IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MICHAEL A. McDONALD,

Plaintiff,

v. **Civil Action No. 18-C-240**
The Hon. Christopher D. Chiles

ADMINISTRATOR LARRY CRAWFORD, individually and in his official capacity;
CAPTAIN CARL ALDRIDGE, individually and in his official capacity;
C.O. PAUL DIAMOND, individually and in his official capacity;
C.O. DON VANCE, individually and in his official capacity;
C.O. DAVID RODES, individually and in his official capacity;
C.O. JOSHUA SCARBERRY, individually and in his official capacity;
C.O. WALLACE, individually and in his official capacity;
C.O. FLEMING, individually and in his official capacity;
C.O. JOHN DOES I-X, individually and their 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.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ON THE 30th day of June, 2021, came the Plaintiff, Michael A. McDonald, by and through counsel, Kerry A. Nessel, Esquire, and The Nessel Law Firm, and the Defendants, by and through counsel Dwane Cyrus, Esquire, and Shuman, McCuskey & Slicer, and a Hearing was held on Defendants' Motion for Summary Judgment. After reviewing the pleadings, hearing arguments and representations, the Court hereby ORDERS as follows:

FINDINGS OF FACT

1. It is undisputed Plaintiff was incarcerated at Western Regional Jail (WRJ) in Barboursville, Cabell County, West Virginia, a jail operated by Defendant West Virginia Regional Jail and Correctional Facility Authority (WVRJA), in June, 2016, when he was allegedly subjected

to abuses at the hands of Defendant C.O. Diamond, Defendant C.O. Vance, Defendant C.O. Rodes, Defendant C.O. Scarberry, Defendant C.O. Wallace and Defendant C.O. Fleming. These Defendants are hereinafter sometimes referred to as "the individual Defendants." Defendants WVRJA, Crawford and Aldridge are sometimes referred to as "supervisory Defendants."

2. Specifically, Plaintiff alleged during his June, 2016 incarceration at WRJ, Defendant Diamond, without being provoked, sprayed O.C. chemical agent in Plaintiff's face and eyes approximately four (4) inches from Plaintiff's face. Shortly thereafter, it is further undisputed individual Defendants strapped Plaintiff to a restraint chair where he languished for approximately twenty-eight (28) hours. Plaintiff alleges he was denied access to the bathroom, was rarely fed, if at all, and rarely supplied water and urinated and regurgitated on himself. Defendants dispute this contention. As Plaintiff was a pre-trial detainee, he contends these alleged acts of abuse violated the Fourth, Ninth and Fourteenth Amendments of the United States Constitution.
3. As he argued, Plaintiff was clearly upset in being placed in a holding cell that was packed with other inmates and allegedly calmly made it known to the officers without threats of violence or self-infliction of pain.
4. Plaintiff argues there were several options besides implementing O.C. spray directly into Plaintiff's eyes when the officers confronted him. Plaintiff argues the video provided by the Defendants clearly shows a docile Plaintiff who had his hands down to his side when sprayed. There were four (4) officers surrounding him. Plaintiff contends all these officers had to do was simply place their hands on Plaintiff's wrists, put them behind his back and walk him to

where they wanted him to go. In his Response brief Plaintiff states when Defendant Diamond was asked "if there is four officers, couldn't you have just placed your hand on his wrist and another officer placed his hand on the wrist and escort him into that holding cell?" Defendant Diamond testified in his deposition "that could have happened, yes." However, that was not done.

