IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0905

THE WEST VIRGINIA DIVISION OF CORRECTIONS & REHABILITATION, ET AL,

Defendants Below, Petitioners,

v.

DAMEIN ROBBINS,

Plaintiff Below, Respondent.

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

PETITIONER'S BRIEF

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3. **The circuit court erred by not dismissing Count V (mis-identified as a duplicate Count IV) of the Amended Complaint as to the Division of Corrections for vicarious liability.**

4. **The circuit court erred by not dismissing Count VI of the Amended Complaint as to the Division of Corrections seeking attorney fees under 42 U.S.C. §§ 1983 and 1988.**

STATEMENT OF THE CASE

The Respondent Damein Robbins (hereinafter "Robbins"), filed his Amended Complaint on October 26, 2020. The Amended Complaint alleged that on July 20, 2018, Robbins, who is a registered sex offender, was ordered to serve forty-eight (48) hours of incarceration at Potomac Highlands Regional Jail in Augusta, West Virginia. *Appendix page 81,* Paragraphs 11-12. In said

Amended Complaint, Robbins alleged that in the early morning hours of Sunday, July 22, 2018, three unnamed inmates housed in the same pod as him entered his cell and proceed to physically and sexually assaulted Robbins. *Appendix page 82*, Paragraph 18. The Amended Complaint stated that Correctional Officer Bryon Whetzel was acting as the "Tower Officer" when he unlocked Robbins's cell door and permitted entry by the three inmates. *Appendix page 82,* Paragraph 19. The Amended Complaint further alleged that Correctional Officer Isaiah Blancarte permitted inmates to roam the pod together, which lead to the entry into Robbins's cell. *Appendix page 83*, Paragraph 30. The Amended Complaint asserted that the reason behind the assault was that Robbins had been identified within a portion of the jail's population during the intake process as a sex offender. *Appendix page 82,* Paragraph 25. Furthermore, the Amended Complaint alleged that Robbins suffered multiple broken ribs and a fractured orbital bone in his cheek during the assault. *Appendix page 82*, Paragraph 23.

The Amended Complaint named the two correctional officers, Bryon Whetzel and Isaiah Blancarte (hereinafter collectively "Correctional Officer Defendants") as defendant-parties in this matter. The Amended Complaint also named the West Virginia Division of Corrections and Rehabilitation (hereinafter "Division of Corrections"), Jeff Sandy (the Secretary of the West Virginia Department of Military Affairs and Public Safety), Betsy Jividen (the Commissioner of the West Virginia Department of Corrections and Rehabilitation), and Edgar L. Lawson (the former Superintendent of Potomac Highlands Regional Jail). The Amended Complaint's direct causes of action against the Division of Corrections are failure to train and supervise the Correctional Officer Defendants, vicarious liability for the alleged actions or inactions of the two correctional officers, and seeking attorneys' fees.

The Division of Corrections filed its Motion to Dismiss at issue in this appeal on January 3, 2021. After this matter was fully briefed and oral arguments held, the Circuit Court denied the Petitioner's Motion on October 8, 2021, and further denied the Motion to Dismiss. Defendants Sandy, Jividen, and Lawson have been dismissed from this case by mutual stipulation of the parties as noted in the Order. These actions left the Correctional Officer Defendants (Byron and Whetzel), the Division of Corrections, and Robbins as the parties in this matter.[1]

SUMMARY OF ARGUMENT

First, the circuit court erred by applying a notice pleading standard rather than a heightened pleading standard to a motion to dismiss based on qualified immunity. Under a heightened pleading standard, the Amended Complaint should be found deficient as it fails to allege specific facts concerning the alleged wrongful actions of the Division of Corrections. "In civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Hutchinson v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996). 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). Rather, the Amended Complaint disguises conclusory statements of liability as fact. Because the Amended Complaint rests on sweeping conclusive claims of liability without alleging facts in support, Robbins fails to state a claim under the heightened pleading standard in cases involving qualified immunity.

Second, the Division of Corrections is immune from claims alleged in the Amended

1 Subsequent to the entry of the Order denying the Motions to Dismiss, the case was reassigned for future proceedings in the Hampshire County Circuit Court from Judge C. Carter Williams to Judge H. Charles Carl III.

