

No.:24-0274

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

Defendant Below, Petitioner

v.

Upon Appeal
West Virginia Supreme Court of

(Case No.: 21-C-1078)

Appeals

ROBERT NEWBROUGH,

Plaintiff Below, Respondent.

**PETITIONERS WEST VIRGINIA DIVISION OF CORRECTIONS
AND REHABILITATION AND JOSEPH WOOD'S BRIEF**

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I. ASSIGNMENT OF ERROR

The circuit court erred when it denied Petitioner's Motion for Summary Judgment because Petitioner was entitled to summary judgment on the basis of qualified immunity.

II. STATEMENT OF THE CASE

A. Statement of Facts

Respondent, and plaintiff below, Robert Newbrough ("Respondent") commenced this civil action alleging he was seriously injured after he was assaulted by an inmate while he was incarcerated at North Central Regional Jail (hereinafter "NCRJ"). Specifically, in the late evening hours of December 5, 2019, Respondent was assaulted by another inmate, believed to be Inmate Hughes, in his cell. Inmate Hughes exited the cell a short time later and then went back into Respondent's cell at approximately 11:42 p.m. At approximately 11:48 p.m., Inmate Hughes exited the cell again and both he and another inmate mopped the floor outside the cell. At 12:02 a.m. on December 6, 2019, Inmate Hughes turned off the lights in Respondent's cell. At 12:05 a.m., a correctional officer viewed Respondent in his cell in his bunk under the blankets. However, neither Respondent nor any another inmate advised that officer that Respondent needed medical attention and the officer did not observe anything unusual. Finally, at approximately 12:51 a.m., Sgt. Shannon Sams entered Respondent's cell after receiving a vague report from an unknown inmate that officers may want to check out that cell. Sgt. Sams turned on the light in the cell, found Respondent with blood on his face, and immediately called for medical assistance and for an ambulance to be called.

It is unclear why Inmate Hughes attacked Respondent, but the *Complaint* alleges that it was because Respondent was charged as a sex offender. However, there is no evidence to support this claim. Further, at the time of this assault, Respondent was being housed in a "like charges section" where all the inmates were charged with sexual offenses. It is similar to protective

custody because Respondent and the other inmates were not with the rest of general population. However, the inmates in the like charges section are not locked down as they would be on protective custody. Inmate Hughes had been charged with a child sex offense previously which is why he was also being housed in that Section.

B. Procedural History

On or about December 2, 2021, Respondent, Robert Newbrough's guardian, Constance Boone, filed her *Complaint* in the Circuit Court of Kanawha County, West Virginia. (JA0008-0020). Petitioners filed *Defendants' Answer to Plaintiff's Complaint* on March 31, 2022. (JA0034-0046). Subsequently, Petitioners filed *Defendants West Virginia Division of Corrections and Rehabilitation and Joseph Wood's Memorandum of Law in Support of Motion for Summary Judgment* on January 24, 2023, and Respondent filed *Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment* on November 22, 2023. (JA0090-0109). Finally, on April 10, 2024, the circuit court entered its *Order Denying Defendants' Motion for Summary Judgment*. (JA0645-0654).

III. SUMMARY OF THE ARGUMENT

The matter below, from which appeal is taken, derives from the *Complaint* filed by the Respondent. At the time of the incident giving rise to this matter, Mr. Newbrough was an inmate at NCRJ. Mr. Newbrough's *Complaint* sought damages against the Petitioners below, the West Virginia Division of Corrections and Rehabilitation and Joseph Wood, Superintendent of NCRJ, for injuries sustained in an attack on Mr. Newbrough, perpetrated by another inmate, on or about December 5, 2019.

The *Complaint* alleges that the Petitioners failed to undertake sufficient efforts to protect the Respondent from assaults by other inmates through various avenues, including staffing levels and correctional officer training, and disregarded purported risks to the Respondent's safety from

inmate-on-inmate violence, due to the nature of his underlying criminal charges. Accordingly, the Respondent's Complaint alleges seven (7) counts: (1) Negligence, (2) Violations of the West Virginia State Constitution, (3) Intentional Infliction of Emotional Distress, (4) Extreme and Outrageous Conduct, Emotional Distress, (5) Negligent Hiring, Retention, and Supervision; (6) Cruel and Unusual Punishment; and (7) Unconstitutional Policies and Practices.

