IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-0906

OFFICER ISAIAH BLANCARTE AND OFFICER BRYON WHETZEL, 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; Case No. 20-C-24)

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

The question before this Court is whether the circuit court erred by failing to evaluate the facts alleged in the Amended Complaint and engage in the appropriate analysis under the Eighth Amendment when it denied Correctional Officer Isaiah Bancarte's ("Officer Blancarte") and Correctional Officer Bryon Whetzel's ("Officer Whetzel") motions to dismiss. The answer is no. In denying the motions to dismiss, the circuit court relied upon facts that were not asserted in the Amended Complaint and failed to evaluate the subjective component of Robbins's claimed Eighth Amendment violation – whether Officer Blancarte and/or Officer Whetzel were subjectively aware that a substantial risk of harm existed to the Respondent, Damien Robbins ("Robbins"), and ignored that risk. Had the circuit court considered the facts asserted in the Amended Complaint, and engaged in the appropriate analysis under the Eighth Amendment, it would have determined that Robbins failed to allege facts that, if true, establish a violation of the Eighth Amendment. The end result of the circuit court's errors was the inappropriate denial of qualified immunity to Officer Blancarte and Officer Whetzel for all claims asserted by Robbins in his Amended Complaint. This Court should now rectify those errors by reversing the circuit court and finding that Officer Blancarte and Officer Whetzel are entitled to qualified immunity.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument, to the extent necessary, would only be appropriate under Rule 19 because this appeal involves assignments of error in the application of settled case law.

III. ARGUMENT

A. The circuit court did not properly identify and evaluate facts that demonstrate Officer Blancarte and Officer Whetzel violated clearly established law.

In evaluating whether Officer Blancarte and Officer Whetzel are entitled to qualified immunity at the motion to dismiss stage, the circuit court is bound by the factual allegations in the

Amended Complaint and this Court's jurisprudence on qualified immunity. Although Robbins maintains that the circuit court "conducted a thorough and well-reasoned analysis of the facts and legal theories," the fact remains that the circuit court relied upon "facts" that were not asserted in the Amended Complaint when it determined that Officer Blancarte and Officer Whetzel were not entitled to qualified immunity. [Resp. Br., p. 5.] [JA 075-086, 116, 129, 265-266.] Moreover, the circuit court did not identify how any of the "facts" asserted in the Amended Complaint demonstrate that either Officer Blancarte or Officer Whetzel violated clearly established law, which, in this case, is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. Specifically, the circuit court did not identify how Officer Blancarte or Officer Whetzel would have been, or should have been, subjectively aware that a substantial risk of harm existed for Robbins if cell doors were unlocked or inmates were allowed to roam the A-6 pod. Had the circuit court engaged in the appropriate analysis, it would have determined that Robbins does not allege facts that, if true, establish the subjective component of an Eighth Amendment violation. Without such a violation, Robbins is unable to establish that either Officer Blancarte or Officer Whetzel violated a clearly established right. Therefore, Officer Blancarte and Officer Whetzel are entitled to qualified immunity for all claims asserted by Robbins.

1. The circuit court relied upon facts not alleged in the Amended Complaint.

Robbins contends that Officer Blancarte and Officer Whetzel do not "accept the final order in its entirety," but instead "cherry pick portions of the order to imply that the circuit court applied the heightened pleading [standard] 'in passing' or it was applied 'capriciously.'" [Resp. Br., p. 11.] Although the circuit court certainly glossed over the heightened pleading standard, applying it in a capricious manner, neither Officer Blancarte nor Officer Whetzel "cherry pick" portions of the circuit court's order to make this point. Officer Blancarte and Officer Whetzel do contend that the

circuit court identified and relied upon "facts" that were not alleged in the Amended Complaint to conclude that neither Officer Blancarte nor Officer Whetzel were entitled to qualified immunity in this case. This misapplication of facts by the circuit court is erroneous and central to the question of whether Officer Blancarte and Officer Whetzel are entitled to qualified immunity.

