

IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA ATTORNEY-GENERAL/
MEDICAID FRAUD CONTROL UNIT; and
NATHAN R. LYLE, in his individual capacity
and in his capacity as an employee of the
West Virginia Attorney-General, Medicaid
Fraud Control Unit,

Petitioners,

v.

No. 22-779

THE HONORABLE KENNETH D. BALLARD,
Judge, Circuit Court of Kanawha County,
And HISEL BAILEY,

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

(Civil Action No. 22-C-145)

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I. QUESTIONS PRESENTED

1. Whether the Circuit Court correctly denied Petitioner West Virginia Attorney-General, Medicaid Fraud Control Unit's ("MFCU") Motion to Dismiss as to Count One of his Complaint alleging violation of his civil rights under 42 U.S.C. §1983?

2. Whether the Circuit Court correctly denied Petitioners' Motion to Dismiss Count Three of his Complaint alleging violation of the Whistleblower statute?

II. STATEMENT OF THE CASE

This Writ of Prohibition is an attempt at an improper interlocutory appeal as to Respondent's civil rights and whistleblower claims to which Petitioners have no legal right and fails to address all required elements to avail itself of this Court's original jurisdiction. Petitioners' make a strained and misconstrued reading of the Circuit Court's Order and Respondent's Complaint to erroneously conclude that Petitioner Nathan Lyle was not sued in his individual capacity. Finally, the Circuit Court was correct in finding that Petitioners played a role in the adverse employment action taken against Respondent for which Petitioners are responsible under the Whistleblower statute. The Circuit Court's Order was proper and should not be disturbed.

III. STATEMENT OF FACTS

Petitioners' factual recitation in its Statement of the Case section is largely accurate as it cites to the Complaint. App. 14-64. This cause of action as it pertains to Petitioners results from their flawed investigation and false report of alleged patient

abuse by Respondent, a registered nurse working at Defendant Mildred Mitchell-Bateman Hospital ("MMBH"), a state psychiatric facility run by Defendant West Virginia Department of Health and Human Resources ("DHHR") in Huntington, West Virginia. Petitioners, through Petitioner Lyle, investigated the allegations and made a report to the Cabell County Prosecuting Attorney's office which resulted in false criminal charges against Respondent. Those charges were subsequently dismissed. Respondent was accused of patient abuse from an incident that occurred on January 7, 2019. After a flawed investigation by Defendants Legal Aid of West Virginia, Inc. ("LAWV") and its agents, Teri Stone and Michelle Woomer, as well as Defendant Craig Richards, CEO of MMBH, Respondent was terminated from his employment at MMBH. Respondent filed a grievance with the West Virginia Public Employee Grievance Board ("WVPEGB") which found in his favor after a Decision that was highly critical of the investigation by Defendants LAWV, Stone, Woomer and Richards. App. 14-64.

However, what Petitioners' Statement of Facts omits is that Respondent's grievance against DHHR and MMBH was successful **BEFORE** Petitioners conducted their custodial interrogation of Respondent and **BEFORE** they made a false report of their findings to the Cabell County Prosecutor. Complaint at paragraphs 175 and 183, App. 46 and 48. Respondent was exonerated from the charges of abuse and neglect against him and reinstated to his position at MMBH by WVPEGB on November 19, 2019. Complaint, para. 175, App. 46. Respondent involuntarily submitted to a custodial interrogation on December 2, 2019 conducted by Petitioners. Petitioners knew then or should have

known that WVPEGB had cleared Respondent of all allegations of abuse and neglect. Complaint, para. 185, App. 48.

Respondent filed his Complaint in the Circuit Court of Kanawha County on February 25, 2022 seeking damages and stating claims against Petitioners for violations of Respondent's civil rights pursuant to 42 U.S.C. §1983 for unreasonable and unlawful seizure. App. 14-64. Specifically, the allegations against Petitioner Lyle are that he intentionally, or with reckless disregard for the truth, conducted an investigation and made a false report to the Cabell County Prosecutor's Office resulting in the prosecution of Respondent. App. 55-57. Respondent further sought damages in Count Two of his Complaint from Petitioners for malicious prosecution based on the same flawed investigation and false report. App. 57-60. Finally, Respondent in Count Three of his Complaint sought damages from Petitioners under the Whistle-blower statute, W.Va. Code §6C-1-3 and W.Va. Code §6C-1-4 (d) for participating in the reprisal against Respondent for his truthful testimony adverse to Defendant DHHR/MMBH in the matter of *Rees v. DHHR/Mildred Mitchell-Bateman Hospital*, Docket No. 2016-0357-DHHR (decided Jan. 18, 2017). App. 60-62.