At the conclusion of discovery, the Petitioners moved for summary judgment, in relevant part, on the basis of qualified immunity. The Petitioners' motion asserted that the Respondent had failed to develop evidence that shows the discretionary decisions made by the WVDCR personnel at NCRJ violated any clearly established law, or that a reasonable officer would believe such a clearly established law was violated by the conduct alleged therein, principally because there was no evidence that Mr. Newbrough was in any articulated danger of attack prior to the assault occurring. The circuit court denied this motion, holding that a jury could find that the Petitioners' conduct violated *The West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails*, W. Va. R. 95 § 1-11 (1996); certain WVDCR policies and procedures; and the constitutional rights to due process and from cruel and unusual punishment. (*See generally* JA0645-0654). In denying qualified immunity, the circuit court also held in error that a dispute of material fact existed as to whether it would be clear to a reasonable officer that the conduct alleged in this case would be otherwise fraudulent, malicious, or oppressive. (*Id.*)

The circuit court has exceeded its legitimate authority in failing to recognize the applicability of qualified immunity in this matter. Petitioners are not able to appeal this Order or these rulings because it is not a final decision on the merits, and it will be unequivocally damaged if it is forced to proceed to trial on claims which cannot exist as a matter of law. Petitioners move

this Court to remand the matter back the Circuit Court of Kanawha County, West Virginia, directing it to reverse its Order and grant Petitioners' *Motion for Summary Judgment*.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request oral argument pursuant to Rule 19 of the *West Virginia Rules of Appellate Procedure*. This case is appropriate for a Rule 19 argument because the Respondent Judge's Order deviates clearly and significantly from the clear language of the *West Virginia Rules of Civil Procedure* and clearly established precedent. This case would be appropriate for a Memorandum Decision.

V. STANDARD OF REVIEW

An order denying a motion for summary judgment is interlocutory and is generally not appealable except in special instances. Syl. Pt. 8, *Aetna Casualty & Surety Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). This Court has specifically recognized that "[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). The Court observed in *Robinson* that allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing them with "the right not to be subject to the burden of trial." *Id.* at 833, 679 S.E.2d at 665 (citation omitted).

The standard of review applied in these special instances is stated in syllabus point one of *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W. Va. 80, 576 S.E.2d 807 (2002): "This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Likewise, the review undertaken follows the general principle applicable to any summary judgment ruling: "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 Casualty & Surety Co.*, 148 W. Va. at 160, 133 S.E.2d at 771.

VI. ARGUMENT

A. The circuit court has exceeded its legitimate authority because it failed to recognize that the Petitioners are entitled to qualified immunity.

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.

W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B., 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).

In its Order denying Petitioners' Motion for Summary Judgment, the circuit court found that

26. . . . there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination . . . the Respondent, 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 Respondent by a fellow inmate . . . 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.

(JA0653-0654).

- 1. The circuit court erred by denying qualified immunity to the West Virginia Division of Corrections and Rehabilitation because the record did not contain adequate facts to support the contention that there existed a particularized risk of harm to Respondent, Mr. Newbrough.**

This Honorable Court set forth the qualified immunity standard to be applied by a trial court in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 766 S.E.2d 751, 756 (W. Va. 2014). First, a court must determine if the alleged conduct can be defined as a “discretionary act.”

To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

Id. at Syl. Pt. 10. Second, a court must determine if material evidence of the violation of a “clearly established law” has been developed.

Respondent’s *Complaint* asserted that the Petitioners were liable because their employees failed to supervise and protect Respondent from Inmate Hughes. However, Superintendent Wood testified that there was no known threat to Respondent:

Q: And even though Shannon Sams testified that he should have never been in this pod with the sexual offenders who are being protected on like charges, your testimony is that he should have been?

A: He should have been. His – his history of violation reports prior to that does not indicate that he is a violent person.

If he was in detention prior to that, it – it doesn’t mean that all of those are fights.

The reason he was in that section is because he had like charges, and that’s where we place like charged inmate.

(JA0283, 5-17).

Further, Respondent has failed to develop and present any evidence that showed the discretionary decisions made by officers at NCRJ violated a clearly established law because there was no warning that Respondent was in danger.

If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision . . .

W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B., 766 S.E.2d 751, 763 (W. Va. 2014). Qualified immunity bars a claim of negligence against a State agency or an officer of that department who is acting with the scope of employment “with respect to the discretionary judgments, decisions, and actions of the officer.” *Id.* This discretionary decision immunity applies here because Petitioners’ employees were all acting within the scope of their employment and were exercising their judgment and discretion when they interacted with Respondent. Additionally, inmate housing was a discretionary decision, which is made by an evaluation of each inmate upon intake. Any claim based on an employee’s supervision of Respondent and/or the determination of where Respondent was housed must fail because they are undoubtedly discretionary decisions and judgments.

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 a party 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).

