IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-0906

OFFICER ISAIAH BLANCARTE AND OFFICER BRYON WHETZEL, ET AL.,

Defendants Below, Petitioners,

v.

DAMEIN ROBBINS,

Plaintiff Below, Respondent.

(On Appeal From Order of the Honorable C. Carter Williams; Circuit Court of Hampshire County, West Virginia; Case No. 20-C-24)

PETITIONERS' BRIEF

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(1) The circuit court erred when it failed to identify and evaluate facts that demonstrate that Officer Blancarte and Officer Whetzel violated the Eighth Amendment's prohibition against cruel and unusual punishment.

(2) The circuit court erred by finding that Officer Blancarte and Officer Whetzel are not entitled to qualified immunity.

STATEMENT OF THE CASE

This is an appeal of an October 8, 2021, order entered by the Circuit Court of Hampshire County denying Correctional Officer Isaiah Blancarte's ("Officer Blancarte") and Correctional Officer Bryon Whetzel's ("Officer Whetzel") motions to dismiss on the grounds of qualified immunity. In refusing to grant their motions to dismiss, the circuit court erroneously determined that the plaintiff, Damein Robbins ("Robbins"), alleged sufficient facts to satisfy this Court's heightened pleading requirement that Officer Blancarte and Officer Whetzel engaged in conduct violating Robbins's clearly established rights under the Eighth Amendment of the United States Constitution. [JA 259-271.]

On October 26, 2020, Robbins filed his Amended Complaint in the Circuit Court of Hampshire County, West Virginia and named the West Virginia Division of Corrections and Rehabilitation ("WVDCR"), Jeff Sandy, Betsy Jividen, Edgar L. Lawson, Officer Bryon Whetzel and Officer Isaiah Blancarte as defendants.[1] [JA 009-030.] In the Amended Complaint, Robbins alleged six causes of action: (1) a violation of the 8th Amendment of the United States Constitution's prohibition against cruel and unusual punishment against Officer Blancarte and

[1] The circuit court also denied the WVDCR's motion to dismiss. The WVDCR appealed that ruling. The WVDCR appeal is being addressed by this Court in Docket No. 21-0905. At the time this brief was filed, pending before this Court is a joint motion to consolidate the appendix in Docket No. 21-0905 with this case.

Officer Whetzel; (2) failure to protect against Officer Blancarte and Officer Whetzel; (3) negligent infliction of emotional distress against Officer Blancarte and Officer Whetzel; (4) failure to train against Sandy, Jividen, Lawson, and the West Virginia Division of Corrections and Public Safety; (5) vicarious liability against Sandy, Jividen, Lawson, and the West Virginia Division of Corrections and Public Safety; and (6) attorneys' fees. [JA 009-030.]

On July 20, 2018, Robbins, a required registrant of the West Virginia Sexual Offender Registry, was ordered to serve forty-eight (48) hours of incarceration at Potomac Highlands Regional Jail ("PHRJ") in Augusta, West Virginia. [JA 078.] During intake, an unknown Correctional Officer elicited information about Robbins's status as a sexual offender in a nonconfidential setting in close proximity to other inmates. [JA 078.] On July 21, 2018, Robbins was placed in a misdemeanor pod within PHRJ; however, during that time, he was "checked off" the misdemeanor pod by other inmates because of his status as a registered sex offender.[2] [JA 078.] Robbins requested to be transferred from the misdemeanor pod, and, after initially being placed in an interview room at PHRJ, Robbins was placed into a felony lockdown pod (A-6) later in the day on July 21, 2018. [JA 078.]

Early morning on Sunday, July 22, 2018, three inmates housed in the A-6 pod entered Robbins's cell and physically and sexually assaulted him for multiple hours. [JA 079.] Robbins alleges that, upon entering his cell, the inmates "closed the door behind them, covered the windows of the cell door, covered the window to the exterior, and turned off the lights inside of the cell." [JA 079.] Robbins was forced to drink urine and consume human feces; was sexually assaulted and sodomized with a broomstick; and was physically assaulted in an outrageous and brutal manner by the three inmates. [JA 079.] Robbins was told by the three inmates that "this is what

[2] "Checked off" means that other inmates in the pod made threats of bodily harm against Robbins. [JA 078.]

happens to sex offenders." [JA 079.] The three inmates told him they would kill him if he told anyone what occurred. [JA 080.] The assault continued until approximately 4:45 p.m. on July 22, 2018, when Robbins was released from PHRJ. [JA 080.] Robbins alleges that he suffered "multiple broken ribs and a fractured orbital bone in his cheek" during the assault. [JA 080.]

