that means. It is not the court’s job to guess at what Petitioner is trying to say, nor to do Petitioner’s job. Petitioner’s failure to lay a proper foundation of the issue it requests this court to review highlights the suggestion that the instant appeal is an improper attempt at a prohibited interlocutory appeal, rather than a legitimate exposition of the “heightened pleading” standard vis a vis the application of qualified immunity to the facts and allegations presented in the First Amended Complaint found at App. Pg. 133.

“If the individual circumstances of the case indicate that the Plaintiff has pleaded his or her best case, there is no need to order more detailed pleadings. ...the early motion to dismiss should be denied.” *Id.* At 660.

In point of fact, in response to Petitioner’s first motion to dismiss the initial complaint, Plaintiff / Respondent filed a first amended complaint which laid out in greater detail

⁷ WV R.Civ.P. Rule 12(e): Motion for more definite statement. - “If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.” (Emphasis added)

Petitioner's numerous regulatory violations that served as a basis for the cause of action. App. Pg. 140-141. In light of this greater detail, and Petitioner's failure to formally seek even greater detail through a Rule 12(e) motion, Petitioner's appeal rings hollow and should be summarily rejected so that this matter may proceed to trial.

2. IT IS IRRELEVANT FOR PURPOSES OF THIS APPEAL WHETHER THE REGIONAL JAIL AUTHORITY IS A STATE AGENCY

A circuit court's denial of a Rule 12(b)(6) motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to appeal under the "collateral order" doctrine. *Marple* at 81, *Hutchison* at 657.

However, the order at issue on appeal found at App. Pg. 368 never mentions whether the RJA is a state agency for purposes of the ruling in the order. Therefore, the issue is irrelevant.

Petitioner's attempt to raise this issue under the "collateral order" doctrine is an impermissible attempt at an interlocutory appeal of a non-issue. *Id.*

However, for purposes of the appeal sub judice, Respondent concedes Petitioner RJA is a state agency.

3. IT IS IRRELEVANT FOR PURPOSES OF THIS APPEAL WHETHER THE REGIONAL JAIL AUTHORITY IS IMMUNE FROM PUNITIVE DAMAGES

A circuit court's denial of a Rule 12(b)(6) motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to appeal under the "collateral order" doctrine. *Marple* at 81, *Hutchison* at 657.

However, the order at issue on appeal found at App. Pg. 368 never mentions whether the RJA is subject to punitive damages for purposes of the ruling in the order. Therefore, the issue is irrelevant.

Petitioner's attempt to raise this issue under the "collateral order" doctrine is an impermissible attempt at an interlocutory appeal of a non-issue. *Id.*

However, for purposes of the appeal sub judice, Respondent concedes Petitioner RJA is immune from punitive changes.

4. PETITIONER IS NOT ENTITLED TO QUALIFIED IMMUNITY

A. Standard of Review

A circuit court's order denying a motion to dismiss is reviewed de novo. *WV Board of Education v. Marple*, 783 SE 2d 75, 81 (WV 2015), citing Syl. Pt. 4., *Ewing v. Bd. of Education of County of Summers*, 503 SE 2d 541 (WV 1998).

B. Criteria for Determining the Applicability of Qualified Immunity.

(a) "Plainly incompetent" doctrine.

"Qualified immunity... provides protection to all but the plainly incompetent or those who knowingly violate the law." *Marple* at 85, citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L Ed2d 271 (1986).

(b) "Knowing violation of the law" doctrine.

Qualified immunity does not protect those that violate the law. *Id.* See also *Crouch v. Gillespie*, Sup. Ct. Of App. of WV, docket no. 17-0025 (2018), citing *Hutchison*.

(c) "Fraudulent conduct" doctrine.

Qualified immunity does not protect those that engage in fraudulent conduct. *W.Va. Regional Jail & Correctional Facility Authority v. A.B.* 766 SE2d 751 (WV 2014) (A.B.), citing *State v. Chase Securities, Inc.* 424 SE 2d 591 (WV 1992).

(d) "Ministerial acts" doctrine.

Government agencies and their officials have no immunity for ministerial acts. *Marple*

at fn.7., *A.B.* at 765.

(e) “Violation of clearly established statutory or constitutional rights” doctrine.

Qualified immunity does not protect those that violate clearly established statutory or constitutional rights. *A.B.*

(f) “Acts outside the scope of authority / duty” doctrine.

Qualified immunity does not protect those that act outside the scope of their authority / duties. *Id.*

C. Argument

1. The Co-Petitioner Was Not Performing A Discretionary Function When Decedent Committed Suicide, Co-Petitioner Was Performing A Ministerial Function.

