
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 25-242

SCA EFiled: Sep 24 2025
08:04 PM EDT
Transaction ID 77165835

WEST VIRGINIA DIVISION OF CORRECTIONS
AND REHABILITATION,

Petitioner,

v.

MARY F. MYERS, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF
RONALD M. MYERS,

Respondents.

PETITIONER'S REPLY BRIEF

From the Circuit Court of Kanawha County,
Case No. 24-C-842

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TABLE OF CONTENTS

Table of Authorities	ii
Assignments of Error	1
Introduction	1
Statement Regarding Oral Argument and Decision.....	4
Argument	4
A. WVDCR IS ENTITLED TO QUALIFIED IMMUNITY FROM ALLEGATIONS OF NEGLIGENCE, INCLUDING ALLEGATIONS OF NEGLIGENT TRAINING, AND THE CIRCUIT COURT’S REFUSAL TO DISMISS THESE CLAIMS WAS IN ERROR.....	4
Conclusion	12

TABLE OF AUTHORITIES

Cases

<i>Clark v. Dunn</i> , 195 W. Va. 272, 465 S.E.2d 374 (1995).....	4, 5
<i>Crawford v. McDonald</i> , 2023 W. Va. LEXIS 85, *22, 2023 WL 2729675.....	6
<i>Crouch v. Gillispie</i> , 240 W. Va. 229, 809 S.E.2d 699 (2018).....	9
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002).....	7
<i>Moorhead v. W. Va. Army Nat’l Guard</i> , 2025 W. Va. LEXIS 151, at *12, 2025 LX 29779 (W. Va. May 2, 2025).....	8
<i>Parkulo v. W. Va. Bd. of Prob. & Parole</i> , 199 W. Va. 161, 483 S.E.2d 507 (1996).....	4
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001).....	11
<i>W. Va. Bd. of Educ. v. Marple</i> , 236 W. Va. 654, 783 S.E.2d 75 (2015).....	1
<i>W. Va. Dept. of Health and Human Services v. Payne</i> , 231 W.Va. 563 (2013).....	9
<i>W.Va. Dept. of Human Services v. A.R.</i> , 2024 W.Va. LEXIS 101.....	10
<i>W. Va. Dept. of Human Services v. David B.</i> , 911 S.E.2d 884, 2024 W. Va. LEXIS 504, *1 (2024).....	1, 8
<i>W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.</i> , 234 W. Va. 492, 766 S.E.2d 751 (2014)....	1, 4, 5, 6, 7, 10, 11
<i>W. Va. State Police. v. J.H.</i> , 244 W. Va. 720, 856 S.E.2d 679 (2021).....	1
<i>Ziglar v. Skiles</i> , 2024 W. Va. App. LEXIS 340 (ICA Dec. 6, 2024).....	8

Statutes

W. Va. Code § 15A-3-5.....	7
W. Va. Code § 15A-3-18.....	6
W. Va. Code § 18-2-13f.....	7
W. Va. Code § 29-12A-1.....	3, 4
W. Va. Code § 29A-3-1, <i>et seq.</i>	6

W. Va. Code § 31-20-9.....	6
W. Va. Code of State Rules § 95-1-1, <i>et seq.</i>	6

Rules

W. Va. R. App. P. 19	4
----------------------------	---

Constitutional Provisions

U.S. Const. amend. VIII.....	8
U.S. Const. amend. XIV.....	8

ASSIGNMENTS OF ERROR

The Circuit Court erred by denying portions of the West Virginia Division of Correction and Rehabilitation's ("WVDCR") Motion to Dismiss seeking dismissal of claims for mere negligence and negligent training because WVDCR is entitled to qualified immunity as a State agency for its discretionary actions. All allegations against WVDCR asserted in the negligence causes of action arise from WVDCR's exercise of its discretionary governmental functions in making decisions related to facility administration and officer training. These claims fail to identify any violation of clearly established laws about which WVDCR should reasonably know, and fail to describe conduct that is fraudulent, malicious, or oppressive. *See, e.g., W. Va. Dep't of Hum. Servs. v. David B.*, 911 S.E.2d 884, 887, 2024 W. Va. LEXIS 504, *1 (2024); *W. Va. Reg'l Jail Auth. v. A.B.*, 234 W. Va. 492, 514, 766 S.E.2d 751, 756 (2014); *W. Va. State Police, et al. v. J.H.*, 244 W. Va. 720, 856 S.E.2d 679 (2021); *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015).