At all relevant times, Officer Whetzel and Officer Blancarte were corrections officers at PHRJ. [JA077-078.] On the date of the incident, Officer Blancarte functioned as the "rover" of the pod in A-6, and Officer Whetzel was "acting as the Tower Officer." [JA 079-080.] Robbins does not claim that Officer Blancarte or Officer Whetzel were aware that Robbins was a registered sex offender or were aware that the other inmates knew about Robbins's status as a registered sex offender. Robbins does not assert any factual allegations that Officer Blancarte or Officer Whetzel had any reason to believe that any of the inmates intended to harm Robbins prior to the assault. Robbins does not assert that either Officer Blancarte or Officer Whetzel were aware of the assault when it occurred. Instead, Robbins contends that Officer Whetzel "unlocked the cell door," which allowed the three inmates to enter Robbins's cell. [JA 079.] Robbins is further critical of Officer Blancarte and Officer Whetzel for permitting "inmates to roam around A-6 pod together and allow[ing] entry of other inmates into [Robbins's] cell." [JA 080.]

On December 28, 2020, Officer Blancarte and Officer Whetzel filed motions to dismiss. [JA 051-074.] Officer Blancarte and Officer Whetzel requested that the circuit court grant their motions to dismiss because they were shielded from liability for Robbins's claims by qualified immunity. [JA 051-074.] In support of their motions to dismiss, Officer Blancarte and Officer Whetzel argued that Robbins does not allege that they were aware the alleged physical and sexual assault was occurring or that they deliberately permitted the assault. [JA 051-061, JA062-074.] Officer Blancarte and Officer Whetzel each argued they were entitled to qualified immunity

because Robbins failed to allege facts that, if proven true, would establish that they violated a clearly established law, which, in this case, according to Robbins, is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.

In its October 8, 2021, *Order Denying Defendants' Motion to Dismiss*, the circuit court denied Officer Blancarte's and Officer Whetzel's motions to dismiss. [JA 260-274.] In its order, the circuit court summarily concludes that the allegations in the Amended Complaint "constitute, as pled, a violation of [Robbins's] Eighth Amendment Rights." [JA0266.] The circuit court does not elaborate as to how the allegations in the Amended Complaint constitute an Eighth Amendment violation. In fact, the circuit court fails to perform any analysis under the Eighth Amendment. It simply concludes, without explanation, the facts alleged in the Amended Complaint amount to a violation of the Eighth Amendment; therefore, Robbins had alleged facts that, if true, establish that Officer Blancarte and Officer Whetzel violated a clearly established right and are not entitled to qualified immunity.

Officer Blancarte and Officer Whetzel appealed to this Court seeking review of the circuit court's order because the circuit court failed to identify facts that Officer Blancarte and Officer Whetzel violated the Eighth Amendment's prohibition on cruel and unusual punishment by acting with deliberate indifference – namely, that Officer Blancarte and Officer Whetzel were subjectively aware that Robbins faced a substantial risk of harm. Had the circuit court performed the Eighth Amendment analysis, it would have determined that Robbins alleged no specific facts demonstrating that either Officer Blancarte or Officer Whetzel engaged in conduct violating it. Neither Officer Blancarte nor Officer Whetzel were aware Robbins was a registered sexual offender. Neither Officer Blancarte nor Officer Whetzel were aware that the inmates allowed to roam the A-6 pod knew Robbins was a registered sexual offender. Neither Officer Blancarte nor

Officer Whetzel were aware that allowing the other inmates to roam around A-6 pod and to enter Robbins's cell created a substantial risk that Robbins would be attacked by the other inmates. [JA 062-074.] Absent these factual allegations, or other factual allegations showing that Officer Blancarte or Officer Whetzel had knowledge that their actions created a substantial risk of harm to Robbins, Robbins has failed to assert a violation of the Eighth Amendment. Absent factual allegations asserting a violation of the Eighth Amendment, Robbins has failed to allege facts that Officer Blancarte or Officer Whetzel violated a clearly established law. Therefore, Officer Blancarte and Officer Whetzel are entitled to qualified immunity, and it was reversible error to deny their motions to dismiss.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary because the argument set forth hereto would not be advanced through oral argument. Should this Court deem that oral argument should be held, it should do so under Rule 19 because this appeal involves assignments of error in the application of settled case law.

