

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED  
2022 AUG 15 11:13  
CLERK  
KANAWHA COUNTY CIRCUIT COURT

**HISEL BAILEY,**

Plaintiff,

v.

Civil Action No. 22-C-145  
Honorable Kenneth D. Ballard

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL; OLIVIA SUSAN SHIELDS**, in her individual capacity and as an employee of West Virginia Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital; **CRAIG RICHARDS**, in his individual capacity and as an employee of West Virginia Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital;  
**WEST VIRGINIA ATTORNEY-GENERAL/MEDICAID FRAUD CONTROL UNIT; NATHAN R. LYLE**, in his individual capacity and in his official capacity as an employee of the West Virginia Attorney-General, Medicaid Fraud Control Unit; **MICHELLE WOOMER**, in her individual capacity and in her capacity as an employee of Legal Aid of West Virginia, Inc.; **TERI STONE**, in her individual capacity and as an employee of Legal Aid of West Virginia, and **LEGAL AID OF WEST VIRGINIA, INC.**; a West Virginia Non-Profit Corporation,

Defendants.

**ORDER DENYING DEFENDANTS WEST VIRGINIA ATTORNEY-GENERAL/MEDICAID FRAUD CONTROL UNIT AND NATHAN R. LYLE'S MOTION TO DISMISS**

On this 15<sup>th</sup> day of August, 2022, came the Defendants West Virginia Attorney-General/Medicaid Fraud Control Unit ("MFCU") and Nathan R. Lyle, by counsel Caleb B. David, Tyler L. Rittenhouse and Shuman McCuskey Slicer, PLLC and Plaintiff Hisel Bailey, by counsel Scott H. Kaminski and Ray, Winton & Kelley, PLLC, upon Defendants MFCU and Lyle's Motion to Dismiss. The Motion has been fully briefed and the Court has reviewed the pleadings and briefs of the parties and makes the following findings of fact and conclusions of law:

## STANDARD OF REVIEW

1. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Chapman v. Kane Transfer Company*, 236 S.E. 2nd 207 (W.Va. 1977) quoting *Conley v. Gibson*, 355 U.S. 41 (1977).
2. Furthermore, "[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).
3. A motion to dismiss is evaluated under the standard of Rule 8(a)(1) of the West Virginia Rules of Civil Procedure.
4. Rule 8(a)(1) of the West Virginia Rules of Civil Procedure states that a claim for relief must contain, "A short and plain statement of the claim showing that the pleader is entitled to relief." *West Virginia Rule of Civil Procedure 8(a)(1)*.
5. A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice. *West Virginia Rules of Civil Procedure 8(f)*.
6. The trial court's consideration begins with the proposition that "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." *Cantley v Lincoln County Commission*, 655 S.E. 2nd 490, 492 (W.Va. 2007) quoting *John W. Lodge Distributing Co. Inc v. Texaco Inc.*, 245 S.E. 2nd 157, 158 (W.Va. 1978).

7. "The policy of Rule 8(f) is to decide cases upon their merits and if the complaint states a claim upon which relief can be granted under any legal theory a motion under Rule 12(b)(6) must be denied." *Id* at 470.

8. A court reviewing the sufficiency of a Complaint, before the reception of any evidence should examine not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974).

9. A court must determine if the complaint states a plausible claim for relief, and if it does, the motion to dismiss must be denied. *Cunningham v. Castelle*, 2011 U.S. Dist. LEXIS 108512, \* 4 (S.D. W. Va. Sept. 22, 2011).

10. A well-pled complaint must assert "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, at 570 (2007)).

11. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is very remote and unlikely." *Id* at 556 (internal quotations omitted).

**DEFENDANTS ARE A "PERSON" UNDER 42 U.S.C. §1983**

12. First, there can be no dispute that Defendant Lyle is a person.

13. He argues, however, that since he was acting in his official capacity, he cannot be a person.

14. Whether Defendant Lyle was acting in his official capacity, or outside his official capacity, is a question of fact and cannot be the subject of a Motion to Dismiss.

15. While Defendant MFCU may not be a “person,” it is vicariously liable for the acts or omissions of its employee, Defendant Lyle.

16. The Supreme Court of Appeals of West Virginia so held in *W.Va. Reg'l. Jail & Corr. Facility Auth. v. A.B.*, 766 S.E.2d 751 (W.Va. 2014) citing *Parkulo v. W.Va. Bd. of Probation and Parole*, 483 S.E.2d 507 (W.Va. 1986).

