/s/ C. Carter Williams
Circuit Court Judge
Ref. Code: 216CMFK4X

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CC-14-2020-C-24
Hampshire County Circuit Clerk
Sonja Embrey

IN THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA

DAMIEN ROBBINS,
Plaintiff,

v. **CASE NO. 20-C-24**

WV DIVISION OF CORRECTIONS AND REHABILITATION, an agency of the State of WV,
JEFF SANDY,
BETSY JIVIDEN,
EDGAR L. LAWSON,
OFFICER BRYON WHETZEL, ET AL.,
Defendants.

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

This matter came before the Court on June 7, 2021, upon the Defendants' respective Motions to Dismiss in the above-styled Civil Action. The Plaintiff, Damein Robbins, appeared by counsel, Gregory A. Bailey, Esq. and J. Daniel Kirkland, Esq. The Defendants, Bryon Whetzel and Isaiah Blancarte appeared by counsel, Michael Dunham, Esq. and Katherine McCann-Slaughter, Esq. The Defendant, West Virginia Division of Corrections (hereinafter "DOCR"), Jeff Sandy, Betsy Jividen, and Edgar L. Lawson appeared by counsel, Matthew Whittler, Esq.

Thereafter, the Court took the matter **UNDER ADVISEMENT** and afforded all parties an opportunity to submit proposed findings and/or orders no later than July 2, 2021. The Court has now received the proposed findings and/or orders and has had the opportunity to fully consider the matter, arguments and proffers of counsel, and pertinent legal authority.

Based upon the pleadings, applicable law and arguments of counsel, the Court hereby **DENIES** Defendants' respective Motions to Dismiss. In support of its ruling, the Court does

hereby **FIND, DETERMINE, ORDER** and **ADJUDGE** as follows:

FINDINGS OF FACT

1. On July 20, 2018, Plaintiff, Damein Robbins, was ordered to serve a forty-eight (48) hour period of incarceration to be served in Potomac Highlands Regional Jail (hereinafter "PHRJ") in Augusta, West Virginia. Am. Compl. ¶ 11. Plaintiff is a required registrant on the West Virginia Sexual Offender Registry. Am. Compl. ¶ 12

2. On July 21, 2020, Plaintiff was placed in a misdemeanor pod within PHRJ. During that time, Plaintiff was "checked off" the misdemeanor pod by other inmates based upon his status as a registered sexual offender. Shortly thereafter, Plaintiff requested a transfer out of the misdemeanor pod for his own safety. Am. Compl. ¶¶ 14-15.

3. In the early morning hours of July 22, 2018, three other inmates housed in the A-6 felony pod entered Plaintiff's "lock down" cell where he was physically and sexually assaulted for multiple hours. Am. Compl. ¶ 18.

4. Plaintiff has alleged that the three inmates entered the lock down cell after an unknown corrections officer, Bryon Whetzel, acting as the Tower Officer unlocked the cell door and permitted them entry upon their request. Am. Compl. ¶ 19. Upon being allowed into Mr. Robbins cell, the three 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. Am. Compl. Am. Compl. ¶ 22.

5. Plaintiff alleges that at all relevant times, Defendant Blancarte was acting as the rover for the A-6 felony lock down pod and in charge of the supervision and safety of the inmates housed therein. In his role as a rover, Defendant Blancarte was present within the lock down pod on numerous occasions throughout the time of the assault.

6. Plaintiff alleges the sexual and physical abuse would occur for hours without any intervention by Defendants Whetzel and Blancarte. Following his release from custody, Plaintiff was treated for significant injuries incurred during the physical and sexual assault. Plaintiff was hospitalized for several days.

7. At all relevant times, Plaintiff Robbins was in the care and custody of the DOCR. Further, at all relevant times Defendants Whetzel and Blancarte were acting under the color of law as correctional officers employed by the DOCR.

8. On October 26, 2020, Plaintiff filed an Amended Complaint in the Circuit Court of Hampshire County alleging six causes of action: (1) violation of the 8th Amendment of the United States Constitution against cruel and unusual punishment in violation of 42 U.S.C. § 1983; (2) failure to protect; (3) negligent infliction of emotional distress; (4) failure to train and supervise; (5) vicarious liability; and (6) attorneys' fees.

9. In addition to the two named correctional officers, Plaintiff has also named the DOCR, Jeff Sandy, Betzy Jividen and Edgar L. Lawson. The Court notes that the Plaintiff has voluntary agreed to the dismissal of the claims against Defendants Sandy, Jividen, and Lawson.

