

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**24-0274**

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

**Petitioners,**

**v.**

**Appeal from the Order of the Circuit  
Court of Kanawha County  
(Court Case No. 21-C-1078)**

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

**Respondent.**

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**RESPONDENT ROBERT NEWBROUGH'S  
RESPONSE BRIEF**

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## INTRODUCTION

The subject incident forming the basis of the Complaint below occurred while Robert Newbrough (“Respondent” or “Newbrough”) was an inmate in the custody of the West Virginia Division of Corrections and Rehabilitation (“WVDCR” or “Petitioners”). Respondent was housed in Section C1 of the North Central Regional Jail (“NCRJ”) facility on multiple charges of sexual abuse by a parent, guardian, or custodian. During the late hours of December 5, 2019, and into the early hours of December 6, 2019, Mr. Newbrough was violently beaten and assaulted by numerous inmates, including Nathan J. Hughes (“Inmate Hughes”) over the course of several hours. *See* Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 7-8. Mr. Newbrough was left unsupervised and without medical attention. The assault was confirmed by an internal investigation. *Id.* at Ex. A, p. 1.

Petitioners' own internal investigation report undertaken by corrections investigator Jon Montgomery concluded the motive of the assault was “due to inmate Robert Newbrough 's sexual abuse charges.” *Id.* at Ex. A, p. 2. The investigation report contains substantial evidence to support their conclusion, including interviews from inmates that indicated (1) prior to the assault, “[o]ne inmate was getting worked up, yelling, and talking about Newbrough’s criminal charges,” (2) Inmate Hughes had in his possession “the victims court paperwork” and (3) during the assault Inmate Hughes was “checking Inmate Newbrough's court paperwork.” *Id.* Further, it was not normal to assign an inmate with an institutional record like that of Inmate Hughes into Mr. Newbrough's housing unit. (JA0185). Based upon his record, Inmate Hughes was known to be dangerous and, immediately prior to Hughes’ assignment to section C1, Hughes had just completed serving time on disciplinary segregation for possession of a weapon. (JA0233).

Despite the known risks associated with housing inmates charged with sexual offenses, the WVDCR and its officers failed to adequately protect Mr. Newbrough from assault by fellow inmates, including Hughes. Petitioners failed to appropriately assess the Respondent's threat and risk factors he faced while in Section C1 of the NCRJ, and the Petitioner's subsequently failed to observe and supervise Newbrough and other inmates as required by law, the Constitution, and as required by the DCR's own policies and procedures.

During the underlying civil action, Petitioners argued to the Circuit Court that it was entitled to summary judgment on qualified immunity grounds because all the relevant acts and omissions of Petitioners, and the relevant acts and omissions of Petitioners' employees, were allegedly discretionary and within the scope of their employment. However, the Circuit Court found that in accordance with the qualified immunity framework, Respondent demonstrated that Petitioners' relevant acts and omissions were "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..." 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).

Specifically, the Circuit Court correctly ruled that the Petitioners were not entitled to qualified immunity when they and their officers failed to observe and supervise the Respondent in violation of statutory law, its own policies and procedures, and the Respondent's 8th Amendment Constitution rights, which allowed Inmate Hughes and other inmates to severely beat the Respondent, causing him severe permanent injury. The Circuit Court also correctly ruled when it determined the Petitioners are not entitled to qualified immunity based upon their assertion that the record did not contain adequate facts to support the contention that there existed a particularized risk of harm. Regarding Petitioner Joseph Wood ("Superintendent Wood" or

“Petitioner Wood”), the Circuit Court correctly ruled that he was not entitled to qualified immunity because the record did contain facts sufficient to establish an act in violation of clearly established law.

