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 Order of the Honorable C. Carter Williams; Circuit Court of Hampshire County, West Virginia; Civil Action: 20-C-24)

RESPONDENT'S BRIEF

Gregory A. Bailey, Esq. (WVSB #7957)
J. Daniel Kirkland, Esq. (WVSB #12598)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25443
304.725-2002 (t)
304.725.0282 (f)
gbailey@arnoldandbailey.com
dkirkland@arnoldandbailey.com
Counsel for Respondent

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STATEMENT OF THE CASE

This is an appeal from an October 8, 2021, order entered by the Circuit Court of Hampshire County wherein the circuit court appropriately and correctly denied Defendant West Virginia Department of Corrections and Rehabilitations ("WVDCR") Motion to Dismiss on the grounds of qualified immunity. Contrary to Defendants assertions, the circuit court correctly found that plaintiff, Damein Robbins ("Robbins") alleged more than sufficient facts to satisfy this Court's heightened pleading standard that Defendant Blancarte and Defendant Whetzel engaged in conduct violating Robbin's clearly established rights under the Eight Amendment of the United States Constitution. [JA 259-271.] In the same respect, the circuit court correctly applied the alleged facts and law alleged against Defendant Blancarte, Defendant Whetzel, and when denying Defendant West Virginia Department of Corrections and Rehabilitation's Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure; and further, correctly denied the motion based upon qualified immunity.

On July 20, 2018, Robbins, a required registrant of the West Virginia Sexual Offender Registry, was ordered to serve forty-eight (48) hours of incarceration at Potomac Highlands Reginal Jail ("PHRJ"). [JA 078.] PHRJ is in Hampshire County, West Virginia. On Juley 21, 2018, during the intake process, an unknown correctional officer elicited and openly communicated information about Robbin's status as a sexual offender in a nonconfidential setting in the view of and hearing of other PHRJ inmates in violation of the Prison Rape Elimination Act. [JA 078] Robbins was initially placed in a misdemeanor pod within the PHRJ, however, during his short time in the misdemeanor pod he was "checked off" the misdemeanor pod because of

threats against him by other inmates because of his status as a registered sex offender[1]. [JA 078]. Following these threats to Robbins, he requested to be transferred from the misdemeanor pod for his own safety. Correctional officers moved Robbins away from other inmates to an interview room for several hours. Robbins was then moved to a segregated felony lockdown pod referred to as "A-6." Robbins was assured that no one would be allowed in his locked individual cell, and he would not be permitted out of his cell because it was a segregated felony unit. [JA 078.] Sadly, that sense of protection proved to be illusory.

Early Sunday, July 22, 2018, three (3) inmates housed in the A-6 felony pod entered Robbin's "lock down" cell (after it was unlocked remotely by Defendant Whetzel) and severely physically and sexually assaulted Robbins over the course of several hours. [JA 079.] The three inmates gained entry into Robbin's locked cell by Defendant Whetzel, who was serving in the capacity of tower officer. Whetzel unlocked remotely Robbins' cell door at the unauthorized request of the three violent inmates who were freely roaming unsupervised in the A-6 pod. [JA 079.] Defendant Whetzel was terminated for his wrongful conduct after an investigation confirmed his reckless acts which violated PHRJ policy. [JA 079.] Upon entering Robbin's cell, the three inmates "closed Robbins's cell door behind them, covered the windows of the cell door, covered the window to the exterior, and turned the lights off inside the cell." [JA 079.] These inmates forced Robbins to drink urine and consume human feces; sexually assaulted and sodomized Robbins with a broomstick; and physically and brutally assaulted Robbins for hours. [JA 079.] The three inmates told Robbins they would kill him if told anyone what occurred. [JA 080.] Robbins was informed by the three inmates that "this is what happens to sex offenders." [JA 079.]

[1] Being "checked off" a pod means that another inmate makes threats of bodily harm against another inmate.

Throughout the remainder of the vicious assault, the three inmates paraded Robbins throughout the pod from cell to cell for the purpose of humiliating him, offering him to perform sexual acts for inmates and to show off to other inmates what they did to him, all within plain view of the tower and roving officer. [JA 079.] Defendant Whetzel observed the actions yet did nothing to intervene. [JA 079.]