5. As for Plaintiff's conduct in the WRJ yard after being sprayed, Defendants claim his behavior was erratic. However, Plaintiff argues he clearly was attempting to alleviate the extreme burning of his eyes and skin from the O.C. spray by using the clothes he had on his person. Plaintiff argued the O.C. spray implemented wound up in both Plaintiff's rectum and urethra in addition to his face, eyes and chest, thereby causing insurmountable pain and discomfort forcing Plaintiff to act in an erratic manner in his futile pleas for relief. Plaintiff further contends any attempts by the Defendants of decontaminating Plaintiff were half-hearted, at best, as the O.C. spray was present for hours. Further, in order to get the attention of the officers Plaintiff argues he had to use body parts such as his head to knock on the door as he was fully restrained and it was the only manner to get medical assistance. As for Defendants' assertion Plaintiff was likewise erratic in disrobing, Plaintiff argues any loss of clothing was due to it falling down/off of Plaintiff while fully restrained and unable to pull up pants, not some intentional motive such as being disruptive or truculent. As he alleges, Plaintiff was in extreme pain and discomfort due to the O.C. and its after effects on all of his body parts, some more sensitive than others. Defendants argue Plaintiff testified he deliberately disrobed to give the officers "a show." However, Plaintiff confirmed he said so jokingly since his clothes were already falling off due to being fully restrained in handcuffs.

6. Plaintiff argued the most egregious acts of cruel and unusual punishment concern the use of the restraint chair. As stated in Defendants' Motion, Plaintiff languished in the "devil's chair" for twenty-eight (28) hours – eighteen (18) hours longer than what the maximum is allowed by the chair's manufacturer, national standards and WVRJA rules and regulations dictate.[1] In the exhibit provided by Plaintiff, the manufacturer clearly states on its website and accompanying instructional video "Detainees should not be left in the SureGuard Safety Restraint Chair for more than two hours. The SureGuard Safety Restraint Chair should **never** be used as a means of punishment." (emphasis in original). While Defendants claim Plaintiff was treated with humanity and fairness by given bathroom breaks, food and water and time to stretch and prevent atrophy, Plaintiff argues this is just not true. It is undisputed the video of the very long incident/incidents cuts off at 2:44 AM – over twenty-six (26) hours before Plaintiff was finally released from the restraint chair. It is further undisputed Defendants have not provided any evidence which contradicts Plaintiff's assertions he was left in this restraint chair for twenty-eight (28) hours non-stop – all the while allegedly vomiting and urinating on himself. On a related note, the video and records reflect officers with a hand-held video camera filming Plaintiff's alleged erratic behavior and actions. In fact, a log entry states "all interactions with sprayed inmate was [sic] recorded." It is likewise undisputed this video evidence was not supplied to Plaintiff during the discovery phase. Plaintiff argues that a negative inference towards Defendants could be deduced from failing to disclose the same, namely, possibly contradicting any assertion of belligerence on behalf of Plaintiff.

1 As provided by Plaintiff, the manufacturer states the maximum amount of time in restraint chair is two (2) hours. However, several other national standards state ten (10) hours maximum time with long breaks every two (2) hours.

7. Plaintiff alleged, and the evidence showed that, the Defendants had other means to subdue Plaintiff. For example, if they believed Plaintiff was a threat to himself or others, these Defendants could have placed Plaintiff in an interview room, with or without restraints. If that was not feasible, Plaintiff could have been placed in a non-contact interview room, again, with or without restraints. If Plaintiff espoused suicidal threats, which no evidence suggests, Defendants could have placed him in a suicidal "pickle suit" in one of the aforementioned rooms. Plaintiff contends that these methods have been employed numerous times prior to the incidents which gave rise to this civil matter.
8. Plaintiff alleges there seems to be contradictory statements/evidence surrounding Plaintiff's actions and his time in the restraint chair. For example, even though individual Defendants state Plaintiff was being loud and erratic, Plaintiff contends nothing in the records indicate a psychiatric consult was ordered. Also, the "Offender Watch Log" shows several entries wherein Plaintiff was calm, docile and just sitting breathing. However, it is undisputed he was still kept in the restraint chair after these entries, which arguably shows Plaintiff should have been released. As addressed more thoroughly below, WVRJA policy and procedure dictates "when the inmate's actions cease, force should cease." Plaintiff alleges this was not done, and that is why the Plaintiff's Complaint contains the excessive force/cruel and unusual punishment, violation of the Fourteenth Amendment/42 U.S.C. 1983, common law claims.
9. Plaintiff further argued that while the acts of excessive force/cruel and unusual punishment were dreadful, the officer Defendants did not stop with physical torture. Plaintiff also alleges that, during his time in the restraint chair he was constantly and consistently ridiculed, embarrassed, laughed at for urinating on himself and mentally abused. Plaintiff claims the acts

of the Defendants were so hateful and hurtful Plaintiff has sought psychological counseling with Dr. David Frederick of Huntington, West Virginia.

