STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

David Lee Manns,
Plaintiff Below, Petitioner

vs.) No. 18-0425 (Kanawha County 16-C-409)

C.O. Harold Preece, individually and in his official capacity,
C.O. Benjamin Browning, individually and in his official capacity,
C.O. Hale, individually and in his official capacity,
C.O. Maynard, individually and in his official capacity,
Administrator David Farmer, individually and in his official capacity,
LT. Hansford Slater, individually and in his official capacity,
The West Virginia Regional Jail and Correctional Facility Authority,
an agency of the State of West Virginia, and, John Doe,
unknown person or persons,
Defendants Below, Respondents

FILED
March 23, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner David Lee Manns ("Mr. Manns"), by counsel Kerry A. Nessel, appeals the judgment order of the Circuit Court of Kanawha County, entered on April 10, 2018.[1] Respondent West Virginia Regional Jail and Correctional Facility Authority ("WVRJCFA"), its administrator David Farmer, its supervising officer Hansford Slater, and several individual correctional officers (collectively, "the individual respondents") appear by counsel M. Andrew Brison and Mark J. McGhee.

[1] Pending is Mr. Manns' motion, filed on January 25, 2019, to strike respondents' brief because the brief contains "excerpts from trial witness testimony which is wholly and completely irrelevant to" Mr. Manns' assignments of error. In addressing a similar motion, one Washington appeals court explained:

> No one at the Court of Appeals goes through the record or the briefs with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial. So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.

O'Neill v. City of Shoreline, 183 Wash. App. 15, 24, 332 P.3d 1099, 1104-05 (2014). We whole-heartedly agree with this description, and the motion to strike is accordingly denied.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Manns filed a complaint in the Circuit Court of Kanawha County in December of 2014, asserting several causes of action for injuries he claimed to have received during a brief pretrial term of confinement at the Southwestern Regional Jail. After several individual defendants were dismissed from Mr. Manns' lawsuit because he failed to serve them, Mr. Manns filed a second complaint in March of 2016, thus instituting this action, and he later voluntarily dismissed the earlier complaint. The parties proceeded through discovery and to trial in 2018, and the jury ultimately awarded judgment to Mr. Manns against a single correctional officer on Mr. Manns' state tort claim for assault. Mr. Manns moved the circuit court to alter or amend judgment on his various other claims against WVRJCFA and the individual respondents (specifically described below), and the circuit court denied his motion.

On appeal, Mr. Manns assigns error to the circuit court's rulings insofar as that court: 1) granted WVRJCFA's motion for judgment as a matter of law on application of qualified immunity and consideration of the vicarious liability of WVRJCFA; 2) granted the individual respondents' motion for judgment as a matter of law and denied Mr. Manns' motion to alter or amend judgment on his excessive force claims brought pursuant to 42 U.S.C. § 1983; 3) excluded testimony about the spoliation of evidence and denied Mr. Manns' request for a hearing to establish WVRJCFA's part in the spoliation; and 4) excluded evidence discovered during the litigation stemming from the 2014 complaint.

We begin with Mr. Manns' third and fourth assignments of error, which address the circuit court's exclusion of evidence and the circuit court's treatment of Mr. Manns' claim that WVRJCFA intentionally discarded or concealed relevant evidence. We have explained the deference afforded to trial courts on issues such as this:

> "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." *State v. Louk*, 171 W.Va. 639, [643,] 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

Syl. Pt. 1, *State v. Shrewsbury*, 213 W. Va. 327, 582 S.E.2d 774 (2003).

The third and fourth assignments of error concern WVRJCFA's video surveillance procedures. Prior to trial, WVRJCFA and the individual respondents filed a motion to exclude testimony by Mr. Manns' witnesses that WVRJCFA destroyed routinely-kept video recordings of key areas in the Southwestern Regional Jail. Mr. Manns responded that there were three cameras in the medical unit "where [Mr.] Farmer administered excessive force" and there should have been "pertinent, relevant video which surely would have shown [Mr.] Farmer traveling to and entering the medical unit. . . ." At a pretrial conference conducted days before the scheduled start of trial,

Mr. Manns represented that he had provided a notice of intent to sue letter sixteen days after the incident in 2014, and respondent was thus on notice to preserve evidence. The circuit court granted the motion to exclude testimony, and we find that it did not abuse its discretion in doing so in light of WVRJCFA's representation to the circuit court (and uncontroverted here) that Mr. Manns' notice of intent to sue addressed a single incident that did not occur in the medical unit. Likewise, we find no fault with the circuit court's denial of Mr. Manns' half-hearted request[2], made well over a year after the filing of the motion to exclude testimony, that the circuit court conduct "a very short five-minute [*Tracy*] hearing."[3] A final concern that Mr. Manns raises about the video footage in question is his general argument that the circuit court erred when it "disallow[ed]" evidence developed on that matter during the litigation of his 2014 complaint. We find this general argument, which references only "evidence concerning the video" and "discovery responses" and does not identify particular evidence, insufficient to alert us to any error committed by the trial court.[4] Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure requires that arguments "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The

[2] When Mr. Manns' counsel requested that the circuit court immediately convene a hearing, WVRJCFA's counsel questioned, "Where are your witnesses?" Mr. Manns' counsel gestured to individuals sitting in the courtroom, and WVRJCFA's counsel responded, "You don't even know who that is." Mr. Manns' counsel admitted, "I don't. He's a sergeant."