The instant appeal was filed by the Petitioner, seeking reversal of the Circuit Court’s denial of summary judgment on qualified immunity grounds. Respectfully, Respondent asks the Court to affirm the Circuit Court’s denial of summary judgment for the following reasons, as will be more discussed herein:

(1) Petitioners failed to follow both relevant statutory authority and their own policies and procedures when they failed to appropriately assess the Respondent’s threat and risk factors he faced while in Section C1 of the NCRJ.

(2) Assuming, *arguendo*, that the Petitioners are entitled to qualified immunity for its failure to appropriately assess the Respondent’s threat and risk factors, the Petitioners are not entitled to qualified immunity for their subsequent acts and omissions involving their failure to observe and supervise the Respondent and other inmates, allowing the Respondent to be severely beaten in violation of specific laws and/or policies of which a reasonable person would have known.

(3) Additionally, the Petitioners are not entitled to qualified immunity because the Respondent has shown that Petitioners violated his Eighth Amendment constitutional rights when it acted with deliberate indifference toward his safety by failing to observe Respondent and other inmates in time period during which he was beaten while the Petitioners had knowledge that Respondent was in danger because of his sexual abuse charges.

## STATEMENT OF THE CASE

### Statement of Facts

The subject incident forming the basis of the Complaint below occurred while Robert Newbrough was an inmate in custody of the West Virginia Division of Corrections and Rehabilitation. Respondent was housed in Section C1 of the North Central Regional Jail facility on charges of sexual abuse by a parent, guardian, or custodian. During the late hours of December 5, 2019, and into the early hours of December 6, 2019, over the course of several hours, Mr. Newbrough was violently beaten and assaulted by numerous inmates, including Nathan J. Hughes. *See Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 7-8.* Over the course of the assault, Mr. Newbrough was left unsupervised and without medical attention. *Id.* The assault was confirmed by an internal investigation. *Id. at Ex. A, p. 1.*

Petitioners' own internal investigation report undertaken by corrections investigator Jon Montgomery concluded the motive of the assault was "due to inmate Robert Newbrough's sexual abuse charges." *Id. at Ex. A, p. 2.* The investigation report contains substantial evidence to support their conclusion, including interviews from inmates that indicted (1) prior to the assault, "[o]ne inmate was getting worked up, yelling, and talking about Newbrough's criminal charges," (2) Inmate Hughes had in his possession "the victims court paperwork" and (3) during the assault Inmate Hughes was "checking Inmate Newbrough's court paperwork." *Id.* Further, it was not normal to assign an inmate with an institutional record like that of Inmate Hughes Mr. Newbrough's housing unit. (JA0185). Based upon his record, Inmate Hughes was known to be dangerous and, immediately prior to Hughes' assignment to section C1, Hughes had just completed serving time on disciplinary segregation for possession of a weapon. (JA0233).

Surveillance footage from Mr. Newbrough's housing section showed no staff member of NCRJ entered the unit between 9:00 PM and 12:03 AM. *See* Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 4. When a NCRJ Correctional Officer, namely, Jesse Smith, finally entered the housing unit at 12:03 AM to conduct a formal count, hours after the assault began, he failed to recognize that Mr. Newbrough had been severely beaten, slashed with a razor, was covered with bedding, and was in dire need of medical assistance. *Id.* at 10. Officer Smith testified in his deposition that he had not received any formalized training beyond the use of force. (JA0346). He further testified that, at the time of the subject incident, he did not know what to look for when performing counts and was subsequently instructed that performing proper counts includes seeing faces. (JA0347).

Petitioners' employees conceded that NCRJ did not have the necessary minimum staff on duty the night when Mr. Newbrough was brutally attacked for hours. (JA0177-8, JA0348). Sergeant Shannon Sams, who was serving as the shift commander that night, stated in her deposition that after realizing the gravity of the staff shortage, she contacted her superiors, including Superintendent Joseph Wood. (JA0190). Superintendent Wood stated in his deposition that there was only one "rover" to patrol all four pods containing 32 housing unit sections of the jail. (JA0241).