The facts put forth by the circuit court in its order differ from the facts set forth by Robbins in his Amended Complaint. The circuit court finds that "Defendants were aware of threats" directed at Robbins. [JA 265.] The circuit court does not articulate, by name, which defendants were aware of these threats, but the implication seems to be that the circuit court concluded that Officer Blancarte and Officer Whetzel were aware of the threats. The circuit court reached this conclusion despite the fact that there are no allegations in the Amended Complaint that either Officer Blancarte or Officer Whetzel were aware of any threat directed at Robbins. [JA 075-086.]

Despite the lack of allegations in the Amended Complaint, the circuit court erroneously determined that "Defendants were aware of threats made against [Robbins] which necessitated moving him throughout the corrections facility several times before leaving him exposed to vulnerable physical attack." [JA 213.] Nowhere in the Amended Complaint are there allegations that Officer Blancarte or Officer Whetzel were aware of threats made against Robbins, knew why Robbins was moved throughout the corrections facility, or knew that Robbins was exposed to vulnerable physical attacks. Robbins simply does not plead the alleged facts which the circuit court seemingly found and relied upon in reaching its decision in this case.

Despite the missing allegations in the Amended Complaint, Robbins now argues that the "correctional staff was put on notice of physical threats made against him because of his status as a registered sex offender." [Resp. Br., p. 5.] Robbins cannot cite to any portion of the record

alleging or inferring that Officer Blancarte or Officer Whetzel were ever put on notice of any physical threats made against Robbins because of his status as a sexual offender.

This is not just a simple disagreement with the ultimate conclusion reached by the circuit court based upon the facts in the record, as Robbins contends. The circuit court completely ignored the allegations in the Amended Complaint and made determinations based upon "facts" that were not alleged by Robbins. Had the circuit court assessed the facts, as alleged in the Amended Complaint, it would have concluded that Robbins does not assert enough facts to establish the subjective prong of an Eighth Amendment violation. Robbins relies upon a violation of the Eighth Amendment to assert that Officer Blancarte and Officer Whetzel violated clearly established law. Without facts alleged supporting a violation of a clearly established law, Officer Blancarte and Officer Whetzel are entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

2. Robbins does not allege facts that, if true, establish that Officer Blancarte and Officer Whetzel were subjectively aware of a substantial risk of harm to Robbins.

A plaintiff alleging a violation of his or her Eighth Amendment rights based upon an inmate-on-inmate attack must show that: (1) he or she faced a "substantial risk of harm," and (2) the defendants acted with "deliberate indifference."[1] *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). The "deliberate indifference" necessary to support a claim that an individual has violated the Eighth Amendment requires a "showing that the official was subjectively aware of the risk." *Id.* at 829. The deliberate indifference standard requires "a state of mind more blameworthy than

[1] Officer Blancarte and Officer Whetzel do not dispute that Robbins pled enough facts alleging that he faced substantial risk of harm. Officer Blancarte and Officer Whetzel do dispute that Robbins pled any facts that they were aware of, or should have been aware of, the substantial risk of harm to Robbins. Officer Blancarte and Officer Whetzel further dispute that Robbins pled any facts that they ignored or disregarded the substantial risk of harm to Robbins.

negligence" – that is, "Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" *Id.* at 835 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

When qualified immunity is at issue, a circuit court must insist on heightened pleading by the plaintiff. *W. Va. State Police v. J.H.*, 244 W. Va. 720, 731, 856 S.E.2d 679, 690 (2021). *See also Hutchison 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). In the context of this case, the circuit court was required to determine whether Robbins, in his Amended Complaint, asserted facts that, if true, would establish that Officer Blancarte and Officer Whetzel were aware that a substantial risk to Robbins' safety existed and then ignored that risk. *Farmer,* 511 U.S. at 837. Reversal of the circuit court's order is appropriate here because the circuit court failed to analyze and point to actual facts in the Amended Complaint that Officer Blancarte and Officer Whetzel had knowledge of Robbins' status as a sexual offender, were aware that the other inmates in "A" pod knew of this status as a sexual offender, or knew that the other inmates intended to physically harm Robbins if allowed to roam the pod.

