

**FILE COPY**



---

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

**DOCKET NO. 21-0905**

---

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

*Defendant Below, Petitioner,*

v.

DAMEIN ROBBINS,

*Plaintiff Below, Respondent.*

**DO NOT REMOVE  
FROM FILE**

(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 REPLY BRIEF**

---

Matthew R. Whitler (WV State Bar No. 7628)  
*PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC*  
261 Aikens Center, Suite 301  
Martinsburg, West Virginia 25404  
Telephone: 304.260.1200  
Facsimile: 304.260.1208  
Email: [mwhitler@pffwv.com](mailto:mwhitler@pffwv.com)  
*Counsel for the West Virginia Division of Corrections & Rehabilitation*

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES.....3**

**SUMMARY OF PETITIONER’S ARGUMENT ..... 4**

**SUMMARY OF RESPONDENT’S ARGUMENT..... 5**

**LEGAL ARGUMENT..... 6**

**1. Respondent fails to allege the particularized facts required to meet the Heightened Pleading Standard warranted by qualified immunity.....6**

**2. Respondent fails to show that his allegations against Petitioner do not relate to discretionary functions, and further fails to proffer any specific constitutional or statutory violations.....8**

**3. Respondent fails to demonstrate vicarious liability against Petitioner, and fails to show the alleged acts and omissions occurred within the scope of employment.....11**

**4. Respondent concedes that he cannot recover attorney’s fees from Petitioner under 42 U.S.C. 1983, and lacks any other means of claiming attorney’s fees.....13**

**CONCLUSION ..... 15**

## TABLE OF AUTHORITIES

### **Cases**

<i>W. Virginia Reg'l Jail &amp; Corr. Facility Auth. v. A.B.</i> , 234 W. Va. 492, 766 S.E.2d 751, 752, 764, 765, 768, 772-76 (2014).....	5, 8, 9, 12, 13, 14
<i>Nobles v. Duncil</i> , 202 W.Va. 523, 534, 505 S.E.2d 442, 453 (1998).....	6
<i>Hutchison v. City of Huntington</i> , 198 W.Va. 139, 479 S.E.2d 649 (1996).....	7, 8, 9
<i>W.Va. Reg'l Jail &amp; Corr. Facility Auth. v. Estate of Grove</i> , 244 W.Va. 273, 281, 852 S.E.2d 773, 781 (2020).....	8
<i>Cantley v. Lincoln County Comm'n</i> , 221 W.Va. 468, 470, 655 S.E.2d 490, 492, (2007).....	8
<i>W.Va. Div. of Corr. v. P.R.</i> , 2019 W.Va. 624, *20 (2019).....	9
<i>C.C. v. Harrison Cty. Board of Education</i> , 859 S.E.2d 762, 774 (W.Va. 2021).....	10
<i>W.Va. State Police v. J.H.</i> , 244 W.Va. 720, 740, 856 S.E.2d 679, 699 (2021).....	10
<i>Chance v. Chandler</i> , No. 15-0340, pages 5-6 (W.Va. Supreme Court, September 11, 2015)(memorandum decision).....	10
<i>Shakka v. Smith</i> , 71 F.3d 162, 166 (4 <sup>th</sup> Cir. 1995).....	11, 15
<i>Hudson v. McMillan</i> , 503 U.S. 1, 5, 112 S.Ct. 995 (1992).....	11
<i>Strickler v. Walters</i> , 989 F.2d 1375, 1379 (4 <sup>th</sup> Cir. 1995).....	11, 15
<i>Parkulo v. W. Va. Bd. Of Probation &amp; Parole</i> , 199 W.Va. 161, 483 S.E.2d 507 (1996).....	12
<i>Helling v. McKinney</i> , 113 S.Ct. 2475, 2480 (1993).....	14
<i>Farrar v. Hobby</i> , 506 U.S. 103, 111, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992).....	15

### **Statutes**

42 U.S.C. §§ 1983 and 1988.....	5, 6, 14, 15
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. 1435.20.....	10

### **Other Authorities**

W.Va. R. Civ. P. 12(b)(6).....	8
--------------------------------	---

### **Constitutional Provisions**

Article VIII of the United States Constitution.....	5, 9, 10, 12, 14
---	------------------

## SUMMARY OF PETITIONER'S ARGUMENT

Petitioner West Virginia Division of Corrections and Rehabilitation ("Petitioner") here within replies to Respondent Damein Robbins' ("Respondent") *Respondent's Brief*. Petitioner emphasizes that Respondent's brief fails to substantively address the numerous errors contained in the Hampshire County Circuit Court's order refusing dismissal of Respondent's *Amended Complaint*. Given the Respondent's failure to adequately address Petitioner's assignments of error in his *Respondent's Brief*, Petitioner submits that it is proper for this Court to overturn the Circuit Court's holding and grant the Petitioner's Motion to Dismiss.