SUMMARY OF ARGUMENT

The circuit court erred when it failed to identify facts that demonstrate that Officer Blancarte and Officer Whetzel were subjectively aware that Robbins faced a substantial risk of harm. Indeed, the circuit court engaged in a limited analysis of Robbins's Eighth Amendment claim, summarily concluding that certain facts alleged in the Amended Complaint "constitute, as pled, a violation of [Robbins's] Eighth Amendment Rights." [JA 276.] The circuit court failed to articulate the test for establishing an Eighth Amendment violation, which requires, in part, that a public official be subjectively aware that his or her actions or inactions have created a substantial risk of harm occurring to an inmate. By failing to engage in an analysis to determine whether

Robbins adequately identified whether Officer Blancarte and Officer Whetzel violated a clearly established right, the circuit court effectively disregarded this Court's jurisprudence on qualified immunity. This Court's jurisprudence on qualified immunity requires a heightened pleading standard of facts that, if true, demonstrate a violation of a clearly established right – in this case the Eighth Amendment's prohibition of cruel and unusual punishment – and a "particularized showing" that a reasonable official would understand that his or her actions violated that right in light of preexisting law.

Had the circuit court engaged in the appropriate analysis under the Eighth Amendment, it would have determined that Robbins has failed to allege facts that, if true, establish a violation of the Eighth Amendment. In this case, Robbins seeks to establish a violation of the Eighth Amendment by claiming that Officer Blancarte and Officer Whetzel acted with deliberate indifference. To establish that a public official acted with deliberate indifference, a plaintiff must allege facts showing: (1) a public official's actions objectively deny an inmate of the minimum required necessities; and (2) a public official either purposefully caused the harm or was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed. Mere negligence does not establish deliberate indifference.[3]

Although Robbins may allege facts showing the Officer Blancarte and Officer Whetzel were negligent, Robbins does not allege facts showing that either Officer Blancarte or Officer Whetzel were aware of facts that a substantial risk of harm existed for Robbins if inmates were allowed to roam "A" pod or were allowed entry into Robbins's cell. Most notably, as Robbins contends that the inmate attack was precipitated by the fact that Robbins is an alleged sexual offender, there are no facts in the Amended Complaint so much as inferring that Officer Blancarte

[3] Officer Blancarte and Officer Whetzel do not dispute that Robbins is able to establish the objective component in identifying whether an Eighth Amendment violation occurred.

or Officer Whetzel had knowledge of Robbins's status as a sex offender or were aware that any of the inmates in "A" pod were aware that Robbins was a sex offender or that any of the inmates intended to physically harm Robbins.

Officer Blancarte and Officer Whetzel are entitled to qualified immunity if Robbins is unable to sufficiently plead that they violated a clearly established right that a reasonable official would have known. Robbins does not allege facts in his Amended Complaint that, if true, would establish a violation of the Eighth Amendment. Therefore, Robbins cannot defeat Officer Blancarte and Officer Whetzel's right to qualified immunity because Robbins cannot establish that they violated clearly established law. Accordingly, it was reversible error for the circuit court to deny Officer Blancarte and Officer Whetzel qualified immunity.

ARGUMENT

I. Standard

"When a party . . . assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*." Syl. pt. 4, in part, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998). "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint." *Cantley v. Lincoln Cty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) (per curiam). When deciding a motion to dismiss under Rule 12(b)(6), "the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). "[D]ismissal for failure to state a claim is only proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint." *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015). "[S]ketchy generalizations of a

conclusive nature unsupported by operative facts" do not set forth a cause of action. *Fass v. Nowsco Well Serv.*, 177 W. Va. 50, 52-53, 350 S.E.2d 562, 563-64 (1986).

With respect to the issue of qualified immunity presented in this case,

> [t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). When qualified immunity is at issue, a circuit court must insist on heightened pleading by the plaintiff. *Id.* at 149, 479 S.E.2d at 659.

II. Qualified Immunity

Qualified immunity is a judicially created affirmative defense under which "government officials performing discretionary functions generally are shielded from liability 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 also State v. Chase Sec.*, 188 W. Va. 356, 362, 424 S.E.2d 591, 597 (1992). Because it is an immunity, and not merely a defense, it protects government officials not only from liability, but also from the burdens of trial and preparing for trial, so it must be addressed by the court at the earliest possible stage of the litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). *See also Hutchison*, 198 W. Va. at 147, 479 S.E.2d at 657 (1996). ("We agree with the United States Supreme Court to the extent it has encouraged, if not mandated, that claims of immunities, where ripe for disposition, should be summarily decided before trial.")