Along with Defendant Whetzel, Defendant Blancarte was responsible for the care and safety of inmates housed in pod A-6. During the violent assault, Defendant Blancarte was the correctional officer assigned as "rover" for pod A-6, yet he also did nothing to intervene or protect Robbins. [JA 080.] The violent repeated assault would continue until Robbins discharge at approximately 4:45 p.m. on July 22, 2018. [JA 080.] Robbins spent multiple days in the hospital following his forty-eight (48) hour sentence. Robbins was diagnosed with multiple broken ribs and fractured orbital bone in his cheek as well as other injuries from the sexual assault. [JA 079].

On October 26, 2020, Damein Robbins filed his Amended Complaint in the circuit court of Hampshire County, West Virginia naming the West Virginia Department of Corrections and Rehabilitation ("WVDCR"), Jeff Sandy, Betsy Jividen, Edgar L. Lawson, Officer Bryon Whetzel, and Officer Isaiah Blancarte as defendants.[2] Robbins' Amended Complaint alleges six causes of action: (1) violation of the 8th Amendment on 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.

On December 20, 2020, Defendants Blancarte and Whetzel filed motions to dismiss asserting that they were separately entitled to qualified immunity because Robbins failed to allege

[2] Prior to ruling on Defendants' Motion to Dismiss, Plaintiff voluntarily dismissed Jeff Sandy, Betsy Jividen and Edgar L. Lawson as parties to this action.

facts that, if proven true, would establish that they violated a clearly established law, which, in this case, is the 8th Amendment to the United States Constitution's prohibition against cruel and unusual punishment. [JA 051-074.] The WVDCR filed its Motion to Dismiss based upon similar grounds.

On October 8, 2021, in its thorough and well-reasoned ruling, the Circuit Court of Hampshire County denied the motions to dismiss and concluded that Robbins had sufficiently plead facts that established the deliberate indifference and negligence of the defendants that led to Robbins brutal sexual assault at the hands of inmates housed in PHRJ. Specifically, the circuit court judge concluded that Robbins sufficiently met the heightened pleading standard give that Defendants: (1) were aware of threats made against [Robbins] which necessitated moving him throughout the corrections facility several times before leaving him exposed and vulnerable to physical attack from other inmates; (2) placed Robbins in an unsecured cell; (3) permitted known violent felons entry into Robbins cell; (4) allowed violent felons to roam around the "A" pod despite it being a lock-down pod: (5) failed to supervise felons roaming around the pod; (6) failed to observe that [Robbins] was paraded around from cell to cell being offered as a sex slave; and (7) failed to monitor [Robbins] condition at any point until he was discharged. The circuit court concluded that alleged conduct was sufficient to state a claim for violation of Robbins' Eighth Amendment Rights; and therefore, Defendant is not entitled to qualified immunity at this early stage of the proceedings, and that based upon the pleadings WVDCR could be held liable under a theory or vicarious liability. [JA 183.]

Defendant now appeals the Order Denying Defendant's Motion to Dismiss by continuing to assert an erroneous claim that the circuit court failed to apply a heightened pleading standard related to qualified immunity; Robbins failed to allege a cause of action against the WVDCR

pursuant to Rule 12(b)(6); and that the circuit court erroneously concluded WVDCR might be liable under a vicarious liability theory; and that the circuit court erred in not dismissing the attorneys' fees request the WVDCR[3].

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Robbins asserts that oral argument is not necessary because the circuit court's well-reasoned order correctly applied this Court's, and the United States Supreme Court's, jurisprudence to the facts of this case. Should this Court deem that oral argument is necessary, an argument under Rule 19 would be appropriate.

SUMMARY OF THE ARGUMENT

The circuit court correctly denied the Defendants' Motion to Dismiss based upon Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and based upon qualified immunity when it conducted a thorough and well-reasoned analysis of the facts and legal theories contained in Robbins Amended Complaint. The circuit court appropriately applied this Court's heightened pleading standard in cases involving immunities in its analysis. The circuit court further engaged in the two-part test when analyzing Eighth Amendment claims and when in viewed in light of Robbins and granting him all reasonable inferences correctly determined that neither Defendant Blancarte, Defendant Whetzel nor Defendant WVDCR were entitled to qualified immunity.