Id. at Syl. Pt. 11. See also *Lavender v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 2008 U.S. Dist. LEXIS 8162 (S.D.W. Va. Feb. 4, 2008). “In other words, the State, its agencies, officials, and employees are immune for acts or omissions arising out of the exercise of discretion in carrying

out their duties, so long as they do not violate any known law or act with malice or bad faith.” Syl. Pt. 8, *Parkulo v. W.Va. Bd. Of Probation*, 483 S.E.2d 507 (W. Va. 1996). A constitutional violation, on the part of prison officials and in the context of an assault by another inmate, only occurs when the injury suffered by the inmate is the result of “deliberate or callous indifference of prison officials to specific known risks of such harm.” *Pressly v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987). “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, *A. B.*, 766 S.E.2d 751.

Additionally, “every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim’s safety. Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, “sufficiently serious.” *Farmer v. Brennan, Warden, et al.*, 511 U.S. 825, 834 (1994). Further, “the second requirement . . . a prison official must have a “sufficiently culpable state of mind.” *Id.* Here, there is no evidence of such conduct or state of mind on the part of any WVDCR employees.

Further, housing decisions are made by the shift commander, when an inmate comes to the facility in intake. (JA0292).

A: So once they’re [an inmate] processed and through intake, and they’re ready to go down the hallway, then the shift commander will bring up the offender’s information on the front end sheet and check current charges, inactive charges, and their disciplinary history is on – can be on that page as well.

...

And their alerts are on the top of that page.

Q: Okay. So that’s a discretionary call that’s made by the shift commander –

A: Right.

(JA0292, 12-24).

Q: . . . if an inmate tells a CO – says, I’m having problems in here. I need new housing. Who then makes that decision?

. . .

A: The shift commander will find out what the issue is, and then make a determination on where they need to go.

Q: Okay. So – so at least here at North Central, that decision is always a decision being made by the shift commander on duty at that time?

A: Yes.

Q: And always in their discretion?

A: Yes.

(JA0293, 5-21).

Even if an officer’s actions could be found sufficiently unreasonable to violate a clearly established law, as alleged by Respondent, a court should nonetheless rule in Petitioners’ favor on qualified immunity grounds if it would not be clear to a reasonable officer that his conduct would violate clearly established law. *City of St. Albans v. Botkins*, 718 S.E.2d 863, 868 (W. Va. 2011); *Wilson v. Layne*, 526 U.S. 603 (1999). The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the Respondent seeks to apply. Otherwise, the rule is not one that “every reasonable official” would know. *District of Columbia v. Wesby*, 138 S. Ct. 589-590 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The “clearly established” standard also requires that the legal principle clearly prohibit the officer’s conduct in the particular circumstances before him. The rule’s contours must be so well defined that it is “clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”

In the current matter, Respondent has failed to identify any clearly established law violated by the Petitioners in its hiring, supervision, or retention of the officers present when Respondent was incarcerated at NCRJ. See generally *Covey v. Assessor of Ohio County*, 777 F.3d 186, 196 (4th Cir. W. Va. 2015). In response to the Petitioners' *Motion for Summary Judgment*, Respondent asserted that the Petitioners violated "*The West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails*" (hereinafter "*W. Va. Minimum Standards*") and provisions of section 95 of the West Virginia Code of State Rules. (JA0096).

Regarding the *W. Va. Minimum Standards*, violation of internal policies and procedures does not rise to a constitutional violation. Respondent has asserted its claim of negligence based on alleged violations of policies and procedures. All of Respondent's arguments here are based on alleged violations of policies and procedures. This is the entirety of the evidence Respondent has produced to overcome qualified immunity, and it is insufficient.

Even if Defendant violated its policies relating to security checks or any other type of internal policy, "[i]t is, in fact, settled law that a violation of departmental policy does not equate with constitutional unreasonableness." *Abney v. Coe*, 493 F.3d 412, 419 (4th Cir. 2007). Those arguments made by Respondent in his *Response to Petitioners' Motion for Summary Judgment*, and relied on by the circuit court in its *Order*, are irrelevant to the determination as to whether Petitioners violated Respondent's constitutional rights. Respondent simply cannot point to any action taken by Petitioners that overcomes qualified immunity. As a result, summary judgment should have been granted for Petitioners on this basis.

Respondent cannot present any evidence to show that any policies and procedures were violated. In addition, failure to identify any clearly established law allegedly violated by Petitioners is fatal to the Respondent's claims of negligence. See *Delli-Veneri v. W. Va. Div. of*

Corr. & Rehab., No. 2:19-cv-00689, 2021 U.S. Dist. LEXIS 61087, at *1 (S.D.W. Va. Mar. 30, 2021) (holding that where Respondent does not contest that correctional officers were performing discretionary functions, WVDCR is entitled to immunity for claims of negligence.) Further, even if Petitioners violated their policies relating to the handling of Respondent, “[i]t is, in fact, settled law that a violation of departmental policy does not equate with constitutional unreasonableness.” *Abney v. Coe*, 493 F.3d at 419. Those arguments are irrelevant to the determination as to whether Petitioners violated Respondent’s constitutional rights. Accordingly, Petitioners are entitled to qualified immunity on all of Respondent’s claims.