INTRODUCTION

Respondent's Complaint sets forth factual allegations entirely focused upon alleged failures in the provider-to-patient relationship. For example, Wexford's alleged failure to obtain accurate and sufficient information respecting Mr. Myers' conditions, risks, and medical concerns (JA 026); the fact that no medical referral was placed to have Mr. Myers evaluated by a psychologist (JA 026); the fact that medical staff allegedly made no effort to communicate with Mrs. Myers to obtain Mr. Myers' medication information or the name of his treating physician (JA 026); alleged incomplete medical records (JA 026); the alleged medical failure to evaluate Mr. Myers' cognitive functioning on intake, failure to order prescribed medications, failure to document that Mr. Myers was not eating the week prior to having a stroke, failure to properly evaluate Mr. Myers, failure to examine Mr. Myers, failure to evaluate Mr. Myers when his mental

state was reported to be altered, failure to evaluate Mr. Myers when he was found unresponsive the morning of July 22, 2020, failure to timely transfer Mr. Myers to a hospital, and failure to take Mr. Myers' vitals during his incarceration (JA 028-029).

Before the Circuit Court, Petitioner moved for dismissal of Ms. Myers' claims for, *inter alia*, negligence and negligent training. Petitioner filed a Motion to Dismiss seeking dismissal of negligence and negligent training claims on the grounds that Petitioner is entitled to qualified immunity. Following briefing, the Circuit Court entered an Order denying Petitioner's Motion on March 19, 2025, and this interlocutory appeal followed. In Respondent's Brief, Ms. Myers argues that Petitioner is not entitled to qualified immunity because she has specifically alleged acts or omissions in violation of a clearly established right in her Complaint. However, the sources of law relied upon by Ms. Myers do not constitute clearly established rights that could overcome qualified immunity.

Respondent's Brief raises numerous issues and arguments that are not relevant to the matters at issue in this interlocutory appeal. For example, Respondent's Brief includes significant discussion pertaining to Ms. Myers' claim of "deliberate indifference in violation of clearly established West Virginia law" asserted in Count III of the Complaint. JA 030. Petitioner has challenged whether "deliberate indifference" as alleged in the Complaint is a viable common law cause of action in West Virginia in a separate proceeding before this Court. Specifically, that issue has been raised in a Petition for Writ of Prohibition and is docketed at Case No. 25-328. That is a separate Count of the Complaint and a separate issue not subject of this interlocutory appeal. This interlocutory appeal concerns only the negligence and negligent training claims asserted in Counts IV and V of the Complaint and, specifically, the fact that they are barred by qualified immunity.

JA 032-033. Respondent's discussion of the claim of deliberate indifference throughout Respondent's Brief has no bearing on the issue before the Court in this interlocutory appeal.

Respondent specifically asserts that "Petitioner WVDCR is not entitled to qualified immunity for its deliberate indifference[.]" *Respondent's Brief*, p. 8. At this point in the proceedings, Petitioner has not raised as part of this appeal that it is entitled to qualified immunity for the deliberate indifference claim asserted in Count III. Whether or not such a claim even exists is the subject of a separate proceeding before this Court in Case No. 25-328. Whether or not qualified immunity is an available defense to the claim asserted by Respondent as "deliberate indifference" is therefore not currently before this Court and need not be addressed as part of the instant appeal. In the instant interlocutory appeal, the issue is whether Petitioner is entitled to qualified immunity for claims of negligence and negligent training asserted in Counts IV and V.