Specifically with respect to Respondent's claims against Petitioner Lyle, Respondent's Complaint identifies Petitioner Lyle in both his individual capacity and his official capacity as an employee of the West Virginia Attorney-General ("WVAG"), Medicaid Fraud Control Unit ("MFCU"). App. 14. Petitioners' argument that the Complaint is flawed for failing to make a claim against Petitioner Lyle in his individual capacity is simply wrong for ignoring the style of the

case. Paragraph 11 of the Complaint specifically alleges that Petitioner Lyle "...at all times relevant...acted in his individual capacity as well as within the course and scope of his employment with Defendants WVAG and MFCU." App. 16. More particularly, in Count One of the Complaint asserting the claim for civil rights violations under 42 U.S.C. §1983, Respondent alleged that Petitioner Lyle was acting "...under color of the authority of their official capacity as employees of the...Defendants WVAG and MFCU." Complaint para. 221, App. 56.

Procedurally, on May 2, 2022, Petitioners served their Motion to Dismiss. App. 65-92. Petitioners sought dismissal of the claims against them asserting they are not a "person" under 42 U.S.C. §1983; Respondent's §1983 claim was barred by the statute of limitations; Respondent's Complaint failed to state a claim for malicious prosecution; prosecutorial immunity; qualified immunity; and Respondent's Complaint failed to state a claim under the Whistle-blower statute. App. 70-85.

Thereafter, on June 3, 2022, Respondent served his Response to Petitioners' Motion to Dismiss. App. 93-109. Petitioners served their Reply on June 16, 2022. App. 110-128.

On August 15, 2022, the Circuit Court entered an Order denying Petitioners' Motion to Dismiss. App. 1-13. It is from this Order which Petitioners seek relief.

Inasmuch as discovery has barely begun, there has been little factual development of this matter to date and the only facts of record are those exhibits attached to the motions, responses and

replies. Accordingly, for purposes of deciding this Writ, Respondent's allegations contained in his Complaint (App. 14-64) must be taken as true and viewed in a light most favorable to Respondent. The trial court's consideration begins with the proposition that "for purposes of the motion to dismiss the complaint is construed in the light most favorable to plaintiff and its allegations are to be taken as true." Cantley v. Lincoln County Commission, 221 W. Va. 468, 471, 655 S.E.2d 490, 492 (2007), quoting John W. Lodge Distributing Co. Inc. v. Texaco Inc., 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).

Since the Circuit Court's Order resulted from a Motion to Dismiss, it was required to and did accept the facts pled in the Complaint as true. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, Chapman v. Kane Transfer Company, 160 W. Va. 530, 236 S.E.2d 207 (1977) quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1977). Furthermore, "[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A motion to dismiss is evaluated under the standard of Rule 8(a)(1) of the West Virginia Rules of Civil Procedure. Rule 8(a)(1) of the West Virginia Rules of Civil Procedure states that a claim for relief must contain, "A short and plain statement of the claim showing that the pleader is entitled to relief." W. Va. R. of Civ. Proc. Rule 8(a)(1). A trial court

considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice. W. Va. R. Civ. Proc. Rule 8(f). The trial court's consideration begins with the proposition that "for purposes of the motion to dismiss the complaint is construed in the light most favorable to plaintiff and it's allegations are to be taken as true." Cantley v. Lincoln County Commission, 221 W. Va. 468, 471, 655 S.E.2d 490, 492 (2007), quoting John W. Lodge Distributing Co. Inc. v. Texaco Inc., 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). "The policy of Rule 8(f) is to decide cases upon their merits and if the complaint states a claim upon which relief can be granted under any legal theory a motion under Rule 12(b)(6) must be denied." Cantley at 470.

