

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**ROBERT NEWBROUGH,
by his power of attorney and
next friend, CONSTANCE
BOONE,**

Plaintiff,

v.

**Civil Action No.: 21-C-1078
Judge Jennifer F. Bailey**

**WEST VIRGINIA DIVISION OF
CORRECTIONS AND REHABILITATION, and
JOSEPH WOOD, Superintendent of the North
Central Regional Jail,**

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court is *Defendants' Motion for Summary Judgment*. The parties previously submitted briefs supporting their positions and the Court heard oral argument on December 7, 2023. Defendant, West Virginia Division of Corrections and Rehabilitation ("WVDOC") appeared by counsel William E. Murray of Bailey & Wyant, PLLC, and Plaintiff, Robert Newbrough, by his power of attorney and next friend, Constance Boone, ("Newbrough") appeared by counsel Joseph H. Spano, Jr. of Pritt and Spano, PLLC and David A. Dobson of West Law Firm, L.C.

Upon consideration of the record, the oral arguments of counsel, and the pertinent legal authorities, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The subject incident forming the basis of the Complaint occurred at the North Central Regional Jail ("NCRJ") during the late hours of December 5, 2019, and into the early hours of December 6, 2019. At that time, Robert Newbrough was an inmate at the facility on charges of sexual abuse by a parent, guardian, or custodian.

2. Over the course of several hours, Mr. Newbrough was violently beaten and assaulted by numerous inmates, including Nathan J. Hughes ("Inmate Hughes"). The assault was confirmed by an internal investigation undertaken by Defendant WVDOC, which concluded the motive of the assault was "due to inmate Robert Newbrough's sexual abuse charges."

3. Surveillance footage from Mr. Newbrough's housing section (C1) from the hours of 9:00 PM until 12:52 AM showed only one (1) time a staff member of NCRJ entered the unit. That single observation from a staff member was not until 12:03 AM. The surveillance footage showed that between 9:00 PM and 12:03 AM, all the doors to the cells inside housing unit C1 were opened, and inmates were freely moving about, going in and out of other inmates' cells, without supervision.

4. NCRJ Corrections Officer Jesse Smith, who entered the housing unit at 12:03 AM to conduct a formal count, hours after the assault began, failed to recognize that Mr. Newbrough, who had been severely beaten, slashed with a razor, and covered with bedding, was in dire need of medical assistance. Officer Smith testified in his deposition that he was a relatively new hire and, as such, had not received any formalized training beyond the use of force as of the date of this incident. Specifically, he stated that he did not know what to look for when performing counts. Officer Smith further acknowledged that a reasonable corrections officer, when faced with such a situation and seeing Mr. Newbrough completely covered under a blanket would have turned on the cell light to take a better look. Officer Smith further testified that after the incident, his Sergeant talked to him about how to make sure this situation is avoided in the future. He was subsequently instructed that he needs to perform proper counts, which includes seeing faces.

5. Defendants' employees conceded that NCRJ did not have the necessary minimum staff on duty on the night when Robert Newbrough was brutally attacked. Shannon Sams, who

was serving as the shift commander that night, stated in her deposition that the staff vacancies “left me with two pods with no officer on the floor.” Sergeant Sams stated in her deposition testimony that after realizing the gravity of the staff shortage, she contacted her superiors, including Superintendent Joseph Wood.

6. Superintendent Joseph Wood stated in his deposition testimony that there was only one “rover” to patrol all four (4) pods containing 32 housing unit sections of the jail.

7. Shannon Sams acknowledged in her deposition testimony that at the time of this incident, it would not have been normal to assign an inmate, with an institutional record like Inmate Hughes, to Mr. Newbrough’s housing unit. Adding that based on his record, Inmate Hughes was known to be “dangerous ... You’re not going to put them into a place with inmates that have safety issues.” Immediately prior to inmate Hughes’ assignment to section C1, Hughes had just completed serving time on disciplinary segregation for possession of a weapon.

8. Plaintiff disclosed expert opinions from Edward Sweeney, an expert witness with over three (3) decades of correctional experience and a Certified Jail Manager accredited by the American Jail Association (AJA). Mr. Sweeney found in that the only NCRJ “staff person on duty that night, who might have been able to identify the emergency, if the post was filled, was the tower control booth officer. Based on my viewing of the video, it is apparent that if this post was manned, the assigned tower officer was not actively monitoring the activity occurring in housing section C1.”