10. In their Motion for Judgment on the Pleadings, the supervisory Defendants took the stance that the individual Defendants' actions/inactions were criminal and outside the scope of their employment at the WRJ. The Plaintiff argued, at the June 30, 2021, hearing, that, if this were truly the case, the supervisory Defendants should have reported the individual Defendants' actions/inactions to law enforcement, but that there was no evidence of the supervisory Defendants having done so.

11. A Complaint in this matter was filed on or about May 2, 2018 alleging various claims against all Defendants. Various Defendants were served shortly thereafter and discovery commenced. These Defendants filed their joint Motion for Summary Judgment on the Pleadings on or about April 5, 2021 and Plaintiff timely responded to the same.

SUMMARY JUDGMENT STANDARD OF REVIEW

12. In regard to the summary judgment standard, the West Virginia Supreme Court of Appeals' decision in Williams v. Precision Coil, Inc., holds that when there is a genuine issue of material fact, the court views the evidence in the light most favorable to the nonmoving party. 194 W.Va. 52, 459 S.E.2d 329 (1995). The Court further held in Painter v. Peavy that summary judgment is appropriate only when the nonmoving party cannot "satisfy the burden of proof by offering more than a mere 'scintilla of evidence,'" and "produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." 192 W.Va. 189, 451 S.E.2d 755 (1994). Simply put, if the nonmoving party can produce evidence that a reasonable jury could return a verdict in its favor, summary judgment should be denied. For

the reasons delineating above and below, Plaintiff has met any and all burdens concerning this standard and, save for the concessions by Plaintiff, the Court DENIES Defendants' Motion for Summary Judgment.

1. PLAINTIFF'S VOLUNTARY DISMISSAL OF CERTAIN NEGLIGENT CLAIMS

13. In his Complaint Plaintiff alleges various negligent claims against Defendant WVRJA, Defendant Crawford and Defendant Aldridge. After reviewing the evidence at hand, Plaintiff voluntarily dismisses his claims against these Defendants for negligent hiring and negligent retention. To that end, this Court DISMISSES those claims against Defendant WVRJA, Defendant Crawford and Defendant Aldridge.

2. VICARIOUS LIABILITY and SCOPE OF EMPLOYMENT

14. In their Motion for Summary Judgment, Defendants WVRJA, Crawford and Aldridge, supervisory Defendants, do not address vicarious liability or scope of employment as it pertains to the individual Defendants. However, Plaintiff argues these legal theories need to be addressed as they pertain to the supervisory Defendant's argument regarding qualified immunity. As stated in the Complaint, Plaintiff asserts various negligence claims against Defendant WVRJA, including negligent training and supervision in addition to the claims against the individual Defendants and non-party offenders. To that end, Plaintiff seeks to hold Defendants WVRJA, Crawford and Aldridge liable in their own right in addition to being vicariously liable for the misconduct of WRJ employees who were acting within the scope of their employment, including the individual Defendants. Concerning the theory of vicarious liability, Plaintiff argues Defendants WVRJA, Crawford and Aldridge can be held liable for the individual Defendants and non-party employees performing duties within the scope of

their employment by engaging in the alleged conduct. For the reasons set forth below, this Court agrees with Plaintiff's recitation of the law as it pertains to the facts in this civil matter.

15. In West Virginia, scope of employment has been broadly defined and applied by the West Virginia Supreme Court of Appeals. In Syllabus Point 4 of Griffith v. George Transfer and Rigging, Inc., 157 W.Va. 316, 201 S.E.2d 281 (1973), the Supreme Court held that whether the agent "was acting within the scope of his employment and about his employer's business at the time of a collision, is generally a question of fact for the jury and a jury determination on that point will not be set aside unless clearly wrong."