17. Therefore, Plaintiff's claims against Defendant MFCU cannot be dismissed and Defendants' Motion is denied.

#### **STATUTE OF LIMITATIONS**

18. Defendants MFCU and Lyle contend that Plaintiff's Section 1983 claim was untimely filed.

19. Defendants cite a two-years statute of limitations under W.Va. Code §55-2-12(b).

20. Defendants MFCU and Lyle argue that the conduct complained of occurred on December 17, 2019 when Defendants MFCU and Lyle authored a false report related to the incident of January 7, 2019 between Plaintiff and M.C., a patient at Defendant Mildred Mitchell-Bateman Hospital.

21. Defendants MFCU and Lyle ignore that its act was a continuing tort.

22. As the Court held in *Copier Word Processing v. Wesbanco Bank*, 640 S.E.2d 102 (W. Va. 2006) at Syl Pt. 2, "Where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease." Citing Syl Pt. 11, *Graham v. Beverage*, 566 S.E.2d 603 (W.Va. 2002).

23. Here, the continuing tort doctrine applies.

24. Because the harm to Plaintiff continued up to the dismissals of the criminal complaint and WV BON complaint, his statute of limitations did not accrue and begin to run until March 2, 2021 at the earliest and April 29, 2021 at the latest.

25. At either of those times, the statute of limitations for a Whistleblower claim was two years per W.Va. Code §6C-1-4(a).

26. Plaintiff filed this lawsuit on February 25, 2022, well within the two-year statute of limitations then existing.

27. A review of the timing of events is necessary to understand why Plaintiff timely filed his Section 1983 claim.

28. The incident that is the subject of the Complaint originated on January 7, 2019. See Complaint, para. 16. Plaintiff was suspended on January 17, 2019. See Complaint, para. 50.

29. On March 11, 2019, Plaintiff was terminated. See Complaint, para. 61.

30. Plaintiff was ordered reinstated to his position by Order of WVPEGB on November 19, 2019. See Complaint, para. 16.

31. Defendants MFCU and Lyle sent Plaintiff a letter on October 4, 2019 demanding a “custodial interrogation” which occurred on December 2, 2019. See Complaint, paras. 182-183.

32. Defendant MFCU and Lyle authored a false report based on their fraudulent investigation on December 17, 2019. See Complaint para. 191.

33. This false report was turned over to the Cabell County Prosecuting Attorney’s Office which led to a criminal complaint against Plaintiff filed on December 30, 2019. See Complaint, para. 212.

34. The Cabell County Prosecuting Attorney dismissed the criminal complaint on March 2, 2021. See Complaint, para. 17.

35. Plaintiff's Section 1983 cause of action was a continuing tort and did not accrue until March 2, 2021.

36. This Complaint was filed on February 25, 2022, well within two years of the statute of limitations.

37. Defendants MFCU and Lyle's Motion to Dismiss denied as to their statute of limitations argument.

#### **MALICIOUS PROSECUTION**

38. Defendants MFCU and Lyle next contend that Plaintiff's malicious prosecution claim fails to state a claim for malicious prosecution.

39. Defendants MFCU and Lyle are wrong on this point.

40. A cause of action for malicious prosecution in West Virginia requires the following elements: (1) that the prosecution was malicious; (2) that it was without reasonable or probable cause, and (3) that it terminated favorably to plaintiff. Syl. Pt. 1, *Preiser v. MacQueen*, 352 S.E.2d 22 (W.Va. 1985) citing Sy. Pt. 1, *Lyons v. Davy-Pocahontas Coal Co.*, 84 S.E. 744 (W.Va. 1915).

41. Plaintiff meets all such elements as to Defendants MFCU and Lyle.

42. Plaintiff alleges that the prosecution by Defendants MFCU and Lyle was malicious. See Complaint, paras. 230 and 231.

43. Plaintiff asserts that the prosecution procured by Defendants MFCU and Lyle was without reasonable or probable cause because Defendants MFCU and Lyle caused a

Magistrate to find probable cause based on their false and flawed investigation and without probable cause. See Complaint, para. 213 and 229.

44. Finally, Plaintiff alleges that the prosecution terminated in his favor by dismissal of the criminal complaint on March 2, 2021. See Complaint, para. 17.

45. Plaintiff has met all burdens of pleading his malicious prosecution claim against Defendants MFCU and Lyle and their Motion to Dismiss is denied.

46. Defendants MFCU and Lyle contend that since the criminal prosecution was not dismissed with prejudice, it can be revived and therefore, the prosecution has not terminated successfully to plaintiff.

47. They cite *Goodwin v. City of Shepherdstown*, 825 S.E.2d 363 (W.Va. 2019) for this proposition.

48. Plaintiff was charged with four crimes in the criminal complaint.

49. The first charge was assault under W.Va. Code §61-2-9(b) which is a misdemeanor.

50. The statute of limitations for a misdemeanor in West Virginia is one year. W.Va. Code §61-11-9.

51. The violation date was January 7, 2019.

52. Thus, the statute of limitations for this charge has expired and the effect of the dismissal is that said charge cannot be lawfully brought against Plaintiff, thus satisfying the *Goodwin* standard of a termination favorable to Plaintiff.