Respondent argues that Petitioner WVDCR is not entitled to qualified immunity for its gross negligence, negligent hiring, or negligent supervision. *Respondent's Brief*, p. 8. This argument has no place in this appeal, because Respondent did not assert claims for gross negligence, negligent hiring, or negligent supervision against WVDCR in this action. JA 030-033. This can only be assumed to be a typographical error. Again, later in the Brief, Respondent states "Respondent specifically alleged that WVDCR violated clearly established rights and/or laws with respect to the training and/or supervision of its employees and contractors." *Respondent's Brief*, p. 14. This is inaccurate, as there is no reference to contractors contained in the Complaint, and no negligent supervision claims against WVDCR are asserted.

Respondent asserts that Petitioner WVDCR is not entitled to any immunities provided by the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1. *Respondent's Brief*, p. 8. This argument is inapplicable because WVDCR is not asserting any immunities under

the Tort Claims and Insurance Reform Act. Respondent engages in pages of meaningless argument related to statutory and sovereign immunity, neither of which have been asserted by Petitioner WVDCR in connection with this appeal. *Respondent's Brief*, pp. 8-10. Petitioner provides no meaningful analysis with respect to sole issue on appeal, which is the application of qualified immunity to the negligence and negligent training claims against WVDCR.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

WVDCR does not dispute that this Court has authoritatively decided the issue of qualified immunity but submits that the decisional process may be significantly aided by oral argument. WVDCR further submits that, although immunity issues are of consequence, at issue is the application of existing law such that the matter is appropriate for Rule 19 oral argument.

ARGUMENT

A. WVDCR Is Entitled To Qualified Immunity From Allegations Of Negligence, Including Allegations Of Negligent Training, And The Circuit Court's Refusal To Dismiss These Claims Was In Error.

Respondent's negligence claims asserted in Counts IV and V are barred by qualified immunity. Under West Virginia law, "[a] public executive official who is acting within the scope of his authority ... 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." *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 483 S.E.2d 507, 510 (1996). "The doctrine of qualified or official immunity bars a claim of mere negligence" against a state officer "acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer." *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). In *West Virginia Regional Jail and Correctional Authority v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014), the Supreme Court of Appeals clarified the application of qualified immunity.

Qualified immunity bars a claim of negligence against a State agency “and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.” Syl. Pt. 7, *A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (quoting Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995)). In the absence of a showing that discretionary governmental acts violated clearly established laws of which a reasonable person would have known, “both the State and its officials or employees charged with such acts or omissions are immune from liability.” Syl. Pt. 11, *id.*

In discussing qualified immunity, Respondent’s Brief relies upon case law interpreting federal qualified immunity as it relates to federal constitutional claims. *Respondent’s Brief*, p. 11. Cases applying the federal test for qualified immunity to claims for violation of the United States Constitution are not particularly relevant or helpful in assessing the operation of qualified immunity under West Virginia law to common law negligence claims under West Virginia law.

Respondent argues that “[a] violation of a constitutional right may be clearly established if the violation is so obvious that a reasonable state actor would know that what he is doing violates the Constitution.” *Respondent’s Brief*, p. 11. The significance of this assertion is unclear and not explained, because Respondent has maintained throughout the litigation below that none of the claims asserted in the Complaint are based upon either the West Virginia Constitution or the United States Constitution. JA 025, 060, 063-064 (representing to the Circuit Court that “[t]he present action does not include constitutional claims, but rather asserts a common law cause of action for deliberate indifference[.]”). Respondent has not asserted claims under the Eighth or Fourteenth Amendments to the United States Constitution, so Respondent’s discussion of qualified immunity as it relates to these federal constitutional provisions is misplaced and inapplicable.