Complaint because each claim alleges violations of executive, administrative, policy-making decisions, or otherwise discretionary governmental functions.

> 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 involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

Syl. Pt. 10, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). Additionally,

> 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.

Id. at Syl. Pt.11. The Amended Complaint alleges on paragraphs 9 and 45 that the following three duties were violated by the Division of Corrections:

A. Duty to train correctional officers.

B. Duty to supervise correctional officers.

C. Duty to protect from the actions of other inmates (vicarious liability).

Applying *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, duties A and B are clearly discretionary to which the Division of Corrections is qualifiedly immune.

Third, the circuit court erred by not dismissing Count V (mis-identified as a duplicate Count IV) of the Amended Complaint as to the Division of Correction for vicarious liability. The

circuit court can only maintain the Division of Corrections as a party if there is an initial determination that sufficient pleadings exist alleging that the state's employee was acting in the scope of his employment, which could impose vicarious liability on the state employer. See Syl. Pt. 12, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B., supra.* However, the Amended Complaint contains allegations of violations by the individual correctional officers of the Respondent's Eighth Amendment rights, namely permitting and entry by the three inmates into his cell, displaying "deliberate indifference" to the physical and sexual assault of the Respondent, and the subsequent parading of the Respondent to further humiliate and embarrass him. However, these claims cannot be construed or interpreted to be connected, related, or an ordinary and natural incident of the correctional officers' duties for the Division of Corrections. The Order of October 8, 2021 incorrectly found that the individual correctional officers' alleged negligent and deliberate indifferent conduct fell within the scope of their employment with the Division of Corrections.

Fourth, the circuit court erred by not dismissing Count VI of the Amended Complaint concerning Robbins seeking attorney fees from the Division of Corrections under 42 U.S.C. §§ 1983 and 1988. The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment on an incarcerated individual and provides protection to incarcerated individuals with respect to treatment by correctional officials and conditions of incarceration. See *Helling v. McKinney*, 113 S.Ct. 2475, 2480 (1993). The Amended Complaint failed to show any heightened pleading directly against the Division of Corrections constituting the deprivation of a basic human need, was objectively 'sufficiently serious,' and that subjectively the Division acted with a sufficiently culpable state of mind. *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995)(citing *Strickler v. Walters*, 989 F.2d 1375, 1379 (4th Cir. 1995)). As any potential allegations concerning the alleged Eighth Amendment violations are directed solely at the named

correctional officers, there was not a direct allegation of such violations against the Division of Corrections, which thereby eliminated a potential exception to the Division of Corrections' dismissal under qualified immunity from the claims of attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, Petitioner Division of Corrections submits that oral argument is unnecessary as the record below is clear, the question presented has been authoritatively decided by this Honorable Court, and the facts and legal arguments on behalf of the Petitioner to overrule the Circuit Court's rulings have been adequately presented in Petitioner's Brief and the record below. Furthermore, affirmance by memorandum decision pursuant to *West Virginia R.A.P.* 21(c) would be appropriate. If the Court in its discretion determines that oral argument would be appropriate and will be held, however, Petitioner Division of Corrections would suggest that this case would be suitable for Rule 19 argument, as a case involving a claim of unsustainable exercise of discretion where the law governing that discretion is settled. *West Virginia R.A.P.* 19(a)(1)-(2).

STANDARD OF REVIEW

A "circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the "collateral order" doctrine." *W. Virginia Bd. of Educ. v. Marple*, 236 W.Va. 654, 660, 783 S.E.2d 75, 81 (2015). This Court reviews such a denial of a motion to dismiss *de novo*. Syl. Pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998). "[T]he purpose of a motion to dismiss is to test

the formal sufficiency of the complaint." Footnote 11, *Davis v. Eagle Coal and Dock Co.*, 220 W.Va. 18, 21, 640 S.E.2d 81, 84 (2006).

"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." *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978). However, to survive a motion to dismiss, a plaintiff's complaint must "at a minimum . . . set forth sufficient information to outline the elements of his claim." *Price v. Halstead*, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987). Although Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is broad and Rule 8 only requires mere notice pleading for most civil pleading in West Virginia, "a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint . . . .'" *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).