Petitioner assigns four errors of law in the Circuit Court's decision to not grant Petitioner's *Motion to Dismiss*. First, Petitioner maintains that the circuit court misapplied the heightened pleading standard in determining that Respondent met the considerable burden of alleging sufficient factual allegations. Second, Petitioner asserts that the circuit court erred in its failure to classify the alleged acts and omissions of Petitioner as discretionary governmental functions subject to qualified immunity. Third, Petitioner reiterates the circuit court erroneously assigned vicarious liability upon it by misapplying the scope of employment standard explained by *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). Fourth, Petitioner notes that Respondent conceded in his response brief that attorney's fees cannot be assessed against Respondent under 42 U.S.C. § 1983; therefore, Petitioner maintains that Respondent cannot claim attorney's fees under this federal statute or through any other legal justification.

## SUMMARY OF RESPONDENT'S ARGUMENT

In his brief, Respondent attempts to defend the Circuit Court's erroneous interpretations of applicable case precedent. However, Respondent fails to demonstrate how this Court should view the cases in his favor besides invoking policy arguments, asking questions, citing secondary studies, and pointing to the Circuit Court's views as controlling without other support. Petitioner respectfully replies that an independent examination of the case law supports dismissal of the *Amended Complaint* by this honorable Court.

Specifically, Respondent first attempts an end-run around established West Virginia case precedent, through selective quote emphasis, to wrongly suggest that he does not have the burden of alleging particularized facts sufficient to meet the heightened pleading standard. Alternatively, Petitioner attempts to assign legitimacy to his cause by vaguely invoking Eighth Amendment policy arguments and the Circuit Court's opinion, without any additional support, to assert that he stated sufficient particularized facts to fulfill the heightened pleading standard.

Respondent secondly attempts to spin the *A.B.* case, a decision clearly adverse to Respondent, in his own favor by suggesting that Petitioner is not entitled to qualified immunity on account of its executive, administrative, and policy-making acts and omissions. However, in purported support of this argument, Petitioner offers only opinions and a non-binding study. Contrary to Respondent's supplications, this Court has long recognized the inherent difficulties of correctional administration and has been skeptical of intervening into the decisions faced by correctional staff. *Nobles v. Duncil*, 202 W.Va. 523, 534, 505 S.E.2d 442, 453 (1998). Mere conclusions by the Respondent that the state or its agents failed some supposed duty are insufficient to defeat the heightened pleading standard and the doctrine of qualified immunity.

In his response to the third assignment of error, Respondent attempts to assign vicarious

liability against the Petitioner by claiming that the acts and omissions Respondent alleges against the Officer Defendants were committed within the scope of their employment. To the contrary, Respondent's *Amended Complaint* alleges willful, reckless, and malicious conduct that would be totally outside the rational training and policy boundaries of the Petitioner. Per the *A.B.* standard, the Petitioner respectfully maintains that this Court cannot interpret the Officer Defendants' alleged conduct as within the scope of their employment. Additionally, Respondent's *Amended Complaint* fails to identify with any particularity the exact rules, policies, procedures, regulations, or statutes the Officer Defendants or Petitioner allegedly violated. Therefore, Respondent fails to meet the heightened pleading standard and cannot claim vicarious liability against the Petitioner.

Finally, Respondent concedes that he is not able to seek attorney's fees against Petitioner under 42 U.S.C. § 1983. Petitioner notes that 42 U.S.C. § 1988 derives from 42 U.S.C. § 1983, and without a valid claim under § 1983 there is no legally cognizable means for Respondent to claim attorney's fees against Petitioner. As 42 U.S.C. § 1983 is the sole means of a plaintiff recovering his attorney's fees from a defendant for violations of federal rights, and as Respondent's claims of injury solely originate from alleged federal constitutional rights violations, Respondent is totally barred from recovering any attorney's fees against the Petitioner.

### **LEGAL ARGUMENT**

#### **1. Respondent fails to allege the particularized facts required to meet the Heightened Pleading Standard warranted by qualified immunity.**

Petitioner asserts, and Respondent concedes in his *Respondent's Brief*, that Petitioner as a state government entity is entitled to assert the defense of qualified immunity. Petitioner previously stated that West Virginia uses the "heightened pleading" standard as outlined by

*Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996), to assess if a plaintiff has claimed enough particularized facts in his allegations for the complaint to survive a motion to dismiss. This heightened pleading standard is special by its very nature because it requires greater specificity in pleading than mere notice pleading used in other West Virginia litigation. *W.Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W.Va. 273, 281, 852 S.E.2d 773, 781 (2020).