A court reviewing the sufficiency of a Complaint, before the reception of any evidence, should examine not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U. S. 232, 236 (1974). A court must determine if the complaint states a plausible claim for relief, and if it does, the motion to dismiss must be denied. Cunningham v. Castelle, 2011 U.S. Dist. LEXIS 108512, * 4 (S.D. W. Va. Sept. 22, 2011) A well-pled complaint must assert "enough facts to state a claim to relief that is plausible on its face." Id. quoting Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is

very remote and unlikely." Twombly at 556 (internal quotations omitted).

Here, what cannot be ignored is that Petitioners had knowledge that the investigation by Defendants LAWV, Stone, Woomer and Richards was flawed and the termination of Respondent's employment had been overturned. Petitioners sought and failed to have their actions dismissed based on Respondent's §1983 claim being made against a state agency (WVAG/MFCU) and the Whistle-blower claim being made against a non-employer.¹ It now seeks this writ.

IV. SUMMARY OF ARGUMENT

The Circuit Court properly denied Petitioners' Motion to Dismiss. Further, Petitioners have failed to assert a proper basis for its right to original jurisdiction with respect to the Circuit Court's denial of its Motion to Dismiss.

The Circuit Court correctly denied Petitioners' Motion to Dismiss Respondent's §1983 claim as it is made against Petitioner Lyle in his individual capacity. Petitioners ignore the clear allegations in Respondent's Complaint (App. 14-64). The Circuit Court was further correct in denying Petitioners' Motion to Dismiss Respondent's Whistle-blower claim because Respondent's employer was ultimately the state of West Virginia. Petitioners are a state agency (WVAG), a division of a state agency (MFCU) and an employee of that division of that state agency (Lyle). Complaint, para. 10-11, App. 16.

¹ Petitioners separately have filed a Notice of Appeal before this Court, No. 22-781, related to its immunity defenses.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Procedurally, Respondent believes this Court respectfully lacks jurisdiction over this improperly filed Petition as one of original jurisdiction pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure and it should be dismissed without argument as Petitioners have failed to assert the basis for their claimed right of original jurisdiction with respect to the Circuit Court's denial of Petitioners' Motion to Dismiss.

With respect to Petitioners' jurisdictional claims, Respondent believes that oral argument is unnecessary as a Memorandum Decision affirming the Circuit Court's decision is appropriate pursuant to W. Va. R. App. Proc. 21(c). To the extent oral argument is granted to Petitioner, Respondent respectfully requests and reserves the opportunity to participate in oral argument, whether pursuant to W. Va. R. App. Proc. 19(a)(1) or (4).

VI. ARGUMENT

A. Petitioner Fails to Meet the Standard of Review for a Petition for Writ of Prohibition.

Petitioner correctly cites the five-factor test for original jurisdiction set forth in Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996). Those factors are:

- 1) Whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- 2) Whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- 3) Whether the lower tribunal's order is clearly erroneous as a matter of law;
- 4) Whether the lower tribunal's order is an oft repeated error or manifest persistent disregard for either procedural or substantive law; and

- 5) Whether the lower tribunal's order raises new and important problems or issues of law of first impression. (emphasis added).

The use of the word "and" requires the analysis of all five factors, not just select ones. Petitioner only analyzes the first three factors. Petitioner ignores factors four and five. There is no indication that the Circuit Court's Order is an oft repeated error by the Circuit Court. Petitioner makes no argument that the Circuit Court persistently disregards procedural or substantive law. Finally, Petitioner does not claim that the Order raises new or important problems or issues of law of first impression. Original jurisdiction does not exist unless all five factors are met. This Court should dismiss this Petition.

Moreover, Petitioners claim they meet the first three factors but they are incorrect. If this Court declines to accept this Writ, Petitioners may later prevail at summary judgment or trial. If Petitioners are not successful at those stages, they then may appeal to this Court and that appeal may present the issues presented herein. Then, this Court may correct any issues with the Circuit Court's Order (except that there are none). Petitioners have an adequate means of obtaining relief. Original jurisdiction is neither appropriate nor necessary.

B. The Circuit Court did not commit clear legal error by denying Petitioners' Motion to Dismiss Respondent's §1983 claim.

Petitioner Lyle argues that he cannot be sued under §1983 as a "person" and the Circuit Court erred because Respondent sued Petitioner Lyle in his official capacity. Petitioner Lyle misreads

the Complaint. The caption of the case identifies Petitioner Lyle as a Defendant sued both "...in his individual capacity and in his official capacity..." App. 14. Paragraph 11 of the Complaint identifies that Petitioner Lyle is sued in his individual capacity. App. 16.