For qualified immunity to apply, a public official first has to show that he or she was "acting within the scope of his or her employment, with respect to the discretionary judgments, decisions,

and actions of the officer." Syl. Pt. 6, *Clark v. Dunn,* 195 W. Va. 272, 465 S.E. 2d 374 (1995). If a public official establishes that he or she was acting within the scope of his or her employment with respect to discretionary functions, then a circuit court must determine, assuming the plaintiff's allegations in the complaint to be true, whether the public official violated a clearly established statutory or constitutional right or law of which a reasonable person would have known or if the public official acted in a fraudulent, malicious, or oppressive manner. *W. Va. State Police v. J.H.*, 244 W. Va. 720, 736, 856 S.E.2d 679, 695 (2021) (citing Syl. pt. 7, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014)).

A right is clearly established when its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *A.B.*, 234 at 492, 766 S.E.2d at 776 (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). This means that, "in the light of pre-existing law, the unlawfulness must be apparent." *E.B. v. W. Va. Reg'l Jail & Corr. Auth.*, 2017 W. Va. LEXIS 31, at *28, fn. 14, 2017 WL 383779 (2017) (memorandum decision) (citing *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987)). *See also A.B.*, 234 W. Va. at 492, 766 S.E.2d at 776. The test for evaluating whether a public official has violated a clearly established right is "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 civil actions where qualified immunity is implicated, "the trial court must insist on heightened pleading by the plaintiff." *Hutchinson*, 198 W. Va. at 149, 479 S.E.2d at 659. Heightened pleading requires more specificity of facts than mere notice pleading in order to permit an evaluation of the qualified immunity claim. *W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove,* 244 W. Va. 273, 281, 852 S.E.2d 773, 781 (2020). Public officials are entitled to

qualified immunity if, under the heightened pleading standard, the plaintiff fails to allege "specific allegations" showing that the immunity does not apply. *Hutchinson,* 198 W. Va. at 147-48, 479 S.E.2d at 657-58. To survive a motion to dismiss under the heightened pleading standard,

> a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a 'particularized showing' that a 'reasonable official would understand that what he is doing violated that right' or that 'in the light of preexisting law the unlawfulness' of the action was 'apparent.'

Id. at 149, fn. 11 (citing *Anderson*, 483 U.S. at 640).

In granting or denying a motion based upon qualified immunity, a circuit court is required to set out factual findings and conclusions of law sufficient to permit meaningful appellate review. *See P.T.P. by P.T.P v. Board of Educ.*, 200 W. Va. 61, 65, 488 S.E.2d 61, 65 (1997). A circuit court may not enter an order granting or denying a motion to dismiss based upon qualified immunity with "nothing more than a conclusory disposal of the qualified immunity issue, with a talismanic referral" to the facts. *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 569, 746 S.E.2d 554, 560 (2013). "Dismissal orders, like summary judgment orders, should contain findings of fact which are sufficient to provide clear notice to all parties and the reviewing court as to the rationale applied by the lower court." *P.T.P.*, 200 W. Va. at 65, 488 S.E.2d at 65, 1997.

With these principles in mind, it is apparent that the circuit court committed error when it denied Officer Blancarte's and Officer Whetzel's motions to dismiss. First, the circuit court failed to identify sufficient facts showing that Officer Blancarte and Officer Whetzel violated a clearly established right – in this case, the Eighth Amendment's prohibition on cruel and unusual punishment. Indeed, in this case, the circuit court failed to undertake the Eighth Amendment analysis altogether. Had the circuit court performed this required analysis, it would have concluded that Robbins fails to allege facts sufficient to give rise to a claim for violation of the Eighth

Amendment's prohibition on cruel and unusual punishment. This would have entitled Officer Blancarte and Officer Whetzel to qualified immunity.

A. The circuit court erred when it failed to identify and evaluate facts that demonstrate that Officer Blancarte and Officer Whetzel violated the Eighth Amendment's prohibition against cruel and unusual punishment.

Under the heightened pleading standard, a circuit court, when denying a motion to dismiss based upon qualified immunity, is required to identify facts pled by a plaintiff in the complaint that, if true, demonstrate a public official engaged in a violation of a statutory or constitutional right or law. In this case, the circuit court erred when it failed to apply the heightened pleading standard when it considered whether Robbins asserted facts that demonstrate that Officer Blancarte or Officer Whetzel deprived Robbins of his constitutional protections against cruel and unusual punishment under the Eighth Amendment.