The question of whether a putative tortfeasor is engaged in a discretionary or ministerial act at the time a cause of action arises is generally a question of fact for a jury. *Hutchison* at 659, *A.B.*, at 768.

At the time of Cody Grove’s death, Co-Petitioner Zombro was performing a ministerial act within the scope of his employment and has no qualified immunity for his acts and omissions, to-wit: he was to perform regular safety checks on inmates like Cody Grove in the medical wing of the jail. Zombro’s failure to do so allowed Grove to hang himself..

“A ministerial act or duty is one which is to be performed under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or exercise of the judgment of the one doing it upon the propriety of the act’s being done.” *Marcum v. Ballot Com’rs. Of Lincoln*, 26 SE 281 (WV 1896). See also, Black’s Law Dictionary, 5th Ed.

The purpose of the Petitioner Regional Jail Authority (RJA), now the Division of

Corrections and Rehabilitation, and its employees like Co-Petitioner Zombro, is to enhance public safety generally, and ensure the safety and care of persons like Respondent Cody Grove in their custody. (See generally WV Code §15A-3-1, et seq.) To that end, statutes, regulations, policies and a code of conduct governed the acts of Petitioners RJA and Zombro at the time this cause of action arose.

Respondent acknowledges that this court has previously concluded that the "...general functions as a correctional officer... are broadly characterized as discretionary...." *A.B.* at 768. However, it must also be acknowledged that the functions of a correctional officer are not exclusively discretionary. In fact, there are several aspects of corrections in general that are ministerial and do not involve any discretion whatsoever. For example, those convicted of crimes and serving sentences of incarceration must not be allowed to escape; as required by law, detainees must be fed, kept safe, and provided adequate medical care; public safety must be ensured; prisoners and detainees must not be allowed to hurt themselves or others. Otherwise, what is the point of corrections and rehabilitation if the objects of such exercises (prisoners and detainees) die or are killed during confinement?

Documents contained in the supplemental appendix demonstrate that Co-Petitioner Zombro was required to perform certain ministerial acts as part of his employment, that there was no discretion involved with certain of these acts, and that failure to perform these ministerial acts were punishable by job termination or criminal prosecution. The fact that failure to perform such ministerial acts carried heavy punishment further substantiates the fact that the acts were and are ministerial. For example:

a. Code of Conduct

On March 9, 2015, at the commencement of his employment with Petitioner RJA, Co-

Petitioner Zombro acknowledged receipt of Code of Conduct - Policy #3010, and acknowledged his responsibility to read Policy #3010. (Supp. App. Pg. 1).

Key excerpts of Code of Conduct - Policy #3010 are found at Supp. App. Pg. 6.⁸ Code of Conduct - Policy #3010 required (i.e., “shall”= no discretion) Zombro to remain alert, observant, and occupied with facility business while on duty. Code of Conduct - Policy #3010 required Zombro to be alert to detect and prevent incidents and/or violations of institutional regulations, i.e., including inmate suicide.

Additional “orders” (i.e., no discretion) for Zombro found at Supp. App. Pg. 6 required him to conduct observations and supervise inmate behavior in order to maintain a safe and secure environment for inmates such as Cody Grove.

In addition to suspension, failure to follow the requirements mentioned above were to be viewed by Petitioner RJA as “unwillingness” and “inability” to comply with job requirements and “shall result in further disciplinary action, up to and including dismissal”. Supp. App. Pg. 7.

The October 21, 2015 memo from Lt. Ouimet, a supervisor of Zombro, concerning the October 18, 2015 incident, found at Supp. App. Pg. 9, refers to Zombro’s actions and omissions as “inattentive,” “an egregious lapse in judgment,” “deliberate and consciously lax in the performance of his duties,” “apparent nonchalance,” “appalling,” “unprofessional

⁸ The document beginning at Supp. App. Pg. 5 and ending at Supp. App. Pg. 8 is an October 27, 2015 letter of reprimand and suspension directed to Co-Petitioner Zombro because of his failure on October 18, 2015, to secure (lock) a cell door in the medical department at the Eastern Regional Jail (ERJ), a ministerial omission. This is the same department in which Respondent Cody Grove was allowed to hang himself a few weeks later on December 8, 2015 because of Zombro’s subsequent and continuing omissions and incompetence in performing his ministerial duties.

indifference,” and “reckless.”