Moreover, "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Hutchison*, supra, 198 W.Va. at 149, 479 S.E.2d at 659. The determination of claims of immunity is a question of law for courts to decide:

> Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.

Id., 198 W.Va. at 148, 479 S.E.2d at 658 (internal citations omitted). Here, the Division of Corrections asserts that it is qualifiedly immune. Accordingly, heightened pleading is required to determine whether the Division of Corrections as a state agency is immune from suit for the alleged wrongful conduct.

ARGUMENT

1. The Circuit Court failed to correctly apply the "heightened pleading" required when the defense of qualified immunity is asserted.

In West Virginia, there is a heightened pleading standard that a plaintiff must meet in his or her pleading to defeat a motion to dismiss when the doctrine of qualified immunity is implicated. This heightened pleading standard requires more specificity of facts in the plaintiff's complaint than the more typically used notice pleading standard in order to survive a motion to dismiss. *Estate of Grove*, supra, 244 W.Va. at 281, 852 S.E.2d at 781. As noted by the West Virginia Supreme Court of Appeals in *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649, (1996) at footnote 11 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)):

> The threshold inquiry is, assuming that the plaintiff's assertions of facts are true, whether any allegedly violated right was clearly established. 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 doctrine of qualified immunity is intended to protect state agencies and government officials 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. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)). Simply explained, "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all." *Hutchinson,* supra, 198 W.Va. at 148, 479 S.E.2d at 658. The "heart" of the qualified immunity defense is that it proactively spares

the defendant the time and expense of going to trial. *Id.*

This Court has stated in previous rulings in cases concerning state agencies claiming qualified immunity that:

> 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 involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

See Syl. Pt. 10, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d. 751 (2014); *W. Va. Dep't of Envtl. Prot. v. Dotson*, 244 W.Va. 621, 628, 856 S.E.2d 213, 220 (2021)

To this end, a court must analyze if the plaintiff has demonstrated that 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)." Moreover, a circuit court must insist on a "particularized showing" of facial plausibility:

> The threshold inquiry is, assuming that the plaintiff's assertions of facts are true, whether any allegedly violated right was clearly established. 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."

Hutchison, supra at footnote 11 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). If the plaintiff cannot make such a demonstration, then both the

state agency and its employees are immune from all liability. *A.B.*, supra, 234 W.Va. at 513-17, 766 S.E.2d at 772-76. (see also *W. Va. Dep't of Envtl. Prot. v. Dotson*, 623, 856 S.E.2d 213, 215 (2021).

As an example, a plaintiff's "bald allegations of conspiracies" by prison guards will not, without particular evidence, survive the heightened pleading standard warranted by qualified immunity. *Chance v. Chandler*, No. 15-0340, pages 5-6 (W.Va. Supreme Court, September 11, 2015)(memorandum decision). Per *Chance*, prison officials are particularly given wide discretion by this Court in having "discretion to transfer prisoners in an effort to maintain a satisfactory operational environment" in order to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* Even if a Plaintiff can make a showing that a state employee is not entitled to qualified immunity, there is no inference made that the supervising state agency is also not entitled to qualified immunity; the plaintiff must satisfy the heightened pleading standard independently for both the state agency and its employees. *W. Va. State Police v. J.H.*, 244 W.Va. 720, 740, 856 S.E.2d 679, 699 (2021).

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment on an incarcerated individual and provides protection to incarcerated individuals with respect to treatment by correctional officials and conditions of incarceration. See *Helling v. McKinney*, 113 S.Ct. 2475, 2480 (1993). However, "[t]he showing necessary to demonstrate that the deprivation of which a prisoner complains is serious enough to constitute cruel and unusual punishment 'varies according to the nature of the alleged constitutional violation.'" *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5, 112 S.Ct. 995 (1992)). Simply put, the mere allegation of an Eighth Amendment violation without backing is insufficient to satisfy the heightened pleading standard.