Sergeant Sams acknowledged in her deposition that Inmate Hughes, who led the attack against Newbrough, was known to be dangerous based on his record, and that "You're not going to put them into a place with inmates that have safety issues." (JA0185). Immediately prior to inmate Hughes' assignment to section C1, Hughes had just completed serving time on disciplinary segregation for possession of a weapon. (JA0233).

Respondent disclosed expert opinions from Edward Sweeney, an expert witness with three (3) decades of correctional experience and a Certified Jail Manager accredited by the American Jail Association. After reviewing NCRJ surveillance video, Mr. Sweeney found 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.” *See* Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 6. And, “it is apparent that if this post was manned, the assigned tower officer was not actively monitoring the activity occurring in housing section C1.” *Id.*

Mr. Sweeney stated that, based upon his 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.” *Id.* at p. 7. Mr. Sweeney found the level of staffing at NCRJ on the night Mr. Newbrough was assaulted as “inadequate, absurd, and unsafe,” (*Id.* at p. 5) 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.” *Id.* at p. 10. And “If the assault happened before the staff could react, staff would have been able to intervene in the early stages of the assault.” *Id.*

After Mr. Newbrough was discovered in his cell, it was determined that he had suffered 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. As a result, Mr. Newbrough lacks physical and mental capacity because of severe neurocognitive disorder caused by the hours-long assault. In other words, Mr. Newbrough is essentially in a vegetative state.

Respondent 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. *See Resp. in Opp. to Mot. for Summary Judgment at Ex. E, p. 1-2.*

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. *Id.*

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. *Id.*

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 . . . depraved infliction of extreme physical pain resulting in serious physical injury to any one (1) victim. *Id.* at p. 3.

In the underlying *Complaint*, based on Petitioners' acts and omissions, Respondent alleged counts of: (1) negligence; (2) violations of the West Virginia State Constitution; (3) intentional infliction of emotional distress; (4) extreme and outrageous conduct and emotional distress; (5) negligent hiring, retention, and supervision; (6) cruel and unusual punishment; and (7) unconstitutional policies and practices. (JA0008-0020).

### **Procedural History**

The procedural history previously put forth by the Petitioner is not in dispute. 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).

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioners requested oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure. The Respondent asserts that the oral argument is not necessary, as the issues raised in the appeal address only the application of law to the subject claims, which the Circuit Court has already correctly addressed. The Respondent further asserts that this matter may be appropriate for a memorandum decision pursuant to Rule 12(d).

### **RESPONSE ARGUMENT**

The Petitioners are appealing the Circuit Court of Kanawha County's denial of summary judgment on the basis of qualified immunity. Petitioners argue that they were entitled to summary judgment because Petitioners' employees were acting within the scope of their employment and were exercising judgment and discretion when they interacted with Respondent. Petitioners further contend that Respondent failed to produce evidence that Petitioners violated a clearly established right. However, as will be shown herein, the Circuit Court's denial of summary judgment was not an error.

The Circuit Court properly denied summary judgment to the Petitioners on the basis of qualified immunity. In particular, the Circuit Court properly found that Respondent had produced sufficient evidence to demonstrate disputed issues of material fact. Specifically, the Circuit Court correctly concluded that the Respondent put forth evidence and arguments to show there were both clearly established statutory and constitutional rights of which a reasonable person would have

known or are otherwise fraudulent, malicious, or oppressive in accordance with *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).

### **Standard of Review**

#### **Summary Judgment Standard**

Rule 56(c) of the West Virginia Rules of Civil Procedure states, in pertinent part, that if “... there is no genuine issue as to any material fact...”, then “... the moving party is entitled to a judgment as a matter of law”. The West Virginia Supreme Court has interpreted Rule 56 as follows, “[a] party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” *Justus v. Dotson*, 242 S.E.2d 575 (W.Va. 1978). A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Supreme Court went further to state that the burden on a motion for summary judgment is not upon the non-moving party to show that he has developed facts which would allow him to prevail if his case was submitted to a jury. Rather, the burden is on the moving party to show that there is no genuine issue as to any material fact in the case. *Lengyel v. Lint*, 280 S.E.2d 66 (W.Va. 1981). The Court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994).