*Hutchison* explains that qualified immunity and heightened pleading are related concepts intended to weed out unwarranted and/or incorrectly filed complaints at the motion to dismiss stage, to spare the government the cost and annoyance of unnecessary litigation. It is important for the court to seriously weigh the qualified immunity defense at the motion to dismiss stage, as qualified immunity serves as a bar to trial and is lost if a case is allowed to proceed. *W.Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, supra, 244 W.Va. at 275, 852 S.E.2d at 776, 782. To satisfy heightened pleading, the particularized showing of facts alleged by a plaintiff must demonstrate that the state defendant violated clearly established constitutional rights or laws of which a reasonable person would have known; if the plaintiff cannot do this, then qualified immunity immediately defeats the complaint. *A.B. supra*, 234 W.Va. at 508, 766 S.E.2d at 767.

Respondent, on an initial basis, misrepresents the standard for dismissal under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Contrary to what Respondent suggests in his misreading of *Cantley v. Lincoln County Comm'n*, 221 W.Va. 468, 470, 655 S.E.2d 490, 492, (2007), that any claim made under a legal theory should survive a motion to dismiss, a Rule 12(b)(6) motion should only be denied if the underlying “claim is one upon which relief can be granted under any legal theory.” *Cantley supra*. (emphasis added). The plaintiff still maintains the burden of stating a legally addressable claim to this Court, and in this matter the burden is

greater than normal owing to the heightened pleading standard.

The *Respondent's Brief* cites dicta from the *Hutchinson* case, which only addresses reply procedures, to assert that Respondent can escape the heightened pleading requirement by not anticipating a defense of qualified immunity. However, the *Hutchinson* opinion, read as a whole and as cited by the multiple subsequent cases this Court has decided on qualified immunity, still places the burden of heightened pleading on the plaintiff. The *Respondent's Brief's* misrepresenting the dissent opinion of *W.Va. Div. of Corr. v. P.R.*, 2019 W.Va. 624, \*20 (2019) as binding West Virginia precedent should not obscure the responsibility of the Respondent alone to sufficiently plead his case. Petitioner respectfully highlights the need to analyze the Respondent's *Amended Complaint* strictly as written against the heightened pleading standard.

**2. Respondent fails to show that his allegations against Petitioner do not relate to discretionary functions, and further fails to proffer any specific constitutional or statutory violations.**

With the heightened pleading standard supposedly addressed, Respondent again vaguely cites the Eighth Amendment and a non-binding secondary source, namely an academic study, to support the Circuit Court's ruling. However, Respondent's argument to the second assignment error can be summarized as simply maintaining that the Circuit Court properly weighed the issues. Petitioner has already demonstrated in its *Petitioner's Brief* the Circuit Court's erroneous application of the Respondent's allegations to the heightened pleading standard. By pointing to unspecified, alleged constitutional rights violations of Petitioner's agents, Respondent hopes to persuade this Court to "read in" enough facts to deny the Petitioner qualified immunity.

Respondent noticeably does not address the main holding of *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, in that the duties of training and supervising officers are clearly discretionary

functions under which are subject to the qualified immunity-heightened pleading standard. Respondent also fails to address the holding of *C.C. v. Harrison Cty. Board of Education*, 859 S.E.2d 762, 774 (W.Va. 2021), that to defeat qualified immunity of a state employer the Respondent needed to (1) make a valid negligence claim as to an employee; then (2) affirmatively demonstrate that the employee was inadequately trained or supervised. The *Amended Complaint* failed to demonstrate, and the *Respondent's Brief* failed to support, that the Respondent alleged sufficient facts to meet these important pleading requirements.

None of the seven allegations Respondent cites as being identified by the Circuit Court make the Petitioner individually culpable to Respondent. This is because those seven allegations relate only to the supposed acts or omissions of the individual correctional officer defendants in this matter. Therefore, Respondent cannot offer anything - no rule, policy, or law - that Petitioner itself supposedly violated as support for its Amended Complaint. The conclusory assumption that Respondent makes, without analysis, that Petitioner is liable because its agents were liable is insufficient per *W.Va. State Police v. J.H.*, 244 W.Va. 720, 740, 856 S.E.2d 679, 699 (2021), as the Respondent did not address the additional requirement to state particularized facts against Petitioner.