16. The Supreme Court of Appeals of West Virginia repeatedly has held, consistent with Griffith, the issue of whether the acts committed by an employee or agent were within the scope of employment, thereby rendering the employer or principal liable under *respondeat superior*, is a question of fact for a jury to decide, even where the acts in question were tortious, violent, or criminal. Plaintiff recited several Supreme Court of Appeals of West Virginia opinions and the Court relies on the same.

17. Like many State of West Virginia agencies, Defendant WVRJA has policies and procedures dictating everything from how to apply for employment to how an employee can be terminated. Pertinent to this civil matter are the duties of an Administrator, Chief Correctional Officer and correctional officer and the job descriptions delineated in the most recent WVRJA Policies and Procedures that Plaintiff's counsel received during discovery.

18. First, prior to beginning employment with WVRJA, a prospective employee must be administered the Oath of Office found in Section 3033 of the WVRJA Policies and Procedures. As stated, the Oath of Office requires the WVRJA employee/agent will not only

follow constitutional provisions and the laws of the State of West Virginia, but also comply with and enforce the policies, procedures, rules and regulations of the WVRJA.

19. Second, Section 3027 of the WVRJA's Policies and Procedures, entitled *Job Description*, lists various duties and tasks associated with every job within the WVRJA. Pertinent to this matter are the duties of a Correctional Officer I and Correctional Officer II, the rank various individual Defendants held at the time the alleged excessive force/cruel and unusual punishment was implemented. Also contained in Section 3027 are the *Essential Functions and Tasks* of a WVRJA correctional officer. Third, When applying the above-referenced authorities in conjunction with the facts of this matter and Defendant WVRJA's policies and procedures, Defendants WVRJA, Crawford and Aldridge can be held vicariously liable for the actions and inactions of all WRJ employees, individual Defendants and non-party employees included, as they were performing tasks within their scope of employment.

20. Third, in West Virginia Regional Jail and Correctional Facility Authority v. A.B., 234 W.Va. 492, 766 S.E.2d 751 (2014.), the Supreme Court of Appeals of West Virginia held that the offending officer's acts of *sexual misconduct* "fall manifestly outside the scope of his authority and duties as a correctional officer." Id., at 36. Most relevant and salient to this matter, the Court further held that "[i]f the public official or employee was acting within the scope of his duties, authority, and/or employment, the State and/or its agencies may be held liable for such acts or omissions under the doctrine of *respondeat superior*, along with the public employee."

21. Most importantly, several individual Defendants clearly admitted under oath that their actions/inactions were within the scope of their WVRJA employment. To that end, a jury

could easily find the individual Defendants and non-party WRJ employees were performing duties well within scope of their employment. As such, considering Defendants did not address this issue in their Joint Motion for Summary Judgment and the individual Defendants and non-party WVRJA employees/agents were performing duties within the scope of their respective employment with WVRJA, that is an issue for the trier of fact and Defendants WVRJA, Crawford and Aldridge are not entitle to summary judgment in that regard.

3. PLAINTIFF'S 42 U.S.C. § 1983 CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

22. As stated, Plaintiff seeks to hold the individual Defendants liable for violations of 42 U.S.C. § 1983, which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); *et seq.*, the United States Supreme Court held in order for an individual to prevail on a 42 U.S.C. § 1983 claim, he must prove, by a preponderance of the evidence, each of the following three (3) elements:

> First, that the conduct complained of was committed by a person acting under color of state law;
>
> Second, that this conduct deprived the Plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States; and,
>
> Third, that the Defendants' acts were the proximate cause of the injuries and consequent damages sustained by the Plaintiff.

Further, the United States Supreme Court held that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even if the prisoner does not suffer serious injury. When an inmate does suffer serious injury/injuries from the excessive use of force by prison officials, a violation of the Cruel and Unusual Punishment Clause is clear. Id.