In this matter on appeal, the Amended Complaint simply alleges that the Officer Defendants were aware of a "substantial risk of harm" to Robbins by allowing three other inmates to access his lockdown cell. *Appendix page 85*, Paragraph 46. The Amended Complaint offered no pleadings indicating that the Officer Defendants or the Division of Corrections knew or should have known of any specialized risk of harm besides that which constituted a normal and unavoidable reality of corrections management, which as a discretionary function is protected by qualified immunity. Similarly, the Amended Complaint at paragraphs 47 and 48 alleges without reference to any supporting facts or documentation that the Officer Defendants' claimed actions and omissions were willful, malicious, wanton, and reckless violations of his constitutional rights. *Appendix page 18.* Such assertions amount to mere "bald accusations of conspiracies" that, absent firm evidence, on their own do not meet the heightened pleading standard.

The Amended Complaint fails to satisfy the necessary element of heightened pleading by establishing the causes of action against the Division of Corrections. The relevant pleading only makes formulaic and bare-bones allegations at Paragraphs 60-62 that the Division of Corrections failed to adequately train and supervise the Defendant Officers in accordance with the Prison Rape Elimination Act and other unspecified duties. *Appendix page 87.* No claim of proof or evidence was offered alleging that the Division of Corrections did not take reasonable steps to prevent the alleged Eighth Amendment rights violations, knew it could have prevented this incident and failed to do so, or that any Eighth Amendment rights violations occurred as a direct result of the Defendant Officers' training and supervision. The Amended Complaint at no point makes a direct allegation against the Department of Corrections itself in violating Robbins' Eighth Amendment rights. Taken together, these allegations do not satisfy the particular showings required to defeat qualified immunity in respect to the Division of Corrections. Because these and the rest of the

Amended Complaint's allegations amount to unsupported and recitatory conclusions of law, the Respondent cannot meet the heightened pleading standard warranted by the qualified immunity defense.

The Circuit Court's holding that the alleged acts and omissions of the Officer Defendants and the Division of Corrections were not protected by qualified immunity is contrary to the well-established principles held by this Court's precedent. The Circuit Court determined that the behavior of the Division of Corrections to be "discretionary in nature" but still not "executive or administrative policy-making acts." *Appendix page 217,* Paragraph 20. The Circuit Court's Order is contradictory to the precedent of the *A.B.* case, where decisions concerning the housing and segregation of inmates were clearly held to be discretionary, executive, and administrative acts protected by qualified immunity. Furthermore, the Circuit Court's Order does not provide explanation behind its decision as to how the barebones allegations contained of the Plaintiff against the Division of Corrections would independently override the Division of Corrections' qualified immunity defense as required by the *J.H.* case. In sum, the Circuit Court's holding disregards most if not all of this Court's recent case law concerning the heightened pleading requirement and qualified immunity. For this reason, the Circuit Court's holding should be overturned.

2. The circuit court erred by not dismissing Count IV of the Amended Complaint as to the Division of Corrections for the failure to supervise, retain, or hire on the grounds of qualified immunity, because said activities are discretionary functions and there is no proper pleadings of constitutional or statutory violations against the Division

In the *A.B.* case, this Court found that the West Virginia Regional Jail Authority is immune for failure to properly train, supervise, retain, or hire its employees, because all of those activities are discretionary functions and not ministerial duties. *A.B.*, supra, 234 W.Va. at 513-17, 766 S.E.2d

at 772-76. It is well-established precedent that "the broad categories of training, supervision, and employee retention" are considered to be "discretionary governmental functions" for the purposes of the qualified immunity analysis. *W. Va. State Police v. J.H.*, supra, 244 W.Va. at 724, 856 S.E.2d at 683. In order for a plaintiff to defeat qualified immunity for a negligent training or negligent supervision claim, there must be an affirmative showing that the state agency "failed to properly supervise [its employee] and, as a result, [the employee] committed a negligent act which proximately caused the appellant's injury." *C.C. v. Harrison Cty. Board of Education*, 859 S.E.2d 762, 774 (W.Va. 2021). Per the *C.C.* ruling, this showing must first (1) make a valid negligence claim as to and employee; then (2) affirmatively demonstrate that the employee was inadequately trained or supervised. In the absence of such a showing, the Amended Complaint's claim against the Division of Corrections should have been dismissed per qualified immunity without any other proceedings continue. *Id.*