Robbins has set forth sufficient facts (especially considering the benefit of all reasonable inferences) to establish that the Defendant objectively denied him the minimum of required necessities; and that the Defendant were aware of facts from which an inference could be drawn that a substantial risk of serious harm existed. Robbins was brutally sexually assaulted, physically

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[3] Robbins concedes that an award of attorneys' fees is not proper against the WVDCR pursuant to 42 U.S.C. §1983.

assaulted, and tortured for hours after being placed in a segregate lock down pod for his own protection. This was done after correctional staff was put on notice of physical threats made against him because of his status as a registered sex offender. Robbins has sufficiently plead that Defendant Blancarte and Defendant Whetzel ignored the brutal sexual and physical assault; and ignored Robbins being paraded around the segregated lock down pod while the damage inflicted upon him was celebrated. [JA 082]. This clearly displayed not only their deliberate indifference to Robbins' health and safety; but further, their actions were willful, malicious, and performed recklessly or with wanton disregard for Robbins clearly established constitutional right to be free from cruel and unusual punishment. [JA 082].

The circuit court correctly determined that Robbins sufficiently plead facts that show the defendant officers were acting within the scope of their employment; and therefore, Defendant WVDCR could be held vicariously liable for the negligent acts and/or omissions as alleged in the Amended Complaint. The circuit court further determined that the acts and/or omissions on the part of the WVDCR employees or officials, as alleged, were discretionary in nature, and do not constitute legislative, judicial, executive or administrator's policy-making acts. [JA 218.] Furthermore, that because the acts and/or omission alleged were performed within the scope of the defendant officers' employment; and that, Robbins had clearly articulated allegations of a violation of a clearly established law WVDCR was not entitled to qualified immunity at this stage of the proceedings. [JA 218]

Any argument advanced by the Defendant that the circuit court failed to apply the heightened pleading standard when concluding that Robbins sufficiently alleged an Eighth Amendment violation; therefore, defeating qualified immunity, is simply without merit, without

support after a clear review of the order, and should be wholly disregarded by the Court. Thus, this Court should affirm the circuit court's *Order Denying Defendant's Motion to Dismiss*

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 Dep't of Educ. v. McGraw*, 239 W. Va. 192, 197, 800 S.E.2d 230, 235 (2017). The circuit court's disposition of the motion will be reviewed *de novo*, and the Court will apply the same standard as employed by the underlying court. *Id.*

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 him 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. As was noted in Bowden.

> "[t]he trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings."

Id. at 269. If the complaint states a claim under any legal theory the motion must be denied. See, *Cantley, Supra.* With regard to the contents of the complaint, the law is also clear that a pleader is only required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that those elements exist. *Mandolidis v. Elkins Industries,*

Inc., 161 W.Va. 695, 246 S.E. 2d 907 (1978). The Court is required to construe the complaint in the light most favorable to the plaintiff. *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 655 S.E.2d 509 (2007). In civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff. *Hutchison v. City of Huntington*, 198 W. Va. 139, 150, 479 S.E.2d 649, 660 (1996)

Applying these standards to the Amended Complaint, the circuit court did not err when it denied WVDCR's Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Proceeding. Furthermore, the circuit court did not err when it correctly determined that Defendant WVDCR is not entitled to dismissal at this stage of the proceedings based upon qualified immunity.

ARGUMENT

"In an oft-repeated formulation, the United States Supreme Court wrote that the law [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).

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 established constitutional rights are at the very heart of the allegations in Robbins' Amended Complaint which details, with specificity, the manner in which Defendants violated these protections owed to Robbins.

It is with these Constitutional guarantees is mind, that this Court should affirm the Circuit Court's October 8, 2021, *Order Denying Defendants' Motion to Dismiss* and permit the action to proceed accordingly.

1. The circuit court correctly applied the heightened pleading standard to the qualified immunity argument asserted by the division of corrections.

a. The heightened pleading standard.

There is no dispute that the circuit court was required to examine the amended complaint under the heightened pleading standard to determine whether the Division of Corrections is entitled to qualified immunity on a motion to dismiss.

With respect to a court's review of qualified immunity, this Court and federal courts have explained the interplay of the heightened pleading standard and more particularly its application at this early stage of litigation:

> We believe that in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff. *See Schultea v. Wood,* 47 F.3d 1427 (5th Cir. 1995) (*en banc*) (a § 1983 action); *see generally Parkulo v. West Virginia Board of Probation and Parole*, [199 W. Va. 161, 483 S.E.2d 507] [(1996)]. *To be sure, we recognize the label "heightened pleading" for special pleading purposes for constitutional or statutory torts involving improper motive has always been a misnomer. A plaintiff is not required to anticipate the defense of immunity in his complaint, Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923-24, 64 L. Ed. 2d 572 (1980), and, under the West Virginia Rules of Civil Procedure, the plaintiff is required to file a reply to a defendant's answer only if the circuit court exercises its authority under Rule 7(a) to order one. We believe, in cases of qualified or statutory immunity, court ordered replies and motions for a more definite statement under Rule 12(e) can speed the judicial process. Therefore, the trial court should first demand that a plaintiff file "a short and plain statement of his complaint, a [statement] that rests on more than conclusion[s] alone." *Schultea v. Wood*, 47