#### **Qualified Immunity Standard**

The seminal case regarding West Virginia’s qualified immunity framework is *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014). In *A.B.*,

the Supreme Court of Appeals of West Virginia set forth the standard to be applied by the trial court.

First the Court must determine if the alleged conduct can be defined as a “discretionary act” on the part of the Defendant:

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).

Next, the Court must determine if the Respondent has produced sufficient evidence that the conduct violated a “clearly established right:”

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. *Id.*

However, if the Respondent identifies a clearly established right or law which has been violated by the acts or omissions of the State, its agencies, officials, or employees, or can otherwise identify fraudulent, malicious, or oppressive acts committed by such official or employee, the court must determine whether such acts or omissions were within the scope of the public official or employee's duties, authority, and/or employment. To the extent that such official or employee is determined to have been acting outside of the scope of his duties, authority, and/or employment, the State and/or its agencies are immune from vicarious liability, but the public employee or

official is not entitled to immunity in accordance with *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992) and its progeny. If the public official or employee was acting within the scope of his duties, authority, and/or employment, the State and/or its agencies may be held liable for such acts or omissions under the doctrine of *respondeat superior* along with the public official or employee.

In this matter, the Circuit Court has already determined that Respondent had produced sufficient evidence to demonstrate disputed issues of material fact, and that the Respondent put forth evidence and arguments to show there were both clearly established statutory and constitutional rights of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with the above-cited framework under *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).

**A. The Circuit Court did not exceed its legitimate authority because it clearly recognized the Petitioners are not entitled to qualified immunity.**

The Petitioners make no argument in this section of their brief but rather state generalized law regarding qualified immunity and the case of *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.*

*B.* The Circuit Court was very thorough in its decision and heard clear arguments from both parties on this issue. The Court clearly found the following:

- The Court **FINDS** that the aforementioned evidence, when viewed in the light most favorable to the Plaintiff, demonstrates that there were violations of statutory laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).
- The Court **FINDS** that dissimilar to *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, wherein *A.B.* “could not identify a single policy, procedure, rule, regulation, or statute” which the WVRJCFA violated, **the Plaintiff in the instant matter has identified for the Court numerous policies, procedures, rules, regulations, statutes, and Constitutional Rights the Defendant WVDOC allegedly violated.**

- Notwithstanding the above-referenced evidence and arguments regarding violations of statutory and constitutional rights put forth by the Plaintiff, **the Court also FINDS that Plaintiff has also put forth sufficient evidence to show that Defendant's own policies and procedures were not followed.** The Plaintiff's evidence included but is not limited to:
  - **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, he had just completed serving time on disciplinary segregation for possession of a weapon.
  - The Court **FINDS** that this evidence, when viewed in the light most favorable to Plaintiff, further shows that Plaintiff has produced sufficient evidence to demonstrate disputed issues of material fact, and summary judgment is not appropriate.
  - Lastly, the Court **FINDS** it is a question for the trier of fact as to whether the Defendants' conduct can "*be regarded as atrocious, and utterly intolerable in a civilized community.*" *Travis*, 504 S.E.2d at 425. Therefore, the claim cannot be disposed of at this stage.

(JA0652-0654) (emphasis added).

The Court heard thorough arguments as to qualified immunity and made a sound decision based upon the facts and law.

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

First, the court clearly found that the alleged conduct was not discretionary. Second the court determined that there were multiple violations of clearly established law and constitutional violations. The Petitioner cites a single deposition assertion by Superintendent Wood that there was no known danger to Mr. Newbrough. This simply is not what the majority of the evidence shows. First, the circuit court found that 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. (JA0185). 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." *Id.* Immediately prior to inmate Hughes' assignment to section C1, he had just completed serving time on disciplinary segregation for possession of a weapon (JA0233).