23. As for the first element, the Court finds that the offending officers were "acting under color of state law" as they were performing duties well within the scope of their WVRJA employment.

24. Second, the Court finds that Plaintiff, as a pre-Trial detainee, is afforded rights, privileges or immunities secured by the constitution or laws of the United States, specifically, the Fourteenth Amendment.

25. Third, the evidence produced in the discovery phase clearly could prove the underlying Defendants' "acts were the proximate cause of the injuries and consequent damages sustained by the Plaintiff." As stated above, Plaintiff arrived at WRJ on June 26, 2016 and was under the influence of an illegal substance and informed the Defendants he did not want to be placed in such a crowded holding cell. As argued, at this time Plaintiff did not complain of any injuries, pains or soreness. Additionally, Plaintiff's account was not contradicted by any witness, and there was no tangible evidence presented by the Defendants which could lead any reasonable person to believe the injuries were not caused by the alleged excessive force by the Defendants.

26. Additionally, the United States Supreme Court held in Farmer v. Brennan, 511 U.S. 825, 837 (1994), that a prison official, such as Defendants WVRJA, Crawford and Aldridge, are liable under the Eight Amendment if "he knows of and disregards an excessive risk to inmate health or safety." Plaintiff argues, that by placing an inmate in a restraint chair for twenty-eight (28) hours in an open and obvious location that is known to and acknowledged by the supervisory

Defendants, a jury could find Defendants WVRJA, Crawford and Aldridge liable.

27. Further, after being directly sprayed in the face with the O.C. which travelled to other sensitive parts of his body and, as alleged, not being properly attended to during his time in the restraint chair could lead to a finding of a further deprivation of Plaintiff's civil rights if proven at trial. Specifically, failing to provide proper medical care for a pre-trial detainee is also a violation of 42 U.S.C. § 1983/Fourteenth Amendment. In Estelle v. Gamble, 429 U.S. 97, (1976), the United States Supreme Court held "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' Gregg v. Georgia, at 173, proscribed by the Eighth Amendment. This could be true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." Id., at 104. As argued, Plaintiff claims he was not properly decontaminated after the close burst of O.C. directly in his face. Further, a jury could find that the mere fact Plaintiff languished in the restraint chair for twenty-eight (28) hours could manifest a failure to provide medical care to an inmate who is obviously suffering.

28. In their Motion for Summary Judgment, Defendants address the recent case decided by the United States Supreme Court concerning 42 U.S.C. § 1983, cruel and unusual punishment and excessive force. In Kingsley v. Hendrickson, et al., 576 U.S. 389, (2015), the United States Supreme Court addressed the very issues before this Court. The facts of Kingsley are similar to the facts of this civil matter. Not unlike Plaintiff, Mr. Kingsley was a pre-trial detainee at a jail and was beaten and tazed by four (4) jail officers. While Kingsley was not victimized as

significantly as Plaintiff alleges, he filed an excessive force/cruel and unusual punishment lawsuit pursuant to 42 U.S.C. § 1983, the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court held as follows: Under 42 U.S.C. § 1983, a pre-trial detainee "must show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim." Id, syl. pt. 1. In their joint Motion, Defendants correctly assert the Kingsley court held "[n]evertheless, a court cannot apply this standard mechanically . . . A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at that time, not with the 20/20 vision of hindsight . . . ." However, Plaintiff argues, and the trier of fact could find, the facts above clearly show the unreasonableness of the pain and suffering inflicted upon Plaintiff at the hands of the individual Defendants is deliberate and blatant and using the objective standard, the trier of fact could conclude the same.

29. When taking into consideration the three (3) elements an individual must prove to prevail on a 42 U.S.C. § 1983 claim in conjunction with the case law provided by both parties, the Court finds all are met by Plaintiff. Further, when the Court considers the law and the facts/evidence before it with the extremely high burden of Rule 56 of the West Virginia Rules of Civil Procedure, there is no pragmatic reason for the Court to grant Defendants' Motion for Summary Judgment concerning Plaintiff's 42 U.S.C. § 1983 claims.