10. The Plaintiff's remaining claims against the DOCR include failure to train and adequately supervise the two correctional officers and vicarious liability for the alleged actions to the two named defendant correctional officers against the DOCR.

11. The Defendants have filed the pending Motions to Dismiss based upon the grounds of qualified immunity, the public duty doctrine, and/or failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

12. A motion under Rule 12(b)(6) challenging whether a complaint fails to state a claim is not favored and is not meant to adjudicate the merits of the claims. Instead, such a motion merely

tests the sufficiency of the complaint and should rarely be granted. See, Cantley v. Lincoln County Comm'n, 221 W.Va. 468, 655 S.E. 2d 490 (2007); Bowden v. Monroe county Comm'n, 232 W.Va. 47, 750 S.E.2d 263 (2013). In appraising the sufficiency of a complaint a court is not permitted to dismiss the action unless it determines beyond any doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle her to relief. Bowden, 750 S.E.2d 263 (2013); R.K. v. St. Mary's Medical Center, 229 W.Va. 712, 735 S.E. 2d 715 (2012), *certiorari denied*, 133 S.Ct. 1738.

13. "Qualified immunity is ... afforded to government agencies, officials, and/or employees for discretionary activities performed in an official capacity." *Maston v. Wagner*, 236 W. Va. 488, 499, 781 S.E.2d 936, 947 (2015). However, "[q]ualified immunity ... is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials; ... Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages." *Hutchinson v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996).

14. "In an oft-repeated formulation, the United States Supreme Court wrote that the law [of qualified immunity] seeks to balance "two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *W. Virginia Div. of Corr. v. P.R.*, No. 18-0705, 2019 WL 6247748, at *8 (W. Va. Nov. 22, 2019) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

15. The West Virginia Supreme Court of Appeals in *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014), set forth the "procedural analysis required to determine whether immunity flows to an individual employee or

official defendant, the State and its agencies, neither, or both." *Id.*, 234 W. Va. at 507, 766 S.E.2d at 766:

> To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify 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.

> To 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 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.*, 188 W.Va. 356, 424 S.E.2d 591 (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., supra, Syl. Pt. 11.

16. "If the plaintiff identifies a clearly established right or law which has been violated by the acts or omissions of the State, its agencies, officials, or employees, or can otherwise identify fraudulent, malicious, or oppressive acts committed by such official or employee, the court must determine whether such acts or omissions were within the scope of the public official or employee's duties, authority, and/or employment. To the extent that such official or employee is determined to have been acting outside of the scope of his duties, authority, and/or employment, the State and/or its agencies are immune from vicarious liability, but the public employee or official is not entitled to immunity in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992) and its progeny. If 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 official or employee."

Id., Syl. Pt. 12.

17. In *Maston*, the Court articulated the standard for qualified immunity as follows: "The test for evaluating if a public official is entitled to qualified immunity, in the absence of fraudulent, malicious or intentional wrongdoing, is this: [W]ould 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?" 236 W. Va. at 501, 781 S.E.2d at 949.

18. The Eight Amendment guarantees the right of the people to be from the infliction of "cruel and unusual punishments." U.S. Const. Amend. VIII. That guarantee imposes upon prison officials the duty and obligation to "provide humane conditions of confinement' to the incarcerated. *Farmer v. Brennen*, 511 U.S. 825, 832 (1994). It further requires officials to "take reasonable measures to guarantee the safety of the inmates." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). This includes the responsibility "to protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833. These clearly articulated and established constitutional rights are at the very heart of the allegations in the Amended Complaint which details the manner in which Defendants violated these protections owed to Mr. Robbins.

19. The Plaintiff asserts that the negligence and deliberate indifference of DOCR employees/officials led to his brutal sexual assault at the hands of inmates housed in Defendant's corrections facility. Plaintiff alleges that Defendants were aware of threats made against him which necessitated moving him throughout 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.

20. First, the Court finds that the acts and/or omissions on the part of the DOCR employees or officials alleged in the Amended Complaint are discretionary in nature, and do not constitute legislative, judicial, executive or administrative policy-making acts. The Court also finds that the aforesaid, specific allegations concerning the conduct of such employees or officials with regard to the Plaintiff constitute, as pled, a violation of Plaintiff's Eighth Amendment Rights.