Robbins contends that Officer Blancarte and Officer Whetzel violated the Eighth Amendment's prohibition against cruel and unusual punishment by failing to protect him from attack by other inmates. [JA 081.] A plaintiff alleging a violation of his Eighth Amendment rights based on an inmate-on-inmate attack must show that: (1) he faced a "substantial risk of harm," and (2) the defendants acted with "deliberate indifference."[4] *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). The "deliberate indifference" necessary to support a claim that an individual has violated the Eighth Amendment requires a "showing that the official was subjectively aware of the risk." *Id.* at 829. The deliberate indifference standard requires "a state of mind more blameworthy than negligence" – that is, "Eighth Amendment liability requires 'more than ordinary lack of due care

[4] Officer Blancarte and Officer Whetzel do not dispute that Robbins pled enough facts alleging that he faced substantial risk of harm. Officer Blancarte and Officer Whetzel do dispute that Robbins pled any facts that they were aware of, or should have been aware of, the substantial risk of harm to Robbins. Officer Blancarte and Officer Whetzel further dispute that Robbins pled any facts that they ignored or disregarded the substantial risk of harm to Robbins.

for the prisoner's interests or safety.'" *Id.* at 835 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

Under this Court's jurisprudence, the circuit court was required to determine whether Robbins satisfied the heightened pleading standard by alleging facts that, if true, establish that Officer Blancarte and Officer Whetzel engaged in conduct beyond the ordinary lack of due care for Robbins's safety, and they were subjectively aware that Robbins faced a substantial risk of harm to his health or safety and ignored that risk. Instead of engaging in this analysis, the circuit court arbitrarily concludes that "specific allegations concerning the conduct of [Officer Blancarte and Officer Whetzel] with regard to [Robbins] constitute, as pled, a violation of [Robbins's] Eighth Amendment Rights." [JA 266.]

In addressing the heightened pleading requirement in passing, the circuit court determines that Robbins "has alleged in the Amended Complaint sufficient 'particularized' facts to satisfy [the heightened pleading standard] on the matter of a clearly established right in this instance and at this stage of the proceedings." [JA 266.] The circuit court identifies the "facts"[5] it relies upon in reaching its conclusion but provides no explanation or analysis as to how those "facts" demonstrate that either Officer Blancarte or Officer Whetzel would have been, or should have been, subjectively aware that a substantial risk of harm existed for Robbins if cell doors were unlocked or inmates were allowed to roam the A-6 pod. Instead, the circuit court summarily concludes that Robbins pled a violation of his Eighth Amendment protections by asserting:

[5] The facts put forth by the circuit court in its order differ from the facts set forth by Robbins in his Amended Complaint. The circuit court finds that "Defendants were aware of threats" directed at Robbins but does not articulate which defendants were aware. [JA 265.] There is no allegation in the Amended Complaint that either Officer Blancarte or Officer Whetzel were aware of any threat directed at Robbins. [JA 075-086.] Additionally, there is no allegation in the Amended Complaint that Robbins was "paraded around . . . offered as a sex slave." [JA 266.] The circuit court appears to have adopted this "fact" from Robbins's arguments in the briefings. [JA 116, 129.]

> that Defendants were aware of threats made against him which necessitated moving him through the corrections facility several times before leaving him exposed and vulnerable to physical attack by: (1) placing him in a felony pod with violent inmates; (2) placing him in an unsecured cell; (3) permitting known violent felons entry into his cell; (4) allowing violent felons to roam around the "A" pod despite it being a lock-down pod; (5) failing to supervise felons roaming around the pod; (6) failing to observe that Plaintiff was paraded around from cell to cell being offered as a sex slave; and (7) failing to monitor Plaintiff's condition at any point until he was discharged.

[JA 265-66.]

Other than capriciously concluding that the aforementioned factual allegations – some of which were not part of Robbins's Amended Complaint – establish a violation of the Eighth Amendment, the circuit court provides no other explanation as to how or why those specific allegations are sufficient to establish either prong of the *Farmer* test. The circuit court does not identify which facts it relies upon to establish that either Officer Blancarte or Officer Whetzel were subjectively aware that there was a substantial risk to Robbins's health or safety by allowing inmates to roam around the A-6 pod or entry into each other cells. Although Robbins alleges in his Amended Complaint that he was "checked off" the misdemeanor pod because he was a registered sex offender, he does not allege in his Amended Complaint that Officer Blancarte or Officer Whetzel were aware that he was a sex offender or that Officer Blancarte or Officer Whetzel were aware that the other inmates in the A-6 pod were aware that he was a sex offender. [JA 078.] Nor does the circuit court identify any other fact which it contends would defeat qualified immunity by establishing deliberate indifference under the Eighth Amendment, if proven true.