This Court holds that "qualified immunity is broad and protects all but the plainly incompetent or those who knowingly violate the law. Further, a public officer is entitled to qualified immunity for discretionary acts, even if committed negligently." *Markham v. W. Va. Dep't of Health & Human Res.*, No. 15-0340, pages 12-13 (W.Va. Supreme Court, May 26, 2020)(memorandum decision). Per the ruling in the *A.B.* case, government actions may involve both discretionary and non-discretionary (ministerial) aspects. The state agency enjoys wide qualified immunity for discretionary functions, while "ministerial" duties within these discretionary functions stem out of the duty to not violate clearly established statutory and constitutional rights of which a reasonable governmental employee may have known. *Id.* This ruling and others further established that the burden of proof is on the plaintiff to establish such violations as ministerial in nature. *Dotson*, supra, 244 W.Va. at 623, 856 S.E.2d at 215.

Importantly, *A.B.* and subsequent cases clarified that this Court determines "the broad categories of training, supervision, and employee retention . . . easily fall within the category of 'discretionary' governmental functions." *W. Va. State Police v. J.H.*, supra, 244 W.Va. at 740, 856 S.E.2d at 699.

Prior rulings on this issue have shown considerable deference and understanding for the considerable challenges state correctional administrators face on a daily basis. "We must be careful not to substitute our judgment for that of prison administrators." *Nobles v. Duncil*, 202 W.Va. 523, 534, 505 S.E.2d 442, 453 (1998); see also *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) ("evaluation of penological objectives is committed to the considered judgment of prison administrators" because it is said administrators who have to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration").

Furthermore, this Court has held that the broad categories of employee hiring, training, supervision, and retention are all within the umbrella of discretionary duties which fall under the scope of qualified immunity. See *A.B.*, supra, 234 W.Va. at 514, 766 S.E.2d at 773 (citing *Stiebitz v. Mahoney*, 144 Conn. 443, 134 A.2d 71, 73 (1957) (the duties of hiring and suspending individuals require "the use of a sound discretion"); *McIntosh v. Becker*, 111 Mich.App. 692, 314 N.W.2d 728, 729 (1981) (school board immune for negligent hiring and supervision); *Gleason v. Metro. Council Transit Operations*, 563 N.W.2d 309, 320 (Minn.Ct.App. 1997) (claims for negligent supervision, hiring, training and retention are immune as discretionary acts); *Doe v. Jefferson Area Local Sch. Dist.*, 97 Ohio App.3d 11, 646 N.E.2d 187 (1994) (school board is immune from negligent hiring and supervision claims); *Dovalina v. Nuno*, 48 S.W.3d 279, 282 (Tex.App. 2001) (hiring, training, and supervision discretionary acts); *Uinta Cnty. v. Pennington*, 286 P.3d 138, 145 (Wyo. 2012) ("hiring, training, and supervision of employees involve the policy

judgments protected by the discretionary requirement.")).

Furthermore, under the *A.B.* analysis, there must have been allegations that qualify under the heightened pleading standards that there was a direct violation of clearly established statutory or constitutional rights or law by the Division of Corrections. The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment on an incarcerated individual and provides protection to incarcerated individuals with respect to treatment by correctional officials and conditions of incarceration. *See Helling v. McKinney*, 113 S.Ct. 2475, 2480 (1993). However, "[t]he showing necessary to demonstrate that the deprivation of which a prisoner complains is serious enough to constitute cruel and unusual punishment 'varies according to the nature of the alleged constitutional violation.'" *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5, 112 S.Ct. 995 (1992)).

While the Amended Complaint asserts a violation of Robbins' Eighth Amendment Rights, said claims failed to establish allegations directly against the Division of Corrections under the heightened pleading standard constituting the deprivation of a basic human need by the Division that was objectively 'sufficiently serious,' and that subjectively the Division acted with a sufficiently culpable state of mind. *See Shakka*, 71 F.3d at 166 (citing *Strickler v. Walters*, 989 F.2d 1375, 1379 (4th Cir. 1995)). Any potential allegations concerning the alleged Eighth Amendment violations are directed solely at the named correctional officers. As such, there is not a direct allegation of such violations against the Division of Corrections, which thereby eliminated this potential exception to the Division of Corrections' dismissal under qualified immunity.