> F.3d [1427,] [ ] 1433 [5th Cir. 1995]. Next, the court may, on its own discretion, insist that the plaintiff file a reply tailored to an answer pleading the defense of statutory or qualified immunity. The court's discretion not to order such a reply ought to be narrow; where the defendant demonstrates that greater detail might assist an early resolution of the dispute, the order to reply should be made. Of course, if the individual circumstances of the case indicate that the plaintiff has pleaded his or her best case, there is no need to order more detailed pleadings. If the information contained in the pleadings is sufficient to justify the case proceeding further, the early motion to dismiss should be denied.

See, Hutchison v. City of Huntington, 198 W. Va. 139, 149-50, 479 S.E.2d 649, 659-60 (1996) (emphasis added).

There can be no good faith argument that the circuit court did not apply the heightened pleading standard because the circuit court expressly detailed its adherence to the heightened pleading standard in its analysis. [JA-214.] The circuit court went to great lengths to identify the acts and omissions alleged by Robbins that supported his claim of a violation of his clearly established constitutional rights. [JA 208-219.] The circuit court further clearly articulated this Court's jurisprudence as it relates to a qualified immunity determination, especially at a 12(b)(6) stage of the proceedings. In doing so, the circuit court correctly held that the Defendants were not entitled to qualified immunity. It did so, not flagrantly or without ample consideration, but in a well-reasoned legal analysis after careful consideration of the pleadings before the circuit court.

b. Robbins' specific allegations satisfied the heightened pleading standard.

WVDCR's baseless assertion that the circuit court failed to correctly apply the heightened pleading standard relevant to qualified immunity analysis is squarely contradicted by the circuit court's specific findings. The circuit court ruled, "The Court finds with regard to the heightened pleading requirement stated above .... that the Plaintiff has alleged in the Amended Complaint sufficient 'particularized' facts to satisfy such requirement on the matter of a clearly established right[.]" [JA-214, para. 22.] Clearly, the circuit court was aware of the heightened pleading

standard and applied it to its analysis. Faced with the circuit court's express finding that the heightened pleading standard had been satisfied, WVDCR suggests (without providing any meaningful explanation) that the circuit court incorrectly applied the heightened pleading standard. This assertion is contradicted by a plain reading of the circuit court's order.

The circuit court identified at least seven (7) separate specific allegations set forth in the Amended Complaint to explain how the heightened pleading standard had been satisfied. The circuit court pointed to the following specific allegations: that defendants were aware of Robbins vulnerable status as a registered sex offender who had been threatened by other inmates; that defendants had moved Robbins throughout the facility because of those threats; that defendants allowed dangerous inmates to roam freely in a lockdown pod; that the dangerous inmates were not supervised and were permitted entry into Robbins cell; that defendants either ignored or failed to monitor Robbins being paraded from cell to cell by the dangerous inmates; and that defendants failed to monitor Robbins until he was discharged. [JA-213-214.] Unlike the circuit court's litany of clear examples of specific allegations, WVDCR simply characterizes the allegations as "barebones" without offering any justification for that baseless characterization. This argument does little to invoke a justifiable legal issue but rather is a veiled attempt to reverse a ruling it simply disagrees with.

This appeal seeks an application of a Rule 12(b)(6) pleading standard well beyond any requirement ever articulated under this Court's jurisprudence. WVDCR asks the Court to impose an impossible burden upon Robbins, and all other aggrieved complainants in matters involving public officials, to preliminary plead subjective intent, without the benefit of reasonable inferences and without the benefit of discovery. Robbins' allegations are not frivolous, his allegations are not meritless, and his allegations are not intended to harass or humiliate. Rather, Mr. Robbins' specific

allegations are substantial and invoke the very heart of constitutional guarantees to be free from cruel and unusual punishment under the 8th Amendment to the United States Constitution.