The one statute that Respondent cites to support his allegations, the federal Prison Rape Elimination Act, is strictly a policy law at the federal level and does not provide a cause of action against state correctional facilities. As already explained in the *Petitioner's Brief*, "bald allegations of conspiracies" among correctional staff do not satisfy the heightened pleading standard. *Chance v. Chandler*, No. 15-0340, pages 5-6 (W.Va. Supreme Court, September 11, 2015)(memorandum decision). Respondent cites the supposed lack of discovery to explain the general dearth of facts or law in support of his position and wonders what exact claims he can allege against Petitioner.

Contrary to Respondent's complaints, the heightened pleading standard is clear in requiring specific factual allegations and specific violations of specific laws. The principle of qualified immunity is indeed maintained by this Court for dismissing insufficient complaints, in order to spare the government the costs of unnecessary discovery.

Contrary to what Respondent asserts, and as Petitioner has already explained in its *Petitioner's Brief*, Respondent's blanket invocation of the Eighth Amendment is not enough alone to satisfy the heightened pleading standard, to defeat Petitioner's qualified immunity, or to compel discovery from Petitioner. *Shakka v. Smith*, 71 F.3d 162, 166 (4<sup>th</sup> Cir. 1995)(quoting *Hudson v. McMillan*, 503 U.S. 1, 5, 112 S.Ct. 995 (1992)). Respondent has also 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* at 162, 166 (citing *Strickler v. Walters*, 989 F.2d 1375, 1379 (4<sup>th</sup> Cir. 1995)). Thus, Respondent has not sufficiently alleged any Eighth Amendment claims against Petitioner.

Simply put, the Respondent's burden in this matter was for him to allege particularized facts and violations of law to satisfy the heightened pleading standard. Respondent failed to satisfy this burden, and now requests this Court to ignore the controlling standards of law to compensate. If the Circuit Court's erroneous holding is allowed to stand, then Petitioner will have lost its qualified immunity defense at this stage and will be subject to unnecessary litigation. Petitioner respectfully asks this Court to not ignore decades of case precedent and to instead provide qualified immunity to the Division of Corrections due to the Respondent's defective complaint.

**3. Respondent fails to demonstrate vicarious liability against Petitioner, and fails to show the alleged acts and omissions occurred within the scope of employment.**

Lacking any basis to directly pursue claims against Petitioner, Respondent alternatively resorts to asking this Court to uphold the mistaken Circuit Court decision imparting vicarious liability. Once again, Respondent's arguments do not hold up to a careful analysis of precedent. As already mentioned in the *Petitioner's Brief*, there is no automatic vicarious liability imparted to a state employer for the alleged acts and omissions of its employees. See *Parkulo v. W.Va. Bd. Of Probation & Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). Qualified immunity also protects the state from bad-actor scenarios where a state employee intentionally inflicts harm or otherwise acts completely outside the scope of their authority. *Parkulo supra*. Thus, Respondent cannot automatically assert claims against Petitioner on a vicarious liability basis; the heightened pleading standard must still be met for Respondent's claim to survive.

As read in the whole, the *A.B.* opinion indicates a narrow and difficult path for a plaintiff to successfully assert a vicarious liability claim against a state employer. The holding in *A.B.* is clear in spelling out that the Respondent in this case still has the burden of pleading sufficient facts to allege that the alleged acts and omissions occurred within the scope of employment. *A.B.* further clarifies that the training, policies, and expectations of the state employer should be taken into account in a plaintiff's complaint as well as the particular rules, statutes, procedures, and regulations that were allegedly violated by that state employer. If the Respondent cannot make this affirmative showing of the Petitioner knowingly violating its own policies as well as applicable laws, then Petitioner cannot be held vicariously liable. Syl. Pt. 12, *A.B.* supra. The *A.B.* case also demonstrates that in the absence of a genuine dispute of material fact, this Court can decide as a matter of law the question of whether the alleged actions and omissions took place within the scope

of state employment. *A.B.*, supra, 234 W.Va. at 507-508, 766 S.E.2d at 766-767.

Respondent attempts to emphasize the outrageous claims that he makes in his *Amended Complaint* in order to distract from his failure to meet the *A.B.* heightened pleading requirements. Namely, the *Respondent's Brief* attempts to skip over this unsatisfied burden of proof by simply stating that since Petitioner employed the Officer Defendants, said Defendants necessarily had to have committed their alleged acts and omissions within the scope of their employment. Respondent only cites the same vague references to the Eighth Amendment, which as shown before are insufficient on their own to meet the heightened pleading standard. The Circuit Court made the same erroneous conclusions by skipping the necessary scope of employment analysis emphasized in the *A.B.* decision. The Respondent, as well as the Circuit Court, are mistaken because the *Amended Complaint* does not name a single rule, policy, procedure, or statute that Petitioner knowingly violated in its hiring, supervision, or retention of the Officer Defendants.