Respondent's Brief relies upon provisions of the West Virginia Code of State Rules, specifically Rule 95-1-14.1 and 95-1-15.9. *Respondent's Brief*, pp. 11-12. These provisions are no longer in effect and cannot constitute "clearly established law" for the purpose of overcoming qualified immunity. Title 95 of the West Virginia Code of State Regulations has been repealed. The original promulgating authority for Title 95 was West Virginia Code § 31-20-9, which was repealed effective July 1, 2018. West Virginia Code § 15A-3-18 specifically expired Title 95 of the West Virginia Code of State Regulations:

(b) All legislative rules and policies of the former Division of Corrections, the former Division of Juvenile Services, and the Regional Jail and Correctional Facility Authority shall remain effective until amended or terminated pursuant to the provisions of §29A-3-1 et seq. of this code by the Division of Correction and Rehabilitation: ***Provided, That these rules shall expire on July 1, 2021, if not superseded sooner.***

W. Va. Code § 15A-3-18 (emphasis added); *See, e.g. Crawford v. McDonald*, 2023 W. Va. LEXIS 85, *22, 2023 WL 2729675 (recognizing that W.Va. Code § 31-20-9, which is now repealed, does not constitute clearly established law for qualified immunity purposes). Though this was raised in Petitioner's Brief, Respondent does not respond to this argument nor provide any justification for continuing to rely upon outdated rules that are no longer in effect and were not in effect at the time Mr. Myers was at Eastern Regional Jail.

Moreover, Respondent's claims asserted in Count V are barred by qualified immunity. Respondent does not identify any action or inaction on the part of any WVDCR employee related to alleged negligent training with any specificity. This is fatal to the claims, because to overcome qualified immunity, Respondent must demonstrate that a WVDCR employee violated clearly established law. A "clearly established" law in this context is one which defines a "clearly established right." *W. Virginia Reg'l Jail & Corr. Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). A right is considered "'clearly established' when its contours are 'sufficiently clear that a

reasonable official would understand that what he is doing violates that right.” *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (additional citation omitted). Sources of law that are too vague or abstract, or that do not establish a right, will not suffice to defeat qualified immunity.

Respondent’s Brief relies upon West Virginia Code § 15A-3-5 as an alleged source of clearly established rights and/or laws with respect to training. *Respondent’s Brief*, p. 14. However, the statute relied upon provides no such clearly established rights or laws. The statute provides:

- (a) The commissioner, or his or her designee, has the authority to manage and administer the finances, business, operations, security, and personnel affairs of correctional units and juvenile facilities under the jurisdiction of the division.
- (b) The superintendent of each institution or correctional unit has the power to hire all assistants and employees required for the management of the institution in his or her charge, but the number of the assistants and employees, and their compensation, shall first be approved by the commissioner.
- (c) It is the duty of the commissioner to investigate any complaint made against the superintendent of any institution, and against any other officer or employee thereof, if the same has not been investigated.
- (d) All prospective correctional employees shall pass a preemployment drug screening prior to being hired.
- (e) All persons employed at a state-operated correctional institution or correctional unit are subject to the supervision and approval of the superintendent and the authority of the commissioner, or his or her designee, except those persons employed by the State Board of Education, pursuant to §18-2-13f of this code.

W. Va. Code § 15A-3-5. Far from defining any clearly established right, this statute sets forth general authority of certain individuals such as the commissioner of corrections and superintendents of each institution regarding the ability to hire and supervise staff. There is nothing specific in the statute that defines any clearly established right, in connection with training or otherwise. As such, it does not serve as a basis to defeat qualified immunity. Though this was raised in Petitioner’s Brief, Respondent does not respond to this argument nor provide any analysis supporting an argument that this statute should be read as providing any clearly established right.

Respondent’s Brief argues that “[t]he WVDCR adopted the National Commission on Correctional Health Care Standards (NCCHC) standards pursuant to *WVDCR Policy Directive*

101.01. *Respondent's Brief*, p. 12. This argument is raised for the first time on appeal and was not asserted as grounds for overcoming qualified immunity in the Complaint or in response to the WVDCR's Motion to Dismiss. JA 057-080. As such, it should not be considered on appeal. However, even if considered by this Court, it does not provide a basis for overcoming qualified immunity because it refers to policies of an outside national commission which are not clearly established law. To the extent Respondent alleges that certain standards have been "adopted" by WVDCR, this still does not constitute clearly established law but, instead, merely refers to internal policy of a state agency.