Furthermore, the Amended Complaint's passing reference to the "Prison Rape Elimination Act" also does not set forth a direct violation of clearly established statutory rights. First, the Amended Complaint does not state a specific section of the Act. that was purportedly violated by

the Division of Corrections. In addition, the purpose of the Prison Rape Elimination Act is "To provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape." The specific language of the Act states:

> **(3) Limitation.--** The Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities. The Attorney General may, however, provide a list of improvements for consideration by correctional facilities.

Prison Rape Elimination Act of 2003, 108 P.L. 79, 117 Stat. 972, 985, 108 P.L. 79, 2003 Enacted S. 1435, 108 Enacted S. 1435. Therefore, there is no specific statutory violation stated in this Cause of Action against the Division of Corrections to defeat qualified immunity against the Respondent's charges of failure to train and supervise. The Circuit Court's ruling to the contrary is not supported under controlling law and should therefore be reversed.

3. **The circuit court erred by not dismissing Count V (mis-identified as a duplicate Count IV) of the Amended Complaint as to the Division of Corrections for vicarious liability.**

The Circuit Court's decision was also incorrect for imputing vicarious liability against the Division of Corrections for the alleged acts and omissions of its employees. The Order fails to provide reasoning as to the Division of Corrections' vicarious liability for constitutional violations under the state constitution or related tort laws, the Circuit Court simply concludes as much after ruling out 42 U.S.C. § 1983 as a source, stating that the actions of the Officer Defendants were taken in the scope of their employment. The law set forward on vicarious liability by this Court overwhelmingly indicates that the Circuit Court's scope of employment interpretation is an error that warrants reversal.

This Court has held in *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483

S.E.2d 507 (1996) that qualified immunity is determined on a "case-by case" basis for the state agency and the employee; this means that a state agency is not necessarily subject to vicarious liability even in the absence of qualified immunity for its employees. *Parkulo supra.* Furthermore, vicarious liability cannot be imputed if a court determines that the plaintiff has not met the heightened pleading standard warranted by qualified immunity. *W. Va. State Police v. J.H.*, supra, 244 W.Va. at 737, 856 S.E.2d at 696. An employee will be entitled to qualified immunity if their actions are discretionary within the scope of their duty, authority, and jurisdiction of their employment. See generally *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, supra. According to the *A.B.* standard, vicarious liability can only be assessed against a state agency if the plaintiff can satisfy the heightened pleading standard of indicating the employees' actions took place within the scope of their employment, which could then be grounds to impose vicarious liability on the state employer. Therefore, a circuit court may only maintain the Division as a party if there is an initial determination that sufficient pleadings exist alleging that the state's employee was acting in the scope of his employment, which could impose vicarious liability on the state employer. See Syl. Pt. 12,. *A.B., supra.* The standard is plain in stating that "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." *A.B.*, supra, 234 W.Va. at 508, 766 S.E.2d at 767.

This Court adopted the *Second Restatement of Torts*' definition of what constitutes actions taken within the scope of employment which states as follows: "Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.*, 234 W.Va. at 510, 766 S.E.2d at 769. According to the *Second Restatement of Agency*, also cited in the *A.B.* decision,

"conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.* The *A.B.* decision also makes clear that when the facts of agency are not in dispute, the court can determine as a matter of law if the alleged actions of an employee are within the scope of their employment. In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment. *Id.*, 234 W.Va. at 509, 766 S.E.2d at 768.

As the *A.B.* holding explained, there are logical reasons for connecting vicarious liability to the scope of employment:

> We can perceive no stated public policy which is justifiably advanced by allocating to the citizens of West Virginia the cost of wanton official or employee misconduct by making the State and its agencies vicariously liable for such acts which are found to be manifestly outside of the scope of his authority or employment. Such conduct is notable for being driven by personal motives which in no way benefit the State or the public, nor is it reasonably incident to the official or agent's duties.