In his briefing below and to this Court, Robbins seems to imply that Officer Blancarte and Officer Whetzel were aware that "an unknown corrections officer, John Doe, conducting intake elicited information about [Robbins'] status as a sexual offender in a nonconfidential setting." [JA 078.] But this fact is not asserted or implied anywhere in the Amended Complaint. Indeed, the broadest reading of the Amended Complaint does not support this notion or the notion that either Officer Blancarte or Officer Whetzel were aware that Robbins was "checked off" the misdemeanor

pod by other inmates because of Robbins' status as a registered sexual offender. Robbins does not allege facts either demonstrating that Officer Blancarte or Officer Whetzel had this specific knowledge, nor does Robbins allege facts which would allow this Court or the circuit court to infer that Officer Blancarte or Officer Whetzel had such knowledge. Under Robbins' Eighth Amendment theory, such facts are required in order to defeat qualified immunity.

Robbins contends that Officer Blancarte and Officer Whetzel simply disagree with the circuit court's conclusion in this case. This is true, in a sense, but the reason for the disagreement is because of the circuit court's failure to engage in the relevant analysis under the Eighth Amendment, which requires the circuit court to identify whether Robbins has asserted facts that, if true, would establish Officer Blancarte and Officer Whetzel's "deliberate indifference" to a substantial risk of serious harm to Robbins. *Farmer*, 511 U.S. at 828. This requires an analysis of an objective component – a grave risk to the prisoner – and a subjective component – a culpable state of mind. *See id.* The circuit court simply fails to engage in this analysis.

In his brief to this Court, Robbins parrots the erroneous "facts" relied upon by the circuit court in its Order. [Resp. Br., p. 10.] But, to establish the subjective component of deliberate indifference under the Eighth Amendment, Robbins is required to allege facts that show that the prison official either purposefully caused the harm or ignored the risk and allowed the harm to occur. *See id. See also Strickland v. Halsey,* 638 Fed. Appx. 179, 184 (4th Cir. 2015) (citing *Wilson v. Seiter,* 501 U.S. 294, 302-03 (1991)). In other words, Robbins must identify facts showing that Officer Blancarte and Officer Whetzel were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference." *Farmer*, 511 U.S. at 837.

A prison official has not violated the Eighth Amendment if he or she "knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Farmer*, 511 U.S. at 844. *See also Rich v. Bruce*, 129 F.3d 336, 338 (4th Cir. 1997) (finding that a prison official did not violate the Eighth Amendment when he did not actually draw the inference that the inmate was exposed to a substantial risk of serious harm). Mere negligence does not establish deliberate indifference. *Farmer*, 511 U.S. at 835. *See also Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999) ("Deliberate indifference is a very high standard-a showing of mere negligence will not meet it."). *Farmer* instructs "that general knowledge of facts creating a substantial risk of harm is not enough. The prison official must also draw the inference between those general facts and the specific risk of harm confronting the inmate." *Johnson v. Quinones*, 145 F.3d 164, 168 (1998) (citing *Farmer*, 511 U.S. at 837).

Robbins does not claim that Officer Blancarte or Officer Whetzel knew why Robbins had been moved to A-6 pod, knew that Robbins was a registered sex offender, or knew that other inmates being held in the A-6 pod were aware that Robbins was a registered sexual offender. Robbins does not claim that Officer Blancarte or Officer Whetzel knew or had reason to believe that inmates being housed in the A-6 pod would physically and sexually assault registered sexual offenders or physically or sexually assault Robbins because he was a registered sexual offender. Robbins does not claim that Officer Blancarte or Officer Whetzel had actual knowledge of a substantial risk that Robbins would be attacked by other inmates if Officer Blancarte or Officer Whetzel permitted the inmates to "roam around A-6 pod together and allowed entry of other inmates into Plaintiff's cell." [JA 080.] Robbins does not claim that Officer Blancarte or Officer Whetzel witnessed the inmates close Robbins's cell door, turn off the lights, or cover the windows. [JA 079.] Robbins does not allege that either Officer Blancarte or Officer Whetzel witnessed the

inmates attack him and failed to intervene. These facts are required to establish a claim that Robbins was deprived of rights provided under the Eighth Amendment.