This Court has made it abundantly clear that agency policies and procedures do not constitute clearly established rights, and that oversight and enforcement of policies is an exercise of discretion. *Moorhead v. W. Va. Army Nat'l Guard*, 2025 W. Va. LEXIS 151, at *12, 2025 LX 29779 (W. Va. May 2, 2025). This Court has explained:

"For purposes of qualified immunity, internal agency policies, procedures, manuals, guidelines, or similar documents that have not been legislatively approved are not, and cannot be used to create clearly established statutory rights or law of which a reasonable person would have known." Syllabus Point 4, *W. Va. Dep't of Human Servs. v. David B., next friend of J.B.*, 911 S.E.2d 884 (2024).

Syl. pt. 5, *Moorhead v. W. Va. Army Nat'l Guard*, 2025 W. Va. LEXIS 151, 2025 LX 29779 (W. Va. May 2, 2025). Further, mere mention of a constitutional provision or statute is not enough to defeat qualified immunity. *Id.*, 2025 W. Va. LEXIS at *17; *see also Ziglar v. Skiles*, 2024 W. Va. App. LEXIS 340 (ICA Dec. 6, 2024). Here, Respondent has not identified any "law" establishing that an inmate has any particular "right" that was violated in this context. Respondent's Brief does not explain why this Court should depart from its reasoning pursuant to *Moorhead, supra.*, that policy violations, even if they occurred, do not defeat qualified immunity.

Respondent has not pointed to the source of any particular “right” associated with any aspect of the claims against WVDCR. This situation is analogous to the question posed to this Court in *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018). In *Crouch*, the Respondent alleged that the defendant, West Virginia Department of Health and Human Resources, had violated clearly established law by failing to follow its own Child Protective Services (“CPS”) Guidelines. At issue in *Crouch* was whether “the CPS Guidelines rise to the level of a clearly established statutory or constitutional right[.]” *Crouch*, 240 W.Va. at 235, 809 S.E.2d at 705. This Court explained that specificity of a right is required:

To prove that a clearly established right has been infringed upon, a Respondent must do more than allege that an abstract right has been violated. Instead, the Respondent must make a “particularized showing” that a “reasonable official would understand that what he is doing violated that right...”

Id.

This case is also similar to *West Virginia Department of Health and Human Services v. Payne*, 231 W. Va. 563 (2013). In *Payne*, this Court found that “Respondents seem to argue simply that if the DHHR defendants were doing their job properly, this incident would not have occurred.” *Id.*, 231 W. Va. at 574. Though the tragic facts of *Payne* made such arguments appealing, “qualified immunity insulates the State and its agencies from liability based on vague or principled notions of government regulation.” *Id.* This Court concluded in *Payne* that the DHHR was entitled to qualified immunity. The same result should be reached here, as Respondent’s argument amounts to nothing more than a vague notion that WVDCR employees must not have been doing their jobs properly, or Mr. Myers would not have died. Such an argument is not sufficient to overcome qualified immunity.

Respondent discusses this Court's decision in *W. Va. Dept. of Hum. Servs. v. A.R.*, 249 W. Va. 590, 900 S.E.2d 16, 2024 W. Va. LEXIS 101 (2024). *Respondent's Brief*, p. 14. This case is directly on point in support of the WVDCR's arguments here, which relate solely to Respondent's claims of negligence and negligent training. In *A.R.*, this Court determined that Respondent had not cited clearly established law sufficient to overcome qualified immunity on negligence claims. That is the same argument that the WVDCR asserts, and the same conclusion should be reached. The fact that other claims remain to be tried in *A.R.* is irrelevant, because none of those remaining claims have been asserted in the instant action against the WVDCR and no other claims are before the Court in the instant interlocutory appeal.