2. The circuit court committed error by denying qualified immunity to Superintendent Wood because the record did not contain facts sufficient to establish an act in violation of clearly established law.

Superintendent Wood is most particularly entitled to qualified immunity. To support the assertion of negligence against Superintendent Wood, Respondent has merely asserted that the WVDCR and Superintendent Wood knew or should have known that the Respondent was at substantial risk of harm.

The circuit court did not articulate any clearly established law violated by his conduct, or any conduct on his part, which proximately caused Respondent’s injuries. Furthermore, the record does not reflect that either Superintendent Wood or the WVDCR had any information that Mr. Newbrough was in particularized danger from Inmate Huges, or that Superintendent Wood made any decision with knowledge of a particularized risk to Mr. Newbrough, which proximately caused his injuries.

To demonstrate a clearly established right was infringed upon, a plaintiff “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’ or that ‘in the light of preexisting law the unlawfulness’ of the action was ‘apparent.’” *A.B.*, 766 S.E.2d at 776 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Superintendent Wood testified that Respondent never articulated that he felt threatened or that he had received threats. In fact, Mr. Newbrough had sought opportunities within the general inmate population:

Q: At any time during that year, or prior to that even, did Mr. Newbrough ever make a request to the staff . . . to be housed in a protective custody situation where he would be locked down 23 hours a day?

A: He – no. He did not.

Q: In – in fact, I believe that he made a request to even be out more in general population through jobs and such, correct?

A: That’s correct. The kiosk has requests on there that I reviewed and showed that his – all of his requests concerned getting a job outside of the – the section . . .

...

Q: Did he ever – but did he ever make any requests which showed a concern for the fact that he was being housed in C1 and was in any kind of danger?

A: No. There was none of those.

Q: Did he ever ma- -- give an alert to anyone that he was afraid of Nathan Hughes?

A: No.

(JA0295, 2-24).

Thus, the circuit court erred by denying qualified immunity protection to Superintendent Wood.

3. The circuit court erred in its holding that qualified immunity can be overcome by a question of fact as to whether internal policies and procedures were violated.

It is well established that alleged violations of internal policies and procedures by agents of a state agency cannot serve the “clearly established law” function for purposes of overcoming qualified immunity. See, e.g., *Abney v. Coe*, 493 F.3d at 412 (“It is, in fact, settled law that a violation of departmental policy does not equate with constitutional unreasonableness.”)(citing *Davis v. Scherer*, 468 U.S. 183, 193-96, 104 S. Ct. 3012 (1984)). Because an alleged violation of internal departmental policies and procedures cannot establish clearly-established law for purposes of qualified immunity, the circuit court’s holding to that effect was in error.

4. The circuit court erred by holding that qualified immunity can be overcome by a repealed regulation.

The circuit court held that there were questions of fact as to whether the Petitioners’ actions violated W. Va. CSR 95-1-11, *et seq.* (JA0653, ¶ 26). However, that regulation was not in effect at the time of the facts giving rise to the claims at issue. The incident occurred in December of 2019. W. Va. CSR 95-1-11 was repealed in February of 2019. See W. Va. S. 240, Reg. Sess. (Feb. 11, 2019). A repealed regulation has no force of law and, thus, cannot form the basis of overcoming qualified immunity. The circuit court erred by giving effect to a regulation that had been repealed and was not in effect.

For the reasons set forth above, Petitioners are entitled to summary judgment on Respondent’s claims on the basis of qualified immunity. The circuit court failed to set forth any conduct of Petitioners which violated any statutory or constitutional right of Respondent. The circuit court’s *Order* relied solely on violations of internal policies and procedures, which does not give rise to constitutional violations. As a result, summary judgment should have been granted in favor of Petitioners and the circuit court’s denial was in error.

VII. CONCLUSION

Petitioners respectfully move this Honorable Court to reverse the circuit court's order denying summary judgment and that the matter be remanded with instructions that Petitioners are entitled to qualified immunity.

Respectfully submitted,

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ROBERT NEWBROUGH,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for Petitioners West Virginia Division of Corrections and Rehabilitation and Joseph Wood do hereby certify that on the 12th day of August 2024, I electronically filed the foregoing *“Petitioners West Virginia Division of Corrections and Rehabilitation’s and Joseph Wood’s Brief”* with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following participants:

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