53. As to this charge alone, Plaintiff's malicious prosecution claim survives.

54. The same is true for the second charge against Plaintiff, abuse or neglect of an incapacitated adult, a misdemeanor under W.Va. Code §61-2-29(b).

55. The same is true for the third charge, battery under W.Va. Code §61-2-9(c).

56. The final charge is also a misdemeanor, abuse or neglect of an incapacitated adult under W.Va. Code §61-2-29(c).

57. The statute of limitations has expired as to all charges.

58. Therefore, they have terminated favorably to Plaintiff.

59. Defendants MFCU and Lyle's reliance on *Goodwin* is misplaced and their Motion to Dismiss is denied.

60. Defendants MFCU and Lyle also rely on the fact that the Magistrate found probable cause.

61. In a vacuum, that is true.

62. But that cannot exonerate Defendants MFCU and Lyle from this malicious prosecution claim where it is alleged that they duped the Magistrate into that finding based on their flawed and fraudulent report. See Complaint, para. 213.

63. The *Goodwin* case does not take up the issue here, that the finding of probable cause was ineffective due to the false allegations in the report and criminal complaint.

64. The Magistrate would not have known that because Defendants MFCU and Lyle failed to provide the Magistrate with the Decision of the West Virginia Public Employee Grievance Board ("WVPEGB") exonerating Plaintiff from the allegations against him and calling into question the "investigation" by Defendants Woomer, Shields, Stone, Richards, MMBH and LAWV.

65. While Defendants MFCU and Lyle purport to have conducted their own, separate investigation, they were aware of the WVPEGB Decision and failed to disclose it to the Magistrate.

66. It is also apparent, though not to the Magistrate, that the report of Defendants MFCU and Lyle relied largely upon the same information and witnesses discredited by the Decision of WVPEGB.

67. It is also apparent, though not to the Magistrate, that the report of Defendants MFCU and Lyle was based on information obtained from certain witnesses with a bias as alleged in this case as they are Defendants herein (Defendants Woomer, Stone, Shields, Richards, MMBH and LAWV).

68. Of course, the Magistrate found probable cause with such information withheld.

69. *Goodwin* does not stand for the proposition that if someone can fool a Magistrate, then they can get away with and avoid liability for a malicious prosecution.

70. The better case of *Jarvis v. West Virginia State Police*, 711 S.E.2d 542 (W.Va. 2010) illustrates the point.

71. Specifically, Syl. Pt. 5 holds that a finding of probable cause creates a presumption that the prosecution was legitimate but that the Plaintiff may rebut that presumption by showing the finding was procured by fraud, perjury or falsified evidence.

72. The only distinction between *Jarvis* and *Goodwin* is that *Jarvis* involved a grand jury indictment rather than a finding by a Magistrate of probable cause through a preliminary hearing as in *Goodwin*.

73. But the fundamental analysis is the same, a finding of probable cause, whether procured by from a grand jury or Magistrate, does not provide a defense to a malicious prosecution claim where the finding of probable cause was procured by fraud, perjury or falsified evidence as is the allegation here.

74. Importantly, *Jarvis* was not specifically overruled by *Goodwin* and therefore is good law applicable to this case.

#### PROSECUTORIAL IMMUNITY

75. The cases cited in Defendants' brief specifically apply to prosecutors.

76. Defendants MFCU and Lyle are not prosecutors and are not alleged to be prosecutors anywhere in the Complaint.

77. Defendants cite the MFCU powers at W.Va. Code §9-7-1 which specifically state it is charged with the "...investigation and referral for prosecution..." (emphasis added).

78. Clearly, Defendants MFCU and Lyle did not act as the prosecutor in this matter.

79. They investigated and referred this matter to the Cabell County Prosecuting Attorney's Office for prosecution.

80. That office was the prosecutor and immune from liability, hence they are not a Defendant herein.

81. But Defendants MFCU and Lyle were not prosecutors, they were investigators who referred this matter for prosecution, fraudulently and maliciously, which is why they are not immune.

82. Defendants' Motion to Dismiss is denied.

### QUALIFIED IMMUNITY

83. Failing at prosecutorial immunity, Defendants MFCU and Lyle next failed attempt is at qualified immunity.

84. Qualified immunity only applies, if at all, to discretionary decisions. *W. Virginia Reg'l Jail and Corr. Facility Auth. V. A.B.*, 766 S.E.2d 751 (W.Va. 2014) and *Clark v. Dunn*, 465 S.E.2d 374 (W.Va. 1995).