Under West Virginia law, "broad categories of training, supervision, and employee retention, as characterized by respondent, easily fall within the category of 'discretionary' governmental functions." *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 773 (2014) (finding that the state agency was entitled to qualified immunity on a negligence claim for failure to reasonably train, supervise, and screen employees, absent a showing that the agency violated a clearly established law). Additionally, the determination of whether an individual appears to need medical care is a discretionary decision involving individual judgment and is thus subject to qualified immunity. Barring a showing by Respondent that Petitioner WVDCR violated a "clearly established right or law" with respect to training, the WVDCR is entitled to qualified immunity on claims involving these discretionary acts. Respondent has not identified any such clearly established rights or laws that were allegedly violated by the WVDCR with respect to its training. Instead, Respondent makes vague, generalized allegations that are not specific enough to overcome qualified immunity.

How the defense of qualified immunity operates depends upon the cause of action being asserted in the first instance. Respondent's Brief conflates qualified immunity under federal law with qualified immunity under state law. *Respondent's Brief*, p. 11. These are distinct concepts. Under federal law, an individual can assert qualified immunity from liability for constitutional violations in the two-step test discussed in *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (explaining how qualified immunity operates "[i]n a suit against an officer for an alleged violation of a constitutional right"). Qualified immunity under West Virginia law, such as the defense asserted here in connection with negligence claims, operates differently, because the claims asserted are different. This Court has defined the contours of qualified immunity under West Virginia law. Page 11 of Respondent's Brief discusses several cases which apply federal qualified immunity in the context of claims for constitutional violations. These cases do apply to Respondent's claims here, because Respondent states that she is not asserting any claims for violation of constitutional rights.

Respondent's failure to identify any clearly established law that was allegedly violated is fatal to the negligence claims asserted against WVDCR. It appears that Respondent is alleging that WVDCR failed generally to engage in what Respondent believes to be adequate employment practices. However, she has identified no specific criticism in the way that the correctional facility was operated that could be deemed a violation of a clearly established law or right sufficient to overcome qualified immunity as described in *A.B.* Under circumstances like the case at bar, WVDCR is entitled to qualified immunity from claims of negligence, including negligent training. Therefore, WVDCR is entitled to qualified immunity from the negligence claims asserted in Counts IV and V as a matter of law.

Respondent argues that “Petitioner’s motion raises issues of fact which have not had the benefit of discovery, and which preclude resolution by way of a motion to dismiss.” *Respondent’s Brief*, p. 8. To the extent Respondent is alleging that issues surrounding the application of qualified immunity to her claims are not ripe, this argument should be rejected. Respondent does not identify any particular foundational facts relevant to the application of qualified immunity that could affect the outcome. Absent identification of such facts, a generalized assertion that discovery is needed is insufficient to prevent resolution of qualified immunity at this stage. And this argument does not address the more glaring problem that Respondent has failed to identify any clearly established law that was arguably violated. Factual development in discovery will not correct this omission which, on its own, is a basis for granting dismissal to Petitioner based upon qualified immunity. Similarly, though Respondent suggests that leave to amend should be given instead of dismissal, Respondent has not identified the substance of any amendments that would make any difference to the application of qualified immunity to the negligence claims asserted in Counts IV and V.

CONCLUSION

Petitioner requests that this Court reverse the Circuit Court’s order denying Petitioner’s Motion to Dismiss and remand this case with instructions to enter an order finding that WVDCR is entitled to qualified immunity for Counts IV and V of Respondent’s Complaint.

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CERTIFICATE OF SERVICE

I, Natalie C. Schaefer, counsel for Petitioner, hereby certify that I have served a true and accurate copy of the foregoing “Petitioner’s Reply Brief” upon counsel of record by utilizing the Court’s e-filing system, on this day, September 24, 2025, as follows:

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