In cases where a defendant raises qualified immunity as a defense, a circuit court, in denying a motion to dismiss, must identify, in its order, specific facts which would justify a finding that a public official violated a clearly established right or law – that is, a public official knew or should have known that his or her actions violated clearly established law. *See J.H.*, 244 W. Va.

at 739, 856 S.E.2d at 698. *See also* Syl. Pt. 4, *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 565-566, 746 S.E.2d 554, 556-557 (2013) (holding that a circuit court's order denying summary judgment on qualified immunity grounds "must contain sufficient detail to permit meaningful appellate review").

The circuit court failed to undertake the appropriate analysis under the heightened pleading standard required by this Court. The circuit court parrots (albeit not verbatim from the Amended Complaint) some of the factual allegations made by Robbins to broadly claim that those facts, if proven, would establish a violation of the Eighth Amendment. But the circuit court does not specifically describe how the facts alleged establish a violation of the Eighth Amendment. Specifically, the circuit court provides no discussion or explanation as to how any of the facts alleged (or identify which facts alleged) establish that Officer Blancarte and Officer Whetzel were subjectively aware that Robbins faced a substantial risk of harm and made the conscious decision to ignore that risk. Without that detailed analysis, it is unclear how Officer Blancarte and Officer Whetzel, on the facts alleged, violated the Eighth Amendment. Without a violation of clearly established law,[6] Officer Blancarte and Officer Whetzel are entitled to qualified immunity for all claims in Robbins's Amended Complaint. Accordingly, this Court should reverse the circuit court's order.

B. The circuit court erred by finding that Officer Blancarte and Officer Whetzel are not entitled to qualified immunity.

Robbins contends that the clearly established right Officer Blancarte and Officer Whetzel violated was Robbins's right to be free from cruel and unusual punishment under the Eighth

[6] Qualified immunity is also denied when a public official's acts are fraudulent, malicious, or otherwise oppressive. Robbins does not allege that, and the circuit court does not evaluate whether, Officer Blancarte and Officer Whetzel's actions are fraudulent, malicious, or oppressive.

Amendment. [JA 080-083.] Therefore, if Robbins's factual allegations fail to give rise to a claim for violation of the Eighth Amendment, then Officer Blancarte and Officer Whetzel are entitled to qualified immunity because Robbins has failed to plead facts that, if true, establish the violation of a clearly established right. In this case, Robbins fails to plea such facts as to Officer Blancarte and Officer Whetzel. Accordingly, it was error for the circuit court to refuse to find that Officer Blancarte and Officer Whetzel are entitled to qualified immunity.

"A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer*, 511 U.S. at 828. Prison officials have a duty to protect inmates from violence against other prisoners but "not ... every injury suffered by one prisoner at the hands of another . . . translates into constitutional liability for prison officials responsible for the victim's safety." *Id.* at 834. A prison official violates the Eighth Amendment only when two components – an objective component and a subjective component – are established. *See id.*

Objectively, a plaintiff must show that "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). To satisfy the objective component, a court must "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

The subjective component requires that the prison official had "a 'sufficiently culpable state of mind.'" *Farmer*, 511 U.S. at 834. Evidence establishing a culpable state of mind requires actual knowledge of an excessive risk to the prisoner's safety or a showing that prison officials were aware of facts from which an inference could be drawn that a substantial risk of serious harm

exists and that the inference was drawn. *See id.* at 837. To establish the subjective component, a plaintiff must allege facts that show that the prison official either purposefully caused the harm or acted with "deliberate indifference" in allowing the harm to occur. *See id. See also Strickland v. Halsey,* 638 Fed. Appx. 179, 184 (4th Cir. 2015) (citing *Wilson v. Seiter,* 501 U.S. 294, 302-03 (1991)).

In order to act with deliberate indifference, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. The test is subjective, not objective. *See Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995) (internal citations omitted). A prison official has not violated the Eighth Amendment if he or she "knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Farmer*, 511 U.S. at 844. *See also Rich v. Bruce*, 129 F.3d 336, 338 (4th Cir. 1997) (finding that a prison official did not violate the Eighth Amendment when he did not actually draw the inference that the inmate was exposed to a substantial risk of serious harm).