A.B., supra, 234 W.Va. at 506, 766 S.E.2d at 765. The *A.B.* decision also addresses that as a policy matter, the state coffers are not infinite and that as such it would be counterproductive to compel the state to pay for egregious employee misconduct that "cannot readily be eliminated." *Id.* Instead, determining vicarious liability involves a process of balancing the competing interests of the plaintiffs and the taxpayers' ability to pay out repeated claims against state agencies. Id., 234 W.Va. at 503 and 505, 766 S.E.2d at 762 and 764. In particular to the context of jails and prisons, to meet the heightened pleading standard and establish vicarious liability as to a correctional facility employer, the Amended Complaint should have particularized "what the (employer) did or failed to do that it would have reasonably understood was unlawful with regard to its supervision, retention, and training of (the employee)", as well as identify rules, policies, procedures, regulations or statutes that the employer violated. *R.Q. v. W. Va. Div. of Corr.*, No.

13-1223, page 14 (W.Va. Supreme Court, April 10, 2015)(memorandum decision).

In his Amended Complaint, the Respondent accuses the Officer Defendants of serious violations of duty which can only equate to actions taken outside the scope of their employment, if true. The Amended Complaint asserted that the Officer Defendants deliberately allowed other inmates to sexually abuse Robbins based on his status as a sex offender. Furthermore, the Amended Complaint alleges that the Officer Defendants were "deliberately indifferent to Plaintiff's health and safety" while they "observed these actions (the alleged physical and sexual assault and subsequent humiliation of Plaintiff) yet did nothing to intervene" and "subjected (Plaintiff) to physical and sexual assault at the hands of other inmates" in a "willful, malicious, reckless" manner with "wanton disregard of the....rights of the Plaintiff." *Appendix pages* 82, 84, 85, 86. Taking these claims as true *arguendo*, these alleged acts of the Officer Defendants would amount to clear violations of training and policy and would fall markedly outside the scope of the Officer Defendants' employment at the Division of Corrections. As found in the *A.B.* case, the alleged actions and inactions cannot be construed or interpreted to be connected, related, or an ordinary and natural incident of their duties at the Potomac Highlands Regional Jail, or otherwise sanctioned or endorsed in any way by the Division of Corrections.

Additionally, the Amended Complaint failed to allege any facts indicating actual or constructive knowledge to the specific claimed actions during Robbins' stay at the Potomac Highlands Regional Jail, which happened only over the course of a number of hours, against the Division of Corrections. The Amended Complaint failed to satisfy the *R.Q.* heightened pleading standard to establish vicarious liability as it does not allege what the unlawful conduct of the Division of Corrections was in terms of its training or supervision of the Officer Defendants, nor does it identify any "rules, policies, procedures, regulations or statutes" that the Division of

Corrections supposedly violated. The Amended Complaint only mentions in its allegations under the Vicarious Liability cause of action the Eighth Amendment to the Constitution of the United States, but this pleading still lacks the specificity required under heightened pleading.

The Circuit Court is also mistaken as to categorize the Officer Defendants' alleged actions and omissions as "monitoring the inmates and taking steps to protect inmates from physical harm." *Appendix page* 221, Paragraph 32. To the contrary, the Amended Complaint clearly alleges willful and malicious acts and omissions that would be intended to put the Plaintiff in danger of physical harm. Such alleged malicious and willful acts, such as permitting, viewing, and condoning sexual assault, cannot be reasonably interpreted to be within the Division of Corrections' authorized scope of employment for its staff. As the Circuit Court incorrectly determined the alleged actions to be within the scope of the Officer Defendants' employment, and the Plaintiff states insufficient facts to overcome the heightened pleading standard to establish vicarious liability, the Division of Corrections respectfully requests the reversal of the Circuit Court's Order on this issue.

4. The circuit court erred by not dismissing Count VI of the Amended Complaint as to the Division of Corrections seeking attorney fees under 42 U.S.C. §§ 1983 and 1988.

Although the Order properly notes that the claim for punitive damages against the Division of Corrections was dismissed by agreement of the parties under W.Va. Code § 55-17-4(3), said Order still maintained the claim for attorneys' fees and costs citing 42 U.S.C. §§ 1983 and 1988 against all defendants, including the Division of Corrections. 42 U.S.C. § 1988 authorizes a court, at its discretion, to award reasonable attorneys' fees and costs to the prevailing party in an action to enforce deprivation of federal constitutional rights claims brought under 42 U.S.C. § 1983.