85. As the West Virginia Supreme Court of Appeals has acknowledged, “qualified immunity, as opposed to absolute immunity, is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials.

86. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages.” *Hutchison v. City of Huntington*, 479 S.E.2d 649, 658 (W.Va. 1996).

87. “[W]hether qualified immunity bars recovery in a civil action *turns on the objective legal reasonableness of the action assessed*, in light of the legal rules that were clearly established at the time it was taken.” *Id.* at 658-9 (citing *State v. Chase Securities, Inc.* 424 S.E.2d 591 (W.Va. 1992); *Bennett v. Coffman*, 361 S.E.2d 465 (W.Va. 1987)(emphasis added).

88. Qualified immunity does not apply in situations where a state actor has knowingly violated a clearly established law or acted maliciously, fraudulently or oppressively. See, *W. Va. Reg'l Jail & Corr. Facility Auth. V. Grove*, 852 S.E.2d 773 (W.Va. 2020) citing *W. Va. Reg'l Jail & Corr. Facility Auth. V. A.B.*, 766 S.E.2d 751 (W.Va. 2014)(emphasis added).

89. Here, Plaintiff has pled exactly that relative to Defendants MFCU and Lyle, that their actions in participating in a false investigation and reporting the false results of

the false investigation were malicious, fraudulent and oppressive. See Complaint, Paras. 230 and 231.

90. Defendants MFCU and Lyle are not entitled to qualified immunity and their motion is denied.

91. Specifically with respect to Defendants MFCU and Lyle, Plaintiff has alleged that their investigation and report were false and fraudulent in light of the fact that they occurred after the Decision of WVPEGB on November 19, 2019. See Complaint, paras. 16, 183, 185 and 186.

92. Defendants MFCU and Lyle initiated contact with Plaintiff relative to their investigation some two weeks after the Decision of WVPEGB, on December 2, 2019.

93. The Decision of WVPEGB is a matter of public record and known or should have been known to Defendants MFCU and Lyle.

94. Nevertheless, despite the clear exoneration of Plaintiff by WVPEGB, Defendants MFCU and Lyle maliciously went forward as alleged by Plaintiff.

95. Defendants' MFCU and Lyle's Motion to Dismiss fails and is denied.

96. Further, Defendant Lyle conducted a custodial interrogation without providing Plaintiff with his Miranda rights.

97. Plaintiff alleges this was a violation of his legal and constitutional rights.

98. Defendant Lyle has no immunity for such violation and his Motion to Dismiss is denied.

#### **WHISTLEBLOWER**

99. Defendant Lyle argues that he cannot be subject to the Whistleblower statute as he was not an employee of Plaintiff.

100. That is true in the sense that Defendant Lyle did not supervise Plaintiff.

101. However, Plaintiff was a state employee.

102. Plaintiff alleges that Defendant Lyle acted in concert with Defendants Shields and Richards, both of whom fit the definition of employer under W.Va. Code §6C-1-3.

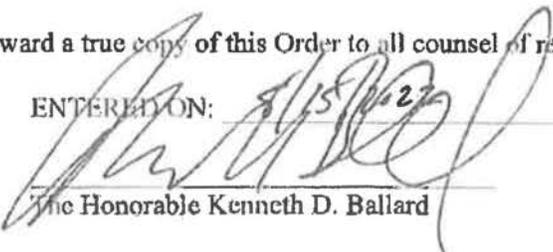
103. But Defendants MFCU and Lyle ignore the final qualification for “employer” under the statute: “...or an agent of a public body.”

104. While Defendant Lyle was not a supervisor of Plaintiff, he was an agent of Defendant MFCU, a public body, and acted in that capacity when conducting the custodial interrogation of Plaintiff and when referring his report to the Cabell County Prosecuting Attorney’s Office for prosecution. See Complaint, paras. 9 and 10.

105. Accordingly, for the reasons set forth herein, the Motion to Dismiss of Defendants West Virginia Attorney-General/Medicaid Fraud Control Unit and Nathan R. Lyle is hereby **DENIED**.

The Clerk is directed to forward a true copy of this Order to all counsel of record.

ENTERED ON:

  
The Honorable Kenneth D. Ballard

Prepared by:

Scott H. Kaminski, WV Bar #6338  
Ray, Winton & Kelley, PLLC  
109 Capitol Street, Suite 700  
Charleston, WV 25301  
304-342-1141  
304-342-0691 fax  
[ScottKaminski@rwk-law.com](mailto:ScottKaminski@rwk-law.com)  
Counsel for Plaintiff

STATE OF WEST VIRGINIA  
COUNTY OF MORGAN  
I, CLERK OF SAID COUNTY  
DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE AND CORRECT COPY OF SAID COURT  
ORDER.  
DATE: August 20, 2012  
CLERK  
CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA  