21. "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 light of preexisting law the unlawfulness' of the action was 'apparent.'" *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Hutchison v. City of Huntington*, 198 W.Va. 139, 149 n.11, 479 S.E.2d 649, 659 n.11 (1996). In short, the clearly established right analysis has been stated as follows: [whether] "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *City of Saint Albans v. Botkins*, 229 W.Va. 393, 400, 719 S.E.2d 863, 870 (2011).

22. The Court finds with regard to the heightened pleading requirement stated above (and asserted by the Defendants as a basis for dismissing the Plaintiff's claims), that the Plaintiff has alleged in the Amended Complaint sufficient "particularized" facts to satisfy such requirement on the matter of a clearly established right in this instance and at this stage of the proceedings.

23. The Court likewise finds that the negligent and deliberate indifferent conduct as alleged in the Amended Complaint does fall within the scope of the employees' employment.

Indeed, the individual DOCR employees identified have as perhaps their greatest single charge in their employment to maintain conditions in their facility that meet the requirements of the Eighth Amendment and other state and federal laws related to correctional facilities. Here, Plaintiff has sufficiently alleged how the DOCR employees negligently failed in their duties and showed a deliberate indifference to their employment duties directly related to their control and supervision of inmates in their facility.

24. In *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, 234 W.Va. 492, 517-18, 766 S.E.2d 751, 776-77 (2014), the Court clarified the Public Duty Doctrine:

> In sum, the "special relationship" or "special duty" doctrine is and exception to the liability defense known as the public duty doctrine; *it is neither an immunity concept, nor a stand-alone basis of liability.* The special duty exception does not create liability but negates the public duty doctrine, a defense to liability." *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998). We have made plain that, [q]ualified immunity is, quite simply, immunity from suit. The public duty doctrine is a defense to negligence-based liability, i.e. an absence of duty. *See Holsten v. Massey*, 200 W.Va. 775, 782, 490 S.E.2d 864, 871 (1997) ("The public duty doctrine, however, is not based on immunity from existing liability. Instead, it is based on the absence of duty in the first instance.") This Court has dedicated an extensive discussion to the similarities, yet fundamental differences, between the two concepts in *Parkulo v. West Virginia Bd. Of Probation and Parole*, 199 W.Va. 161, 172, 483 S.E.2d 507, 518 (1996); "[The public duty doctrine] is not a theory of governmental immunity, 'although in practice it achieves the same result.'" (quoting Syl. Pt. 1, Benson v. Kutsch, 181 W.Va. 1, 380 S.E.2d 36 (1989)). Although both defenses are frequently raised, as in this case, only qualified immunity, if disposed of by way of summary judgment, is subject to interlocutory appeal. All other issues are reviewable only after they are subject to a final order[.]

25. The Public Duty Doctrine is different form the principle of governmental immunity in that it rests on the principle that recovery may be had for negligence by the State only if the duty breached was owed to the particular person seeking recovery. *W. Virginia Reg'l Jail & Corr. Facility Auth v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751, 756 (2014)(dissent), citing *Parkulo v. West Virgina Bd. Of Prob & Parole,* 199 W.Va. 161, 172, 483 S.E.2d 507, 518 (1986).

26. The Public Duty Doctrine may be defeated under the "special relationship" exception. The special relationship exception applies if the following elements are met: (1) an assumption by the government entity through some promises or actions of an a affirmative duty on behalf of the injured party; (2) knowledge by the government entity that the government agent's inaction could lead to harm; (3) some form of direct contact between the government entity's agent and the injured party; and (4) the injured party's justifiable reliance on the government entity's affirmative undertaking. *Id., citing Syl Pt. 2, Wolfe v. City of Wheeling,* 182 W.Va. 253, 387 S.E.2d 304 (1989).

27. The Court finds that the facts in the Amended Complaint, as alleged, sufficiently meet each of the four elements to satisfy the special relationship exception to survive a motion to dismiss: First, the DOCR and its agents took the affirmative steps to provide him special protection based upon threats made against the Plaintiff after their agents revealed to other prisoners that he was on the sexual offenders registry; and, they moved him several times to several locations within the facility before placing him in a lock down felony pod, even placing him in an interview room for hours, which is clearly not the protocol for housing prisoners. These efforts to move the Plaintiff were all affirmative steps especially unique to him and taken in an effort to protect him personally. Secondly, the DOCR and its agents had knowledge that their failure to protect Plaintiff would very likely lead to his being injured. That is the very reason they took special steps to move him several times. Third, the direct contact between Plaintiff and DOCR and its agents was the act of them physically moving him to different locations throughout the facility. Finally, the fourth element is met, again as alleged, because Plaintiff had good reason (and no choice) but to rely upon the DOCR and its agents to take steps to protect him from harm during his 48-hour incarceration.