Based on the foregoing, the undersigned suggests that the simple task of following the code of conduct and maintaining inmate safety is ministerial, not discretionary.

b. Oath of Office

On March 10, 2015, Co-Petitioner Zombro recited and signed the Oath of Office found at Supp. App. Pg. 2. He swore that he “will” support the Constitutions of the United States of America and West Virginia. He swore that he “will obey” the laws of West Virginia, the lawful orders of his superior officers, and that he “will comply” with and enforce the policies, procedures, rules and regulations of the Petitioner RJA, and that he “will” faithfully and diligently perform the duties of his position.

It should be noted further that failure to perform official duties is a crime under West Virginia Code §61-5-28.

The clear and direct language of his oath is not discretionary, it is mandatory and ministerial under penalty of job termination and criminal prosecution. The oath of office did not grant Zombro discretion or the right to exercise individual judgment. There are no half steps, Zombro will either comply or not.

As a direct result of Zombro’s failure to fully execute his ministerial oath of office and protect Cody Grove from harm, Cody Grove is dead. Zombro does not enjoy qualified immunity in light of the dereliction of his ministerial, non-discretionary duty.

c. Statutes, regulations, policies

As mentioned, WV Code §61-5-28 makes it clear that Zombro’s failure or refusal to perform his official job duties as required of him by law is a crime. Zombro had no discretion as to whether or not to perform his job duties, he either did or he did not perform

those duties.

Respondent Grove's First Amended Complaint (App.Pg. 140-141) sets forth several regulations⁹ applicable to both Co-Petitioners Zombro and RJA vis a vis the manner in which they conduct their corrections operations. These regulations carry the force and effect of law.¹⁰ They are for the benefit of both the public and incarcerated persons such as Grove. While it may be true that Petitioner RJA had discretion in how to create policies to enforce these regulations, the actual application of the regulations in practice at issue in this case is not discretionary, it is mandatory and ministerial.

Similarly, while creation of the policies mentioned on page 6 of the Supp. App. may have been discretionary on the part of Petitioner RJA, the actual application of those policies in practice by Co-Petitioner Zombro was a ministerial act not protected by qualified immunity. That is to say, Zombro had no choice as to whether or not to remain "alert and observant" so as to "detect and prevent incidents and/or violations of institutional regulations." In fact, Zombro's statement that he "wasn't thinking at the time" when he failed in the simple ministerial act of locking a cell door in the October, 2015 incident is an admission by him that his duty to be "alert and observant" to "detect and prevent incidents" is not discretionary, it is ministerial. Supp. App. Pg. 5.

Likewise, the ERJ Medical Dept. Security Check Report (log) at App. Supp. Pg. 16, which was altered by Zombro in an attempted cover up after Grove's death, is revealing. First, the log itself on its face does not contain a location for discretionary entries except, perhaps, the

⁹ 95 CSR§§1-14.1; 1-14.9.5; 1-14.9.7; 1-14.9.11; 14.9.12; 1-12.14

¹⁰ WV Code §29A-1-1

“comments” section. It is required to be accurately completed. There is no place on the log to give a discretionary date, time, or name entry. Accurate completion of the log is a ministerial act. Second, the reaction of Petitioner RJA to Zombro’s alteration of the log suggests that accurate completion of the log is not discretionary. Supp.App.Pg. 13, 14 and 15. “Deliberate altering of the medical log (by Zombro) was in violation, [sic] but not limited to, Policy and Procedure #3010, the Code of Conduct, General Regulation #18.” Supp. App. Pg. 15. Accurate completion of the log, and not altering the log, were ministerial, non-discretionary duties which Zombro breached. Zombro’s attempt at a cover-up after Grove’s death demonstrates his guilty knowledge.

d. The Response of Petitioner RJA to various acts and omissions by Zombro in breach of Zombro’s ministerial duties.

As mentioned, the reaction of Petitioner RJA to both the Grove incident and a prior October, 2015 incident demonstrating Zombro’s incompetence, i.e., warning, suspension, threat of termination, and investigation, suggest Zombro’s failure to perform ministerial, not discretionary duties. In other words, if Zombro had discretion whether or not to lock cell doors, whether or not to conduct regular, timely safety checks of inmates like Cody Grove, and whether or not to make false statements and alter official records during an official investigation, there would be no need for disciplinary steps against Zombro.

Qualified immunity does not protect a state employee like Zombro whose acts and/or omissions violate a ministerial duty of that employee. Similarly, under the doctrine of respondeat superior, that employee’s employer (here, Petitioner RJA) is not protected by qualified immunity either. *A.B., Marple* at fn. 7.