4. QUALIFIED IMMUNITY IN RELATION TO ALL PLAINTIFF'S CLAIMS

30. As alleged and argued, Plaintiff contends he was subjected to various United States Constitution violations and State common law torts due to his treatment at the hands of all Defendants and seeks to holds all Defendants liable for the same in both direct, indirect and

negligence theories of liability. Defendants argue various reasons why Plaintiff's action and claims against them should be dismissed.

31. First, as addressed above, the supervisory Defendants can be held vicariously liable for the actions of the individual Defendants.[2] Further, as noted by Plaintiff in his Response brief and during the June 30, 2021 oral argument, in their Motion for Summary Judgment Defendants fail to address the WVRJA Policy Directives which dictate duties that officers perform within the scope of employment. Defendants partially relied on the Supreme Court of Appeals of West Virginia's decision in West Virginia Regional Jail and Correctional Facility Authority v. A.B., 234 W.Va. 492, 766 S.E.2d 751 (2014.). Specifically, in A.B., the first prong revolves around a reviewing court determining "whether the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or otherwise involve discretionary governmental functions." Id., at 23. The Court held in A.B. that the correctional officer's "general functions as a correctional officer, like most law enforcement officers, are *broadly* characterized as discretionary, requiring the use of his discretionary judgments and decisions." Id., at 27 (emphasis in original). To that end, all WVRJA employees'/agents' respective actions/inactions could likely be determined to be discretionary.

32. The second prong in A.B. revolves around the official's acts or omissions being in violation of a clearly established law and/or constitutional rights. As stated in the Complaint and in his Response brief, Plaintiff alleges various constitutional provisions and State tort claims were violated by all Defendants. As for the "clearly established laws" that were violated by

2 As conceded by Plaintiff, Defendants WVRJA, Crawford and Aldridge cannot be held vicariously liable for 42 U.S.C. 1983 violations but can be held vicariously liable for Plaintiff's common law torts.

Defendants, in addition to U.S. and West Virginia Constitutional provisions, Plaintiff states that West Virginia Code §31-20-9, *Jail facilities standard commission; Purpose, powers and duties*, defines the duties WVRJA owes to its inmates. In pertinent part, §31-20-9 reads as follows:

> *Prescribe standards for the maintenance and operation of county and regional jails.* The standards shall include, but not be limited to, requirements assuring adequate space, lighting and ventilation; fire protection equipment and procedures; provision of specific personal hygiene articles; bedding, furnishings and clothing; food services; **appropriate staffing and training**; sanitation, **safety** and hygiene; isolation and suicide prevention; **appropriate medical, dental and other health services**; indoor and outdoor exercise; appropriate vocational and educational opportunities; classification; inmate rules and discipline; inmate money and property; religious services; inmate work programs; library services; visitation, mail and telephone privileges; **and other standards necessary to assure proper operation**. (emphasis added).

Plaintiff contends the Defendants did not adhere to their duty to provide Plaintiff with a "safe" environment and did not have "appropriate staffing and training" at WRJ when Plaintiff was the victim of excessive/unreasonable force/corporal and cruel and unusual punishment. Plaintiff also contends, these Defendants ignored its own "Mission Statement" and policies and provisions which define its duty owed to inmates. To that end, a jury could find not only was West Virginia Code §31-20-9 violated, WVRJA violated its own policies, provisions and "Mission Statement." As such, "clearly established laws" could be found to have been violated by Defendants WVRJA, Crawford and Aldridge.