9. Mr. Sweeney stated that “based on my review of the evidence, including the video recordings of the housing unit, Newbrough had been repeatedly assaulted over a two-and-a-half-hour period.” Mr. Sweeney found the level of staffing at NCRJ on the night Mr. Newbrough was assaulted as “inadequate, absurd, and unsafe,” and that if adequate staffing had been in place, and

if the housing unit was being effectively patrolled and monitored, staff may well have been able to identify the brewing animus toward Newbrough before the assault occurred. If the assault happened before the staff could react, staff would have been able to intervene in the early stages of the assault.

10. Mr. Sweeney opined that at the time of this incident, the Defendants' housing classification process was "unclear and inconsistent with basic corrections norms. In correctional parlance, protective custody is a form of segregation. Not every person who is classified as protective custody can be safely housed together or be allowed to recreate with one and other, even if they all have at some point committed a sex offense."

11. Following the discovery of Robert Newbrough in his cell, it was determined that he had sustained numerous traumatic and serious injuries, including, but not limited to, his ear being partially cut off; a traumatic subarachnoid hemorrhage; severe injuries to his face and skull; and, a skull fracture. To date, Mr. Newbrough lacks physical and mental capacity because of major neurocognitive disorder due to the assault. Mr. Newbrough has significant impairment in his ability to physically function and perform activities of daily living such as feeding and hygiene.

12. Plaintiff has also exhibited selected WVDOC policies and procedures, which include the following (in pertinent part):

- All inmates shall be assessed during an intake screening and upon transfer to another WVDOC institution/facility/center for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.
- The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization: whether the inmate has prior convictions for sex offenses against an adult or child.
- Within the set time period, not to exceed thirty (30) days from the inmate's arrival at the institution/facility/center, the institution/facility/center will reassess the inmate's risk of victimization or abusiveness.
- The following inmates may be housed in a single cell if deemed appropriate by facility Director of Classification or designee based upon a file review of the

individual inmate: Inmates whose crimes of commitment involve . . . deprived infliction of extreme physical pain resulting in serious physical injury to any one (1) victim.

13. Plaintiff also relied upon *The West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails*, W. Va. Code C.S.R. §§ 95-1-11, which states the following:

- 11.10. Staffing. The jail facility shall have the staff needed to provide full coverage of designated security posts, full surveillance of inmates, and to perform all ancillary functions.
- 11.11. Emergency response. Correctional officers shall be located in or immediately adjacent to inmate living areas to permit officers to hear and respond promptly to emergency situations.
- 11.12. Observation. Written policies and procedures shall require that all high and medium security inmates shall be personally observed by a correctional officer at least every thirty (30) minutes, but on an irregular schedule. A schedule of observations at least every fifteen (15) minutes shall be required for those inmates who are violent, suicidal, mentally disordered or who demonstrate unusual or bizarre behavior.

14. As a result of the subject incident, Plaintiff alleges, among other things: (1) that Defendants negligently unsupervised Robert Newbrough for hours during and after being beaten in his cell; (2) that Defendants knew (or reasonably should have known) that there was a substantial risk of harm to Robert Newbrough; and, (3) that Defendants failed to take the steps to prevent injury to Robert Newbrough. Plaintiff's Complaint alleges causes of action for Negligence; violations of the West Virginia State Constitution; Intentional Infliction of Emotional Distress; Extreme and Outrageous Conduct; Negligent Hiring, Retention and Supervision; and, Cruel and Unusual Punishment.

CONCLUSIONS OF LAW

15. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there

is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law. W. Va. R. Civ. P. 56(c).

16. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

17. The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined. Syl. Pt. 5, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

18. The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

19. To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the Plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. Syl. Pt. 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).

20. The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to

the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition. Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

21. In support of his claim of cruel and unusual punishment pursuant to the Eighth Amendment, Plaintiff cites to *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) for the authority that "[p]rison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must protect prisoners from violence at the hands of other prisoners." Additionally, "[a] prison official may be held liable under the Eighth Amendment . . . if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.*

22. Furthermore, under West Virginia law, a plaintiff must establish four elements to maintain an intentional infliction of emotional distress claim. The plaintiff must show: (1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *Travis v. Alcon Labs. Inc.*, 202 W. Va. 369, 504 S.E.2d 419, 425 (W. Va. 1998) (quoting *Hines v. Hills Dep't Stores*, 193 W. Va. 91, 454 S.E.2d 385, 392 (W. Va. 1994).