Second, surveillance footage from Mr. Newbrough's housing section (C1) from the hours of 9:00 PM until 12:52 AM showed only one time a staff member of NCRJ entered the unit. See Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 4. That single observation from a staff member was not until 12:03 AM. *Id.* The record shows that the guards were supposed to conduct a count at 11:00 p.m. that evening and were so understaffed that count in section C1 was not performed until almost two hours late. *Id.* This is a violation of *W. Va. Code C.S.R. §§ 95-1-11 & 95-1-12*. Should the Petitioners argue that the C.S.R.'s were repealed by *W. Va. S. 240, Reg. Sess. (Feb. 11, 2019)* in February of 2019, it still does not overcome the fact that the WVDCR violated its own policies and procedures which are clear constitutional violations. WVDCR Policy Directive #129.06 states, "Superintendents, and work unit supervisors and directors as appropriate, are authorized to develop employee work schedules....to ensure that staff coverage is adequate to accomplish the work of the facility or work unit." Furthermore, WVDCR P.D. #129.06 states, "the staffing of mandatory security posts is essential to public safety." Finally, WVDCR P.D. #129.06 states, "Supervisors may use their discretion in authorizing overtime to fill mandatory posts."

In the present case, the facts show that the jail was seriously understaffed. There was only one rover at the jail that night for four pods, when there should have been a rover for each pod (JA0172). This was the reason corrections officer Jesse Smith was almost two hours late into pod

C1 that day. Furthermore, 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 reported and stated in her deposition testimony that after realizing the gravity of the staff shortage, she contacted her superiors, including Superintendent Joseph Wood. (JA0172). “Prison officials have a legal duty under the Eighth Amendment of the Constitution to refrain from using excessive force and to protect prisoners from assault by other prisoners.” *Benson v. Cady*, 761 F.2d 335, 339 (1979).

Third, the facts clearly show that the count (which took place almost two hours late in accordance with the WVDCR procedures) was done incorrectly.

Corrections Officer Jesse Smith admitted in his deposition testimony 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. In his deposition testimony, 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.

(JA0364-0404).

The jail was staffed with approximately one third of the employees needed to effectively run the jail and ensure safety to both the officers and inmates. As to the argument by the Petitioner that W. Va. Code C.S.R. §§ 95-1-11 & 95-1-12 have been repealed, the WVDCR’s own Policy Directive #305.00 clearly shows the violations. Policy #305 states,

Regardless of the type of count, reason for the count, or the time of day at which count is taken, employees are required to count only living, breathing flesh. If obvious signs of life are not readily detected (such as rise/fall of chest), the employees shall attempt to awaken the inmate/resident. Employees counting inmates/residents will resolve doubts in favor of facility security and public safety.

*WVDCR Policy Directive #305.00*. This clearly did not happen in the present case and is a clear policy and procedure violation and constitutional violation. The Petitioners arguments fail at all levels.

- 2. The Circuit Court properly found that in light of the evidence presented, there were both clearly established violation statutory and constitutional rights of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive against Superintendent Wood, in accordance with *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).**

Petitioner Wood argues that he was entitled to qualified immunity as “Petitioner’s employees were all acting within the scope of their employment and were exercising their judgment and discretion when Respondent was housed in general population...” However, this is not simply a “discretionary act” case as the Petitioner attempts to portray. There is substantial evidence in the record to show that Wood’s conduct was not “administrative policy-making” as it alleges and was instead a violation of clearly established statutory laws and constitutional rights.

To begin, the Circuit Court established that the Respondent had produced material and substantial evidence that Wood failed to follow both his own internal policy and procedures, as well as statutory authority. The Petitioner’s own policies and procedures include the following, which are pertinent to the instant matter.