33. As argued by Plaintiff and addressed above, Plaintiff claims other clearly established laws were violated by Defendants, namely, "The West Virginia Regional Jail and Correctional Facility Authority's Policy and Procedure Statement." In regard to excessive force, the Statement holds in Document Number 9031 "force which is used when unnecessary or which exceeds that which is necessary to accomplish a legitimate purpose, is illegal and constitutes either a tort (assault and battery), a violation of inmate civil rights under the Eighth Amendment or Fourteenth

Amendment (Cruel and Unusual Punishment and/or Deprivation of Due Process), or even a crime (assault and battery)." (parentheses and contents in original). To that end, Plaintiff argues this clearly established law was violated by all Defendants, most particularly the individual Defendants, as the force was excessive and Plaintiff's Fourteenth Amendment/42 U.S.C. §1983 rights could be deemed violated by a jury. In fact, as pointed out by Plaintiff, this section of the Statement specifically refers to the elements contained in 42 U.S.C. §1983 and addressed above.

34. Document Number 9031 further states "once resistance has ceased, the application of force will cease" as well as "force cannot be used to punish an inmate." Plaintiff argues this provision likewise was not followed by all Defendants. Plaintiff also argued in his Response brief, as well as in his June 30, 2021 oral argument, that maybe Plaintiff was somewhat loud when in the receiving area of WRJ, but after being sprayed with O.C., he posed no threat. Nevertheless, the individual Defendants placed Plaintiff in a restraint chair for several hours, if not one full day, past what is subscribed by law and the manufacturers blatant and obvious instructions. As contained in Statement 9031, "the use of corporal punishment -- infliction of pain as a punishment for violation of a regulation is prohibited." Plaintiff argues that these Defendants' actions were not only excessive force but also could be construed as corporal punishment and that, as addressed above, the logs during Plaintiff's time in the restraint chair indicate on several occasions he was "calm" and "singing."

35. In his Response brief Plaintiff further alludes to other provisions contained in Document Number 9031 of the Statement -- the levels of force permitted. "The [WVRJA] has adopted the following levels of control as a guideline to ensure only the amount of force reasonable and necessary to control resistive behavior is utilized:

a. officer presence
b. verbal direction
c. empty hand control (soft/hand)
d. intermediate control devices (soft/hand)
e. deadly force."

Plaintiff's counsel admitts Plaintiff's verbal behavior may have been offsetting, but argues that the video supplied by Defendants show his physical actions denoted submission as he posed no threat. Therefore, Plaintiff argues the level of force used simply regarding the O.C. spray was excessive, unreasonable and punitive. Plaintiff also notes that Defendant Diamond testified there could have been less excessive force used on Plaintiff rather than spraying O.C. directly in his face. In Roberson v. Torres, the Sixth Circuit ruled that and officer who deployed pepper spray as a first response without attempting less intrusive means was not entitled to qualified immunity. Roberson v. Torres, 770 F.3d 398, 406 (6th Cir. 2014). In Williams v. Curtin, 631 F.3d 380 (6th Cir. 2011), plaintiff sufficiently stated an Eighth Amendment claim for use of excessive force when he alleged that after asking a question in response to a deputy's command, the deputy and a squad of officers deployed pepper spray. Additionally, Davis v. Pickell, 562 F. App. 387, 392 (6th Cir. 2014), held a prisoner was not resisting or threatening the deputies when they tackled and pepper sprayed him and concluded that "if [the prisoner] was neither threatening nor resisting officers" then the use of chemical spray "on a compliant inmate shocks the conscience" and violates the prisoner's clearly established constitutional rights." Plaintiff argues, and the Court agrees, a jury may find that Plaintiff McDonald was simply asking questions (verbal command), was not restrained by less excessive hands-on-wrists (empty hand control) and was pepper/O.C. sprayed directly into his face.

36. On a related note, that same section states "the staff person using force and the subject against

whom force was used will receive immediate medical attention, as appropriate." This provision was allegedly violated by all Defendants as Plaintiff claims he was not afforded proper medical attention when strapped to the restraint chair for an exorbitant amount of time which Plaintiff alleges is also a violation of Petitioner's §42 U.S.C. 1983 rights. *See* Estelle v. Gamble, 429 U.S. 97 (1976). As stated above, Plaintiff argues he was not afforded proper medical care and, in fact, still suffers from the physical and emotional injuries sustained due to all Defendants' actions and inactions and has sought counseling.