28. The Plaintiff has asserted a claim under 42 U.S.C. § 1983. A civil action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." Gamble v. South Carolina Department of Corrections, 2020 WL 5249223 *4 (U.S. Dist. Ct. South Carolina 2020) (citing City of Monterey v. Del Monte Dunes at Monterey Ltd., 526 U.S. 687, 707 (1999).

29. In order to state a claim under this § 1983, a plaintiff need only allege the following essential elements of the claim: (1) "that a right secured by Constitution or law of the United States was violated," and (2) "that the alleged violation was committed by a person acting under the color of state law." *Id.* (Citing *West v. Adkins*, 487 U.S. 42, 48 (1998).

30. In the case at bar, the Plaintiff has alleged sufficient facts to show that Defendant Whetzel and Defendant Blancarte were acting under the color of state law at the time of the alleged violation of the Plaintiff's Eight Amendment Constitutional right to be free from cruel and unusual punishment. As such, this Court finds that both Defendant Whetzel and Defendant Blancarte are proper parties to this cause of action.

31. The Court finds that while the there is no vicarious liability for 42 U.S.C. § 1983 claims, Defendant WVDCR can be vicariously liable for the negligent acts committed by its employees under the remaining state tort claims set forth in the Amended Complaint.

32. The West Virginia Supreme Court of Appeal's analysis of *respondeat superior* vicarious liability in *W. Virginia Reg'l Jail & Corr. Facility Auth v. A.B.*, 234 W.Va. at 506-510 establishes the fundamental principles of vicarious liability of State for the negligent conduct of its employees where the employees are acting within the scope of their duties when committing the negligent conduct. The majority of the Court in the above case ultimately determined that the State was not vicariously liable for the intentional sexual assault committed by its employee

because his acts were outside the scope of his employment. In contrast, in the instant case Plaintiff's allegations of negligence and failure to protect are significantly distinguishable. Here, the failures and conduct alleged against the DOCR and its employees were squarely within the scope of their employment duties. As discussed previously, monitoring the inmates and taking steps to protect inmates from physical harm is a primary charge of DOCR and its employees. Accordingly, the WVDCR could be vicariously liable for the negligence of its employees committed within the scope of their employment if the allegations are proven to be true as this matter proceeds.

33. Thus, the Court finds that at this stage of the proceedings, the Defendants are not entitled to dismissal based upon qualified immunity, failure to state a claim pursuant to Rule 12(b)(6), and/or the public duty doctrine on Plaintiff's claims of vicarious liability.

34. In the instant case, and in a light most favorable to the Plaintiff, the Court finds that the Amended Complaint filed by the Plaintiff includes sufficient facts to defeat a Rule 12(b)(6) dismissal based upon qualified immunity grounds.

35. Because Plaintiff has alleged sufficient facts to make clear that WVDCR employees violated his clearly established rights while acting within the scope of their employment, Defendants are not entitled to immunity for their negligence in performing the discretionary functions as State actors at this stage of the proceedings.

ACCORDINGLY, for the reasons set forth herein and on the record at the June 7, 2021, hearing on the motion to dismiss, it is hereby **ORDERED** and **ADJUDGED** that Defendant West Virginia Department of Corrections and Rehabilitations Motion to Dismiss, Officer Isiah Blancarte's Motion to Dismiss, and Officer Bryon Whetzel's Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the public duty doctrine, and qualified

immunity is hereby **DENIED**. However, Defendants Jeff Sandy, Betzy Jividen, and Edgar L. Lawson are hereby **DISMISSED**, with prejudice, as named parties to this action based upon the Plaintiff's concession to their respective Motions to Dismiss.

Pursuant to Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009), it is further **ORDERED** and **ADJUDGED** that this Order denying the Defendants' motions to dismiss predicated upon qualified immunity is an interlocutory ruling, which is subject to direct appeal herein by the Defendants.

Further, Plaintiff's claim for punitive damages against the State agency is hereby **DISMISSED** by agreement of the parties.

The Clerk is hereby directed to transmit attested copies of this Order, once entered, to all counsel of record.

Entered this the 8th day of October 2021.

C. CARTER WILLIAMS, JUDGE