23. To support a claim for negligent supervision, a plaintiff must show that an employer failed to properly supervise its employee and, as a result, the employee committed a negligent act

which proximately caused the plaintiff's injury. *C.C v. Harrison County Board of Education*, 245 W. Va. 594, 606 (2021). A negligent supervision claim necessary includes an underlying claim for employee negligence. *Id.* Furthermore, the West Virginia Supreme Court of Appeals has recognized that, to hold an employer liable for negligent retention, the employer "must have been able to foresee the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee." *Id.* at 608 (quoting *McCormick v. W. Va. Dep't of Pub. Safety*, 202 W. Va. 189, 193, 503 S.E.2d 502, 506 (1998)).

24. Additionally, Plaintiff has alleged a private cause of action for money damages in Count II of the Complaint "under *Article III, Sections 1, 5, 10 and 14 and Article XII, Section 1 of the West Virginia State Constitution*" (emphasis in original). First, Article XII, Section 1 of the West Virginia Constitution states that "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." Obviously, this state constitutional provision is wholly inapplicable to any single fact or allegation in this case. Second, Article III, Sections 1, 5, and 14 do not provide for a private cause of action for money damages. However, a private cause of action does exist where a governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article III, Section 10 of the West Virginia Constitution. Syl. Pt. 2, in part, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

25. Here, Defendants seek summary judgment on all counts, arguing that it is entitled to qualified immunity because its employees were all acting within the scope of their employment and were exercising their judgment and discretion when they interacted with the Plaintiff and/or determined where Plaintiff was going to be housed. Defendants further argue that Plaintiff has failed to develop evidence which shows the discretionary decisions made by officers at NCRJ

violated any clearly established law because “there is absolutely no evidence that Plaintiff was in danger prior to the assault,” and that there is no evidence in this case that Defendants acted maliciously or with intent to harm. Additionally, Defendants argue that even if their officers’ actions could be found sufficiently unreasonable as to violate a clearly established law, it would still not be clear to a reasonable officer that his conduct would violate a clearly established law. Lastly, Defendants argue that “Plaintiff has failed to even identify a policy or procedure that was violated.”

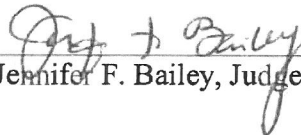
26. After a thorough review of the evidentiary record and the pertinent case law in West Virginia regarding qualified immunity, the Court **FINDS** that there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination. Far from ‘failing to identify a clearly established law’ and ‘fail[ing] to even identify a policy or procedure that was violated,’ the Plaintiff, with substantial evidentiary support developed in the record, has identified numerous clearly established laws which a jury could find to have been violated by the acts or omissions of the WVDOC employees who were admittedly acting within the scope of their employment with respect to the assault upon the Plaintiff by a fellow inmate. Those clearly established laws include the provisions of *The West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails* as contained in W. Va. Code C.S.R. §§95-1-11, *et seq.*, as outlined in ¶13 above, the Defendants’ own policies and procedures as outlined in ¶12 above, and the constitutional rights to due process and protection from cruel and unusual punishment while incarcerated. Furthermore, a genuine dispute clearly exists as to whether it would be clear to a reasonable officer that his conduct as alleged in this case would be otherwise fraudulent, malicious, or oppressive.

27. The Court also finds that it is for a trier of fact to weigh whether Defendants' actions were so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress, and that genuine disputes of material fact exist as to whether the Defendants were negligent, precluding a finding of summary judgment in favor of the Defendants.

28. Accordingly, after a thorough review of the record of this matter, the arguments of counsel, and the pertinent legal authorities, the Court hereby **DENIES** the Defendants' *Motion for Summary Judgment*.

The Court **DIRECTS** that the Clerk of the Court shall forward certified copies of this Order to all counsel of record.

Entered this 16th day of April, 2024.


Jennifer F. Bailey, Judge