37. As also addressed above, A.B.'s third, and most important, prong concerns whether the individual Defendants were acting within or outside the scope of their employment with the WVRJA when they were alleged to have implemented excessive/unreasonable force upon Plaintiff. The Court held that the offending officer's acts of *sexual misconduct* "fall manifestly outside the scope of his authority and duties as a correctional officer." Id., at 36. Most relevant and salient to this matter, the Court further held that "[i]f the public official or employee was acting within the scope of his duties, authority, and/or employment, the State and/or its agencies may be held liable for such acts or omissions under the doctrine of *respondeat superior*, along with the public employee." Id., at 26. It is undisputed the individual Defendants testified in their respective depositions their acts were clearly within the scope of employment. As stated, A.B. revolved around an offending officer sexually assaulting a female inmate wherein the Supreme Court of Appeals of West Virginia held *raping* an inmate was not part of that offending officer's job description. In this matter, it is clear the individual Defendants were acting within the scope of their respective employment and it was for the benefit of Defendants WVRJA, Crawford and Aldridge.

38. The A.B. opinion also holds "[t]o the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of a clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with State v. Chase Securities, Inc., 424 S.E.2d 591 (W.Va. 1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability." A.B., Syl. Pt. 11.

39. Plaintiff first argues that, as stated above, Defendants violated the above-referenced "clearly established statutory laws," most importantly the Fourteenth Amendment/42 U.S.C. § 1983, when it implemented and/or failed to protect Plaintiff from being the victim of excessive force/corporal punishment at the hands of the individual Defendants.

40. Second, as also stated above, the A.B. Court held that a governmental entity is not afforded qualified immunity if its acts and omissions are fraudulent, malicious or oppressive. A.B., Syl. Pt. 11. Plaintiff argues that, in failing to properly staff and protect Plaintiff, these Defendants' individual and collectives acts and omissions clearly fall under the auspices of these parameters. Black's Law Dictionary defines *fraud* as consisting "of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury." Black's Law Dictionary definition of *malice* as an "intentional performance to do a wrongful act" as well as "a malicious act is an intentional, wrongful act performed against another without legal justification or excuse." Various definitions of *oppression* or *oppressive* are "very cruel or unfair," "very unpleasant or uncomfortable" and "the subjugation of one group by another,

carried out under conditions of unequal power, and often enforced by threats."

41. When taking into consideration the ruling in A.B., the above definitions of fraudulent, malicious and oppressive along with the actions implemented on Plaintiff by the individual Defendants and the alleged failure of Defendants WVRJA, Crawford and Aldridge to protect Plaintiff, the Court finds that none of these Defendant are entitled to a ruling of summary judgment in this matter. Rather, the Court finds that the issues raised in this case are questions properly for a jury to decide.

42. Finally, on March 25, 2019, the Supreme Court of Appeals of West Virginia addressed qualified immunity in regard to excessive force/cruel and unusual punishment of various West Virginia Division of Corrections offending officers in Ballard v. Delgado, 826 S.E.2d 620 (W.Va. 2019). In affirming the lower Court's denial of summary judgment in regard to alleged Eighth Amendment violations in conjunction with qualified immunity, the Court held that issues of such violations are an issue for the trier of fact. An analysis of Ballard in conjunction with the facts and pleadings in this matter solidifies Plaintiff's contention that this Court should deny Defendants' Motion for Summary Judgment before it as the trier of fact could conclude the same.

CONCLUSION

Taking into consideration the pleadings and evidence in this matter in conjunction with the controlling law, this Court has no plausible reason to grant Defendants' Motion for Summary Judgment. To that end, save for the concessions made by Plaintiff, the Court hereby DENIES Defendants' Joint Motion for Summary Judgment.

It is so ORDERED this the _____ day of _____, 2021.

Christopher D. Chiles

The Hon. Christopher D. Chiles

Order prepared by:

Natalie N. Matheny

Natalie N. Matheny, Law Clerk