Robbins contends that an "impossible burden" is placed upon him "to preliminarily plead subjective intent, without the benefit of reasonable inferences and without the benefit of discovery." [Resp. Br., p. 11.] Robbins does not cite any law to support this proposition. That is because none exists. Subjective intent is an enunciated requirement to establish an Eighth Amendment violation. A plaintiff – in this case Robbins – has the burden to show that an official acted with improper subjective intent. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). When a prisoner's cause of action arises under the Eighth Amendment, the defendant's subjective intent comprises an essential element of an affirmative case. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991). And while subjective intent may be inferred from context, Robbins does not provide any here. The fact that an employee working in a different section of the jail, on a different date, solicited certain information regarding Robbins's status as sexual offender does not automatically impute that knowledge to Officer Blancarte or Officer Whetzel. Thus, in an Eighth Amendment case, such as this one, while a circuit court must accept the plaintiff's factual allegations as true, the defendants' assertion of a qualified immunity defense requires the plaintiff to further put forth "'specific, nonconclusory factual allegations that establish improper motive.'" *Crawford-El*, 523 U.S. at 598 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991)). Robbins does not put forth any such factual allegations; therefore, it was error for the circuit court to determine that Robbins has alleged facts supporting a violation of the Eighth Amendment.

3. Officer Blancarte and Officer Whetzel are entitled to qualified immunity.

Officer Blancarte and Officer Whetzel are "shielded 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." *Harlow,* 457 U.S. at 818 (1982). *See also State v. Chase Sec.*, 188 W. Va. 356, 362, 424 S.E.2d 591, 597 (1992).

Officer Blancarte and Officer Whetzel are not transforming qualified immunity into a "impenetrable forcefield that no litigant will ever overcome;" rather, Officer Blancarte and Officer Whetzel are entitled to have the circuit court undertake a proper analysis of Robbins's allegations in his Amended Compliant. What is notably missing from Robbins's Amended Complaint is allegations of knowledge that substantial risk existed that Robbins would be attacked by other inmates if Officer Blancarte or Officer Whetzel permitted the inmates to "roam around A-6 pod together and allowed entry of other inmates into Plaintiff's cell." [JA 080.]

In cases such as this, where subjective intent is an essential element of the cause of action, the qualified immunity analysis still begins with an examination of whether, taking the facts in the light most favorable to a plaintiff, a constitutional violation has been alleged. As part of that showing, a plaintiff must "put forth specific, nonconclusory factual allegations" that establish improper motive in order to defeat a defendant's claims to qualified immunity. *Crawford-El*, 523 U.S. at 598. Robbins fails to allege any facts regarding Officer Blancarte and Officer Whetzel's subjective intent. Without allegations of improper motive, no violation of a constitutional right is established. *See id. See also Siegert,* 500 U.S. at 236; *Wilson,* 501 U.S. at 303. Accordingly, Officer Blancarte and Officer Whetzel are entitled to qualified immunity at this stage. The circuit court erred by failing to appreciate the lack of allegations in Robbins's Amended Complaint to support an Eighth Amendment violation. For that reason, this Court should reverse the circuit court's order denying Officer Blancarte and Officer Whetzel qualified immunity.

IV. CONCLUSION

For the reasons discussed herein and further articulated in Petitioners' Brief, Officer Isaiah Blancarte and Officer Bryon Whetzel request that this Court reverse the circuit court's *Order Denying Defendants' Motions to Dismiss* and remand the matter to the circuit court with direction to enter an order granting Officer Isaiah Blancarte's and Officer Bryon Whetzel's motions to dismiss.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of April 2022, I served the foregoing ***"Petitioners' Reply Brief"*** on the following counsel of record via email, and via United States mail, in an envelope addressed as follows:

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