[3] Syllabus Point 2 of *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999) provides:

> Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed.

[4] The few citations to the appendix record on appeal direct to rulings by the circuit court on the question of whether evidence that Mr. Manns would introduce is of the type excluded by the circuit court's grant of WVRJCFA's motion in limine to exclude testimony about spoliation of evidence. We found no error in the circuit court's ruling on that matter, and Mr. Manns does not argue that the circuit court misapplied its earlier ruling on the motion of limine. Thus, if we were to further explore this issue, it seems apparent that we would find little more than an attempt to circumvent the circuit court's earlier evidentiary ruling concerning the mention of spoliation.

Court may disregard errors that are not adequately supported by specific references to the record on appeal." Because we were presented a lack of support for this assignment of error, we consider it no further. Accordingly, we find Mr. Manns' third and fourth assignments of error without merit.

We now circle back to Mr. Manns' first and second assignments of error, concerning the circuit court's granting of judgment as a matter of law on certain claims, and the subsequent denial of Mr. Manns' motion to alter or amend its judgment.

> The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a [judgment as a matter of law] will be reversed.

Syl. Pt. 3, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996). And then,

> [t]he standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.

Syl. Pt. 1, *Wickland v. Am. Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998).

At the conclusion of Mr. Manns' case-in-chief, WVRJCFA and the individual respondents moved for judgment as a matter of law on Mr. Manns' excessive force claim against the individual respondents and his negligence claim against WVRJCFA. The court granted those motions on the ground that all respondents enjoyed qualified immunity.[5] Mr. Manns' brief, when addressing the individual respondents' liability, repeatedly refers to "violations of 42 U.S.C. § 1983."

> Because Title 42, U.S.C.A. § 1983 (1979) does not create substantive rights, but rather provides a remedy for pre-existing rights, all claims under this section must allege a specific violation of the constitution or "laws" of the United States. In order to recover damages under § 1983, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.

Syl. Pt. 4, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

Mr. Manns twice states that the individual respondents' actions violated his due process rights under the Fourteenth Amendment to the United States Constitution, and he makes a passing

[5] Only Mr. Manns' state tort claims were left for the jury's consideration.

reference to the Eighth Amendment regarding the individual respondents' "deliberate indifference to [his] serious medical needs." Inasmuch as Mr. Manns offers no meaningful discussion about this statement, and inasmuch further as there is no dispute that Mr. Manns received medical care, we consider the circuit court's grant of qualified immunity only in the context of the Fourteenth Amendment. The individual respondents are entitled to qualified immunity where:

> (1) a trial court finds the alleged facts, taken in the light most favorable to the party asserting injury, do not demonstrate that the officer's conduct violated a constitutional right; or (2) a trial court finds that the submissions of the parties could establish the officer's conduct violated a constitutional right but further finds that it would be clear to any reasonable officer that such conduct was lawful in the situation confronted. Whenever the public officer's conduct appears to infringe on constitutional protections, the lower court must consider both whether the officer's conduct violated a constitutional right as well as whether the officer's conduct was unlawful.

Syl. Pt. 6, in part, *City of Saint Albans v. Botkins*, 228 W. Va. 393, 719 S.E.2d 863 (2011). Here we emphasize that

> [t]he test for evaluating if a public official is entitled to qualified immunity, in the absence of fraudulent, malicious or intentional wrongdoing, is this: would an objectively reasonable public official, acting from the perspective of the defendant, have reasonably believed that his or her conduct violated the plaintiff's clear statutory or constitutional rights?

Maston v. Wagner, 236 W. Va. 488, 501, 781 S.E.2d 936, 949 (2015). In support of his argument that the individual officers are not entitled to immunity, Mr. Manns devotes his attention to the extent of his injuries and the presumption that his injuries were sustained at the hands of officers. Here, however, where Mr. Manns conceded at trial that his version of events was "somewhat true," and where testimony from correctional officers established that Mr. Manns initiated a fracas with the officers by throwing a "haymaker" that required officers' immediate reaction (which Mr. Manns then resisted), there is no evidence suggesting that the individual respondents did not act in an objectively reasonable manner or that they purposefully violated Mr. Manns' statutory or constitutional rights. Accordingly, we find no error.

The only issue remaining for our consideration, then, is Mr. Manns' first assignment of error, wherein he argues that WVRJFCA was not entitled to qualified immunity. He summarizes his argument: "[The] claims of negligent supervision and training as well as [WVRJCFA] being held [to] vicarious liability for its employees performing duties within the scope of their employment" should be presented to a jury. Mr. Manns argues that WVRJCFA had a clear duty under the since-repealed West Virginia Code § 31-20-9 to provide "appropriate staffing and training" and "standards necessary to assure proper operation." We need not consider whether the general directions of that statute convey a "clearly established" law sufficient to impute responsibility on WVRJCFA (*see State v. Chase Securities, Inc.*, 188 W. Va. 356, 357, 424 S.E.2d 591, 592 (1992)), because Mr. Manns offered no evidence at trial to support his theory that the WVRJCFA was deficient in its operation of the Southwestern Regional Jail. We, therefore, find

no error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 23, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Evan H. Jenkins
Justice John A. Hutchison