Mere negligence does not establish deliberate indifference. *Farmer*, 511 U.S. at 835. As the Fourth Circuit has explained:

> In *Farmer*, the Supreme Court noted that officials 'may be found free from liability if they responded reasonably' to a perceived risk. 511 U.S. at 844. This observation, of course, must be true because if the official's response was reasonable—i.e., not negligent—then *a fortiori* he was not deliberately indifferent. It does not follow, however, that when an officer's response is unreasonable—i.e., negligent—that he is liable for deliberate indifference. Indeed, we have noted that an officer's response to a perceived risk must be more than merely negligent or simply unreasonable. *See Brown* [*v. Harris*], 240 F.3d [383] [,] 390-1 ('At most, [the officer's] failure to take additional precautions was negligent [i.e., unreasonable under the circumstances], and not deliberately indifferent'). If a negligent response were sufficient to show deliberate indifference, the Supreme Court's explicit decision in *Farmer* to incorporate the

> subjective recklessness standard of culpability from the criminal law would be effectively negated.

Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 306-07 (4th Cir. 2004). *See also Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999) ("Deliberate indifference is a very high standard-a showing of mere negligence will not meet it."). *Farmer* instructs "that general knowledge of facts creating a substantial risk of harm is not enough. The prison official must also draw the inference between those general facts and the specific risk of harm confronting the inmate." *Johnson v. Quinones*, 145 F.3d 164, 168 (1998) (citing *Farmer*, 511 U.S. at 837).

Thus, to survive a motion to dismiss based upon qualified immunity, when relying upon an infringement of the Eighth Amendment to satisfy the violation of a clearly established right prong of qualified immunity, a plaintiff must assert facts sufficient to form an inference that "the official in question subjectively recognized a substantial risk of harm" and "that the official in question subjectively recognized that his [or her] actions were 'inappropriate in light of that risk.'" *Parrish*, 372 F.3d at 303 (quoting *Rich*, 129 F.3d at 340, fn.2). Robbins does not make this showing with specificity in his Amended Complaint. Therefore, it was error for the circuit court to deny Officer Blancarte and Officer Whetzel qualified immunity.

Robbins does not claim that Officer Blancarte or Officer Whetzel purposefully caused him harm. Therefore, to satisfy the subjective component of the *Farmer* test, Robbins was required to allege facts that give rise to an inference that Officer Blancarte and Officer Whetzel were aware that allowing inmates to roam in the A-6 lockdown pod created a substantial risk of harm to Robbins. The "mere threat" of possible harm does not suffice. *See Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986) ("The standard does not require that the guard or official believe to a moral certainty that one inmate intends to attack another at a given place at a time certain before

that officer is obligated to take steps to prevent such an assault. But, on the other hand, he must have more than a mere suspicion that an attack will occur.").

In Count I and Count II of his Amended Complaint, Robbins contends that Officer Blancarte and Officer Whetzel violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to protect Robbins from being attacked by other inmates housed in the A-6 lockdown pod. Robbins is critical of Officer Blancarte and Officer Whetzel for allowing inmates to roam around the pod which ultimately led to entry into Robbins's cell. [JA 080-83.] Without explanation, the circuit court contends that the following facts, if true, establish an infringement upon Robbins's Eighth Amendment protections:

> (1) placing him in a felony pod with violent inmates; (2) placing him in an unsecured cell; (3) permitting known violent felons entry into his cell; (4) allowing violent felons to roam around the "A" pod despite it being a lock-down pod; (5) failing to supervise felons roaming around the pod; (6) failing to observe that Plaintiff was paraded around from cell to cell being offered as a sex slave; and (7) failing to monitor Plaintiff's condition at any point until he was discharged.

[JA 265-66.]

Robbins implies the inmates assaulted him because of his status as a registered sexual offender.[7] Robbins admits to being a required registrant on the West Virginia Sexual Offender Registry and claims that, during the intake process, an unknown corrections officer – not Officer Blancarte or Officer Whetzel – elicited information regarding his status as a sexual offender in a nonconfidential setting in view and hearing of other inmates. [JA 078.] Robbins claims that, based upon his status as a registered sexual offender, he was "checked off" the misdemeanor pod by the other inmates, which necessitated his move to the A-6 pod. [JA 078.]

[7] Robbins contends that, during the attack, the three inmates informed him "this is what happens to sex offenders." [JA 079.]