2. Even If Co-Petitioner Was Performing A Discretionary Function At The Time of Respondent's Death, Co-Petitioner's Acts And Omissions Violated Clear Statutory And Constitutional Rights Which Overcomes Qualified Immunity.

In the event the Court concludes that Zombro was not engaged in a ministerial act at the time of Cody Grove's death, Zombro's violation of statutory and constitutional rights strips him, and Petitioner RJA, of qualified immunity. See Syl. Pt. 2, *Hutchison*; *A.B.* at 765; *Marple* at 85, citing *Malley*; and Syl.Pt. 3, *Crouch*. Similarly, Zombro's failure of duty and breach of institution policy and regulation while acting within the scope of his employment strips both him and Petitioner RJA of qualified immunity, *A.B.* at 765. Zombro's knowledge that he failed in his duty and breached Petitioner RJA's policy and regulation is borne out by Zombro's fraudulent activities of falsifying records and making a false statement during the official investigation by Petitioner RJA into Grove's death, all as detailed above.

a. Petitioner RJA's Regulations have the force and effect of law

Respondent's First Amended Complaint sets forth a claim for regulatory violations which strip both Zombro and the RJA of qualified immunity and are sufficient to survive a Rule 12(b)(6) motion to dismiss. See paragraph 9 of First Amended Complaint (App.Pg. 135), and count six of First Amended Complaint (App. Pg. 140). Under the State Administrative Procedures Act (WV Code § 29A-1-1, et seq.), the RJA's regulations "... have the force and effect of law..." pursuant to WV Code §29A-1-1 and are actionable. *State ex rel. Kincaid v. Parsons*, 447 SE2d 543 (WV 1994). See also *A.B.*, fn 30.

b. Statutory violations

Respondent's First Amended Complaint contains a claim under the Wrongful Death Statute because Cody Grove's death was caused by the "neglect" and "default" of Zombro

within the scope of his duty. WV Code §55-7-5. App. Pg. 140. This statutory violation strips Petitioners Grove and RJA of qualified immunity. *Hutchison, A.B., Marple, Malley, Crouch.*¹¹

c. Constitutional violations

Count 1 of Respondent's First Amended Complaint sets forth a claim for deprivation of constitutional rights because the acts and omission of Co-Petitioners Zombro and RJA (through respondeat superior) in violating statute, regulation and policy as set forth above are a violation of due process under Art. 3, §10 of the WV Constitution and are actionable. Syl. Pt. 2, *Hutchison*. Due process requires government agencies to comply with their own regulations. "...[A] private cause of action exists where state government, or its entities, cause injury to a citizen by denying due process. To suggest otherwise, would make our constitutional guarantees of due process an empty illusion." *Id.* At 660.

In response to Petitioner's Motion to Dismiss Plaintiff's First Amended Complaint, Grove set forth additional constitutional violations sufficient to put Petitioners on notice of Plaintiff's claims and survive the Rule 12(b)(6) motion to dismiss. App. Pg. 161.

3. Zombro's obvious incompetence strips both Co-Petitioner Zombro and Petitioner RJA of qualified immunity, if they even had qualified immunity.

The "plainly incompetent" are not protected by qualified immunity. *Marple* at 85, *Hutchison* at 658, citing *Malley*. As set forth above, the Supplemental Appendix contains several examples of Zombro's incompetence to perform his job generally. Critically, the assessment of Zombro's job performance by a superior officer of Petitioner RJA after the

¹¹ Zombro's failure to perform his official duty is a misdemeanor. WV Code §61-5-28. Zombro's violations of statute are independently actionable. WV Code §55-7-9.

October 2015 incident, just weeks before Grove's death is damning. Terms such as "brazen security concerns, ... inattentive, ...deliberately and consciously lax in performance of his duties, ... nonchalance, ... appalling, ... unprofessional indifference, ... and reckless" are startling language to be used to describe a correctional officer working in what is purported to be a secure environment. Supp. App. Pg. 9.

Zombro was charged with protecting and serving Cody Grove. Zombro did neither. Petitioner RJA's assessment of Zombro's job performance can not be described as anything other than incompetence. Petitioner RJA's failure to terminate Zombro after the October 2015 incident was itself reckless and incompetent. Zombro and RJA must answer for their acts and omissions in a public trial. Their petitions for appeal should be denied.

CONCLUSION

Based on the foregoing, the decision of the Circuit Court of Berkeley County denying Petitioner's Rule 12(b)(6) motion to dismiss should be affirmed and the matter remanded for further proceedings.

In the alternative, this matter should be remanded for further development of the issue of the application of qualified immunity to the facts of this case.

Respectfully submitted,

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