The circuit court correctly concluded that Robbins had sufficiently plead facts that established the deliberate indifference and negligence of the defendant Division of Corrections under the heightened pleading standard. WVDCR has offered no basis in law or fact that warrants reversal of the circuit court's order denying qualified immunity at this stage of litigation.

2. The circuit court did not err by denying defendants motion to dismiss Count IV of the Amended Complaint because Robbins has properly plea d that WVDCR failed to properly train and/or supervise the defendant officers.

WVDCR is incorrect in asserting that solely because employee training, supervision, and retention are discretionary governmental functions it is fatal to Robbins claims asserted against it in the Amended Complaint. *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 515, 766 S.E.2d 751, 774 (2014). Robbins clearly asserted in its claims against WVDCR that is had a duty to adequately train and supervise its correctional officers in a manner that promoted compliance with its Eight Amendment constitutional responsibilities to prevent inmate on inmate violence and sexual assault. To the extent that Robbins can demonstrate that WVDCR failed in its responsibilities leading to a violation of a "clearly established" right with respect to its training, supervision, or retention of the defendant officers, WVDCR is not entitled to immunity. *Id.*

In one of the largest and most comprehensive studies to date of qualified immunity decisions, only 0.6% of cases asserting qualified immunity as a defense were dismissed prior to discovery. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 45 (2017). In moving for dismissal at this preliminary stage, WVDCR ignores this difficult standard. Indeed, most of the cases it relies upon, including *A.B.*, in demanding specificity or particularity of the clearly established right stem from a summary judgment stage, not a motion to dismiss stage.

At this premature stage of the proceedings, we know that Robbins was a vulnerable inmate as established in his prescreening intake that was improperly performed in violation of the Prison Rape Elimination Act, thereby announcing his vulnerability to other inmates. That Robbins was removed from a misdemeanor pod because of threats of bodily harm; that he was placed in an interview room for an extended of time (for his safety); that he was placed in a segregated housing unit (for his safety) that he was to be locked own twenty-three hours per day with only one hour per day out of his cell (alone). All the affirmative acts were especially unique to Robbins and taken to protect his safety and well-being. Despite these steps, the defendant officer, WVDCR staff, permitted entry into his locked cell by three violent inmates who physically and sexually assaulted him for hours. To further this assault, he was paraded around the locked down cell by three violent inmates without any intervention by the defendant officers. At the time of the assault, Robbins was under the care and supervision of the State. The State was responsible for ensuring that this clearly established rights were not violated. The State's responsibility was delegated to it agents. The State's agents failed. Thus, the State failed. Was this a product of negligent training, supervision, or retention? Was there a disconnect between correctional officers that would have prevented Robbins torturous experience had proper training and supervision been in place? It would certainty seems so, but without the ability of discovery it will remain unknown. It will not only remain unknown, but it will be subject to reoccurrence if WVDCR is permitted to escape liability at a pleading level stage of the proceedings.

Robins had a clearly established right to free from the infliction of cruel and unusual punishment. The failure of WVDCR to properly train and supervise its employees conduct violated that right and it failed protect Robbins from a substantial and known risk of harm. Accordingly,

the circuit court did not err when it determined that WVDCR was not entitled to qualified immunity at this stage of the proceedings.

3. The conduct alleged in the Amended Complaint was committed within the scope of the defendant officers' employment; and therefore, WVDCR could he held vicariously liable and not entitled to qualified immunity.

While there is no vicarious liability for 42 U.S.C § 1983 claims, WVDCR is vicariously liable for the negligent acts committed by its employees under the remaining state tort claims set forth in the Amended Complaint. This Court's analysis and holding related to *respondeat superior* vicarious liability in *W.Va. Reg'l Jail Corr. Facility v. A.B.,* 234 W.Va. 492, 766 S.E.2d 751, 755 (2014) establishes the fundamental principles of vicarious liability of a state agency for the negligent conduct of its employees when the employees are acting within the scope of their employment at the time of the acts or omission complained of. In essence, a court may only maintain a state agency as a party to an action if the pleadings sufficiently establish that a state agency employee was acting within the scope of employment. In the instant case, it is undeniable the defendant officers were acting within their scope of employment.

A public official who is "acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29–12A–1 et seq. is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known." *A.B.*, 766 S.E.2d at 762. (quoting Syl., in part, State v. Chase Securities, 188 W. Va. 356 S.E.2d 591 (1992)). Qualified immunity "may extend to protect the State against suit in contexts other than legislative, judicial, or executive policy-making settings" where an "officer intentionally inflicts an injury or acts completely outside his authority." *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 483 S.E.2d 507, 522-23 (1996).