A §1983 claim further requires that it be made against someone acting under color of state authority. Paragraph 221 of the Complaint alleges that Petitioner Lyle, when he made his false report against Respondent, was acting "...under color of the authority of..." his "...official capacity as an employee of Defendant[s] ... MFCU." App. 56. Examining solely the allegations contained in the Complaint as required by West Virginia law, the Circuit Court correctly found Respondent's §1983 claim properly pled and denied Petitioner Lyle's motion.

While Petitioner MFCU may not be a "person," it is vicariously liable for the acts or omissions of its employee, Petitioner Lyle. The Supreme Court of Appeals of West Virginia so held in W.Va. Reg'l. Jail & Corr. Facility Auth. v. A.B., 234 W. Va. 492, 506-507, 766 S.E.2d 751, 765-766 (2014), citing Parkulo v. W.Va. Bd. of Probation and Parole, 199 W. Va. 161, 178, 483 S.E.2d 507, 524 (1986). Therefore, the Circuit Court properly denied Petitioner MFCU's Motion to Dismiss.

Petitioner MFCU does not argue that it is not vicariously liable for Petitioner Lyle's conduct insofar as Respondent's §1983 claim. And so, it's argument misses the mark as far as the Circuit Court's Order is concerned. The Circuit Court did not find that

Petitioner MFCU is a "person." Rather, it found that it is vicariously liable for Petitioner Lyle's conduct. App. 3-4. As such, Petitioner makes the wrong argument since Respondent is not making a direct §1983 claim against Petitioner MFCU. While Parkulo was not a §1983 case, it does not distinguish that a state agency's vicarious liability does not apply to such cases.

Respondent properly pled a §1983 claim against Petitioners and their writ must be denied.

C. The Circuit Court did not commit clear legal error when it denied Petitioner Lyle's Motion to Dismiss Respondent's Whistle-blower claim.

Petitioner Lyle argues that he cannot be subject to the Whistle-blower statute as he was not an employer of Respondent. That is true in the sense that Petitioner Lyle did not supervise Respondent. However, Petitioner Lyle was a state employee. Petitioner Lyle acted in concert with Defendants Shields and Richards, both of whom fit the definition of employer under W.Va. Code §6C-1-3. But Petitioners ignore the final qualification for "employer" under the statute: "...or an agent of a public body." While Petitioner Lyle was not a supervisor of Respondent, he was an agent of Petitioner MFCU, a public body, and acted in that capacity when conducting the custodial interrogation of Respondent and when referring his report to the Cabell County Prosecuting Attorney's Office for prosecution. See Complaint, paras. 9 and 10. App. 16.

W.Va. Code §6C-1-2(e)(1) defines a public body to include an "officer, agency... or other instrumentality of the State of West Virginia." The act is designed to protect state employees like

Respondent who report wrongdoing or waste. W. Va. Code §6C-1-3(a). This language evidences an intent by the legislature to protect employees who report such wrongdoing or waste by public officials and is designed to have a remedial effect. Therefore, it should be liberally interpreted to protect the public interest in open, honest and responsible government.

Petitioner Lyle's logic produces an illogical result. It would allow one state agency to conspire with another to participate in the cover up of the type of activity the Whistle-blower statute is designed to protect. But such conspiracy would allow at least one of the participating parties to escape liability because he was not the direct employer of the party bringing the claim. Here, Petitioner Lyle was being used an agent of other Defendants to effect a purpose of punishing Respondent for having reported wrongdoing by Defendants MMBH/DHHR. No Court should permit any state agency or employee to escape liability under the Whistle-blower law, even if not the direct employer.

VII. CONCLUSION

Respondent respectfully requests that this Court issue a Memorandum Decision affirming the Order of the Circuit Court of Kanawha County and denying Petitioners' Writ of Prohibition.

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THE HONORABLE KENNETH D. BALLARD,
Judge, Circuit Court of Kanawha County,
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Respondents.

CERTIFICATE OF SERVICE

I, Scott H. Kaminski, counsel for Respondent Hisel Bailey, certify that I served a true and correct copy of the foregoing "Response to Petition for Writ of Prohibition" by FileAndServeXpress and by U.S. mail, postage prepaid, on this 28th day of November, 2022:

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