By contrast, Respondent's allegations of willful, malicious, deliberate, and reckless conduct against the Officer Defendants are impossible to reconcile with the Petitioner's rules, training, policies, and procedures. As mentioned in the *Petitioner's Brief*, Respondent alleges the conduct of the Officer Defendants to have been intentional and extreme abuses against him. Respondent in this matter essentially accuses the Officer Defendants of going into business for themselves to deliberately cause harm. Notably, Respondent's *Amended Complaint* does not make any similar allegations against Petitioner individually.

In the *A.B.* case, a corrections officer similarly disregarded the basic procedures and standards of conduct set by his correctional facility employer to allegedly rape the plaintiff. The *A.B.* court, after weighing all legal and policy arguments, concluded that these alleged actions and omissions were so outside the tolerated rules of employment that the court could not reasonably

assign vicarious liability. In this matter, the Circuit Court was presented with a pattern of allegations very similar to that of the *A.B.* case, yet it inexplicably chose the opposite result. The Circuit Court gave no justification, besides its own fiat, in declaring the alleged acts and omissions to be within the scope of the Officer Defendants' employment. This ruling cannot be allowed to stand in light of the clear case precedent set by *A.B.* and *Parkulo*.

As the *A.B.* opinion also makes clear, the courts must carefully balance the interest of plaintiffs against the fairness of forcing taxpayers to pay out judgments. Because the Respondent failed to meet his burden to properly plead that the alleged acts and omissions were committed in the course and scope of the Defendant Correctional Officers' employment under rules and/or policies set forth by the Division of Corrections, vicarious liability cannot be assigned against the Petitioner. Therefore, the Petitioner respectfully requests that this Court reject Respondent's vicarious liability arguments.

**4. Respondent concedes that he cannot recover attorney's fees from Petitioner under 42 U.S.C. 1983, and lacks any other means of claiming attorney's fees.**

As explained in the *Petitioner's Brief*, the Circuit Court erred by not dismissing Respondent's requests for attorney's fees against the Petitioner 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). As already mentioned, Respondent has failed to show any heightened pleading directly against Petitioner constituting the deprivation of a basic human need, that the alleged violation 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 Officer Defendants, there was not a direct allegation of such violations against the Petitioner, 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.

The *Respondent's Brief* noticeably does not contest any of Petitioner's arguments that attorney's fees cannot be assessed in this case under 42 U.S.C. § 1983. Therefore, Petitioner will only reply here to the extent necessary to obviate any alternate possibility of attorney's fees assessment. Respondent argues that its claims against the Officer Defendants only originate from alleged federal Eighth Amendment violations. 42 U.S.C. § 1988 derives its authority from 42 U.S.C. § 1983 in that a plaintiff can only collect attorney's fees under § 1988 if they have 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). Therefore, as Respondent's claims for attorney's fees exclusively derive from § 1983, a rejection of fees under § 1983 would necessary extend to § 1988. Absent 42 U.S.C. §§ 1983 and 1988, there are no other avenues by which Respondent may assess attorney's fees against the Petitioner. Since the Circuit Court exclusively linked the question of attorney's fees under 42 U.S.C. §§ 1983 and 1988 to the vicarious liability question, and the issue of vicarious liability should be determined in Petitioner's favor, Petitioner respectfully requests this Court to explicitly disclaim and deny any and all of Respondent's attorney's fees claims against Petitioner.

**CONCLUSION**

Petitioner maintains that the *Respondent's Brief* fails in all regards to explain, rationalize, or justify the Circuit Court's erroneous decision to deny Petitioner's *Motion to Dismiss*. The four legal errors made by the Circuit Court, namely concerning (1) the heightened pleading standard, (2) qualified immunity, (3) vicarious liability, and (4) attorney's fees, warrant the overturning of the entirety of the Order at question in regards to the Division of Corrections. Therefore, Petitioner respectfully requests that the Circuit Court's order denying the Petitioner's Motion to Dismiss be reversed by this honorable Court, and that this Court direct the Circuit Court below to dismiss with prejudice all of the Respondent's claims against the Petitioner.

Respectfully submitted,

**THE WEST VIRGINIA DIVISION OF  
CORRECTIONS & REHABILITATION**

**By Counsel**



Matthew R. Whitler, WV State Bar No. 7628

***PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC***

261 Aikens Center, Suite 301

Martinsburg, WV 25404

Telephone: (304) 260-1200

Facsimile: (304) 260-1208