In *A.B.*, the court held that where an "employees conduct which properly gives rise to a cause of action is found to within the scope of his authority or employment," the State is not entitled to a qualified immunity and may "therefore be liable under the principles of respondeat superior." *Id at 765.* Thus, qualified immunity is not proper where "State actors violate clearly established rights while acting within the scope of their authority and/or employment." *Id.* Further, qualified immunity is not proper where the actions are fraudulent, malicious, or oppressive. *Id.* It is only when a public official acts or omission are found to be outside the scope of his employment that that the State and/or its agencies are immune from vicarious liability. *Id.* at 767. The question of whether a public official was acting within the scope of employment is one of fact for a jury to determine. *Id.* at 768.

WVDCR takes great strides to convince this Court that the defendant officers were acting outside the scope of their employment. Nothing could be farther from the truth. Furthermore, this argument stands in complete contradiction to the arguments asserted by the defendant officers who have continuously claimed they were performing their job duties in a reasonable manner; and therefore, did not violate clearly established law. 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. In its ruling below, the circuit court correctly determined that monitoring inmates and taking steps to protect inmates from physical harm is squarely within the scope of their employment duties. [JA 215].

Indeed, it is perhaps the greatest single charge in the employment of prison officials/officers to maintain conditions in their facility to meet the requirements of the Eight Amendment. Now, however, WVDCR, after an adverse ruling below, seeks to escape liability by labeling the officers' actions as performed willfully, maliciously, and well beyond the scope of their employment. In advancing this argument, WVDCR calls into question the validity of the immunity argument set forth by its agents. Specifically, that they did not possess the requisite subjective intent to be held liable under the Eight Amendment. The defendants in this matter should not be permitted to have it both ways and should not be permitted to submit contradictory arguments to escape individual liability.

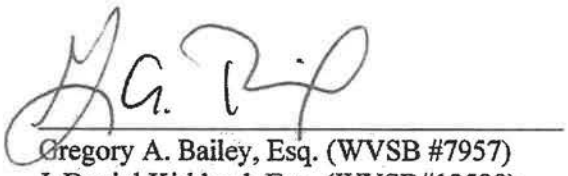
Thus, the circuit court correctly found that the acts and/or omissions on the part of the WVDCR employees or officials, as alleged, were discretionary in nature, and do not constitute legislative, judicial, executive or administrator's policy-making acts. Furthermore, that the acts and/or omission alleged were performed within the scope of the defendant officers 'employment; that Robbins had clearly articulated allegations of a violation of a clearly established law; and therefore, WVDCR was not entitled to qualified immunity at this stage of the proceedings.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Damein Robbins respectfully request that this Court affirm the Hampshire County Circuit Court's *Order Denying Defendants' Motion to Dismiss* and remand this matter back to the circuit court with direction to allow this matter to proceed accordingly.

Respectfully submitted,

DAMEIN ROBBINS
Respondent, By Counsel



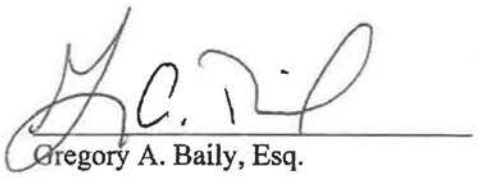
Gregory A. Bailey, Esq. (WVSB #7957)
J. Daniel Kirkland, Esq. (WVSB#12598)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25414
304.725.2002 (t)
304.725.0282 (f)
Counsel for Respondent Damein Robbin

CERTIFICATE OF SERVICE

I, J. Daniel Kirkland, Esq., do hereby certify that I have served a true and accurate copy of the foregoing, ***Respondent's Brief***, by U.S. Mail, First Class, postage prepaid, and electronic mail, this 25th day of March 2022, on the following counsel of record:

Matthew R. Whitler, Esq.
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
261 Aikens Center, Suite 301
Martinsburg, West Virginia 25404
Counsel for Defendant WVDCR

Michael D. Dunham, Esq.
Kathryn V. McCann-Slaughter, Esq.
Shuman McCuskey Slicer PLLC
116 South Stewart Street, First Floor
Winchester, Virginia 22601
Counsel for Defendant's Isaiah Blancarte and Bryon Whetzel



Gregory A. Baily, Esq.