A plaintiff must prove the personal, individual, and direct culpability of the defendant in the alleged violations in order to claim fees under 42 U.S.C. §1988. *Vinson v. Butcher*, 244 W. Va. 144, 146, 851 S.E.2d 807, 809 (2020). Liability under 42 U.S.C. § 1983 must be assessed for each defendant on an individual basis. Neither vicarious liability nor *respondeat superior* liability can be assigned to supervising or employing entities for 42 U.S.C. § 1983 claims, because these claims are allowed only against defendants in their individual capacity (except for "extremely narrow circumstances", where it was the employer's policy or custom to attack constitutional rights; the Respondent did not pled such a claim in his Amended Complaint). *Id.* Liability also cannot attach to a defendant if it "had no affirmative part in depriving one of their constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 377, 96 S. Ct. 598, 607, 46 L. Ed. 2d 561 (1976). See also Vinson, supra, 244 W.Va. at 151, 851 S.E.2d at 814. Finally, attorneys' fees and costs under 42 U.S.C. § 1988 can only be awarded if a party has already prevailed in a § 1983 claim. *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494 (1992).

The Circuit Court, perhaps in an effort to avoid a perceived premature ruling, did not directly address Plaintiff's attorney fees request from the federal standpoint in its motion rejecting dismissal. However, at Paragraph 31 of the Court's Order, the Circuit Court does correctly state that "there is no vicarious liability for 42 U.S.C. § 1983 claims." *Appendix page* 220. The Circuit Court goes on to incorrectly hold that the Division of Corrections could suffer theoretical vicarious liability under unnamed state statutes; the vicarious liability issue mentioned by the Circuit Court is addressed in full by subpart 3 of the Argument Section above. The Division of Corrections cannot be held responsible for the Respondent's attorneys' fees and costs under 42 U.S.C. §§ 1983 and 1988, as the Division cannot be held vicariously liable for its employees' conduct under either of said statutes. With Robbins' recovery of his attorneys' fees and costs barred on both state and

federal grounds, the Order failing to dismiss Count VI of the Amended Complaint respective to the Division of Corrections must be reversed.

CONCLUSION

The Division of Corrections respectfully requests that the Circuit Court's order denying the Division of Corrections' Motion to Dismiss be reversed, and direct the Circuit Court below to dismiss with prejudice the Plaintiff's claims because 1) the Circuit Court incorrectly failed to apply the heightened pleading standard warranted by a qualified immunity claim; 2) the Plaintiff's claims for negligent training and supervision are executive, administrative policy-making or other discretionary governmental functions from which the Division of Corrections is immune and to which no constitutional or statutory violation can apply; and (3) the Division of Corrections is not vicariously liable in this matter as the claimed actions of its employees are outside of the scope of their duties and employment; and (4) under 42 U.S.C. §§ 1983 and 1988, the Division of Corrections is not liable to pay Plaintiff's attorney's fees and costs.

Respectfully submitted,

THE WEST VIRGINIA DIVISION OF CORRECTIONS & REHABILITATION
By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0905

THE WEST VIRGINIA DIVISION OF CORRECTIONS & REHABILITATION, ET AL,

Defendants Below, Petitioners,

v.

DAMEIN ROBBINS,

Plaintiff Below, Respondent.

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

APPENDIX

Petitioner West Virginia Division of Corrections, by counsel Matthew R. Whitler, files this Joint Appendix pursuant to Rule 7 of the West Virginia Rules of Appellate Procedure.

RULE 7 CERTIFICATION

Undersigned counsel certifies, in accordance with Rule 7(c)(2) of the West Virginia Rules of Appellate Procedure, that the contents of the appendix are true and accurate copies of items contained in the record of Hampshire County Circuit Court Case Number 20-C-24. Counsel for petitioners further certify that they have conferred in good faith with all parties including respondent to determine the content of the Appendix.

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CERTIFICATE OF SERVICE

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The undersigned, counsel of record for Respondent, West Virginia Division of Corrections & Rehabilitation, does hereby certify on this 8th day of Februar, 2022, that an original and ten copies of the foregoing "Petitioner's Brief", and an original and one copy of the "Joint Appendix" was filed with the Clerk of the West Virginia Supreme Court of Appeals and was served on the following:

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