Notably missing from Robbins's Amended Complaint are any allegations that Officer Blancarte or Officer Whetzel knew why Robbins had been moved to A-6 pod, knew that Robbins was a registered sex offender, or knew that other inmates being held in the A-6 pod were aware that Robbins was a registered sexual offender. Robbins does not allege that Officer Blancarte or Officer Whetzel knew or had reason to believe that inmates being housed in the A-6 pod would physically and sexually assault registered sexual offenders or physically or sexually assault Robbins because he was a registered sexual offender. Robbins does not claim that Officer Blancarte or Officer Whetzel had actual knowledge of a substantial risk that Robbins would be attacked by other inmates if Officer Blancarte or Officer Whetzel permitted the inmates to "roam around A-6 pod together and allowed entry of other inmates into Plaintiff's cell." [JA 080.] Robbins does not claim that Officer Blancarte or Officer Whetzel witnessed the inmates close Robbins's cell door, turn off the lights, or cover the windows. [JA 079.] Robbins does not allege that either Officer Blancarte or Officer Whetzel witnessed the inmates attack him and failed to intervene.

Robbins does not allege facts that give rise to an inference that Officer Blancarte or Officer Whetzel "subjectively recognized a substantial risk of harm" to Robbins by allowing inmates to roam the "A" pod. Robbins is required to provide enough facts in his Amended Complaint to allow a circuit court to plausibly find that Officer Blancarte and Officer Whetzel were deliberately indifferent to a substantial risk of serious harm. Allegations that Officer Blancarte or Officer Whetzel allowed prisoners to roam freely are not sufficient. *See Mack v. Miles*, 2019 U.S. Dist. LEXIS 49219 (S.D. Ga., Mar. 25, 2019) (failing to secure cell door which allowed an inmate to gain access to the cell and stab another inmate was insufficient to survive a motion to dismiss a plaintiff's claim for deliberate indifference). A generalized possibility of jail violence, rather than

a specific risk of serious harm, does not establish the subjective component of deliberate indifference. Robbins's allegations might form the basis of a claim for negligence against Officer Blancarte and Officer Whetzel, but his claims are insufficient to establish a deprivation of Eighth Amendment rights. *See Brown v. Harris*, 240 F.3d 383, 391 (2001) (Negligence "does not give rise to a constitutional claim when the operative standard is 'deliberate indifference.'"). *See also Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999) ("Deliberate indifference is a very high standard -- a showing of mere negligence will not meet it.").

Robbins's lack of allegations giving rise to a violation of the Eighth Amendment's prohibition of cruel and unusual punishment is significant in the context of qualified immunity, because, without such a violation, Robbins is unable to establish that Officer Blancarte or Officer Whetzel violated a clearly established right. *See A.B.*, 234 W. Va. at 517, 766 S.E.2d at 776. ("To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a 'particularized showing' that a reasonable official would understand that what he is doing violated that right or that in the light of preexisting law the unlawfulness of the action was apparent.")

The circuit court erred by failing to appreciate the lack of allegations in Robbins's Amended Complaint to support an Eighth Amendment violation: (1) there are no allegations that Officer Blancarte or Officer Whetzel placed him in the A-6 pod or knew why Robbins was being placed in A-6 pod; (2) there are no allegations that Officer Blancarte or Officer Whetzel knew, or should have known, that placing Robbins in an unsecured cell, permitting felons entry into his cell, or allowing felons to roam around A-6 pod placed Robbins in substantial risk of harm; and (3) there are no allegations that Officer Blancarte or Officer Whetzel witnessed the inmates assault Robbins and failed to intervene to prevent the assault. Robbins fails to allege facts that plausibly

suggest that Officer Blancarte or Officer Whetzel knew of and disregarded a substantial risk of serious harm to Robbins by allowing inmates to roam around in the A-6 lockdown pod, and such failure entitles Officer Blancarte and Officer Whetzel to dismissal of Robbins's Amended Complaint on the grounds of qualified immunity.

CONCLUSION

For the reasons discussed herein, Officer Isaiah Blancarte and Officer Bryon Whetzel request that this Court reverse the circuit court's *Order Denying Defendants' Motions to Dismiss* and remand the matter to the circuit court with direction to enter an order granting Officer Isaiah Blancarte's and Officer Bryon Whetzel's motions to dismiss.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-0906

OFFICER ISAIAH BLANCARTE AND OFFICER BRYON WHETZEL, ET AL,

Defendants Below, Petitioners,

v.

DAMEIN ROBBINS,

Plaintiff Below, Respondent.

(On Appeal From Order of the Honorable C. Carter Williams; Circuit Court of Hampshire County, West Virginia; Case No. 20-C-24)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of February 2022, I served the foregoing ***"Petitioners' Brief"*** on the following counsel of record via email, and via United States mail, in an envelope addressed as follows:

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