Moreover, *The West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails*,” *W. Va. Code C.S.R. §§ 95-1-11 & 95-1-12*, contain certain regulations regarding staffing, observation and protective custody regarding jail facilities. Pertinent regulations to the instant matter include (emphasis added):

1. 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.
2. 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.*

3. 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 observation 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.

4. Review of protective custody. Inmates in protective custody shall have their status reviewed by the appropriate personnel at least every fifteen (15) days.

The Respondent's testimony also comports with the Petitioner's witnesses, who confirmed that inmates charged with sexual crimes are at a substantial risk of serious harm by other inmates. The Circuit Court was thus able to properly deny summary judgment on qualified immunity grounds, given the substantial issues of material fact, and that the Respondent was able to clearly identify evidence and arguments to show violations of clearly established statutory laws.

In addition, apart from the above-referenced, clearly identifiable violations regarding the administration of protective custody inmates, the Respondent also identified violations of statutory laws regarding observations and security checks. The mandatory observations and security checks of inmates was not performed in accordance with *W. Va. Code C.S.R. §§ 95-11-12*, thereby allowing the inmates to physically beat and attack the Respondent for hours. The specific, statutory authority requires that all high and medium security inmates shall be personally observed by a correctional officer at least every thirty (30) minutes. The evidentiary record is clear that Surveillance footage from Mr. Newbrough's housing section (C1) from the hours of 9:00 PM until 12:52 AM showed only one time a staff member of NCRJ entered the unit. *See* Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 4. That single observation from a staff member was not until 12:03 AM. *Id.* at p. 10. 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. *Id.*

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. *Id.*

Importantly, the specific, identifiable evidence put forth by the Respondent is dissimilar to the Plaintiff in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, wherein A.B. “could not identify a single policy, procedure, rule, regulation, or statute” which the WVRJCFA violated. Instead, the Respondent in the instant matter has put forth sufficient evidence to identify for the Court that the acts and omissions of the Defendants were purportedly unlawful, and the Respondent has already demonstrated that such actions violated a “clearly established right.” The Petitioner’s assertions that the identifiable violations are simply “administrative policy-making” decisions regarding their own policies and procedures is inaccurate as shown by the referenced statutory violations under the “*West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails.*”

Finally, the facts clearly show that Wood knew the jail was understaffed in violation of administrative law and policies and procedures based upon constitutional rights. 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.” (JA0440). Sergeant Sams reported and stated in her deposition testimony that after realizing the gravity of the staff shortage, she contacted her superiors, including Superintendent Joseph Wood (JA0190). Also, Mr. Sweeney (Respondent’s expert) found in his analysis: (a) 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.” *See* Resp. in

Opp. to Mot. for Summary Judgment at Ex. H, p. 6. In conclusion, Wood was aware of the facts of statutory, constitutional and policy violations sufficient to establish an act in violation to overcome qualified immunity.

**3. The circuit court did not error in its holding that qualified immunity can be overcome by a question of fact as to whether internal policies and procedures were violated because the Respondent clearly showed numerous violations of statutory law and constitutional violations.**

The Petitioners argue that, because internal policies and procedures were violated, somehow the facts of this case do not rise to the level to overcome qualified immunity. This is simply not true.

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).

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.*

The Circuit Court made the following rulings regarding how the Respondent clearly has overcome qualified immunity:

That in the instant case, sufficient evidence existed to how the plaintiff put forth evidence and arguments to show there were both clearly established statutory and constitutional rights of which a reasonable person would have known or are otherwise fraudulent, malicious or oppressive in accordance with *A.B.*

That the plaintiff has clearly shown violations of law and constitutional rights on multiple issues that overcome qualified immunity.

That the jail did not have adequate staff on hand to protect the safety of both the inmates and the guards.

That the jail did not properly conduct the plaintiff's screening intake in violation of laws and constitutional rights of inmate protection.

That the plaintiff was not housed in a safe unit due to his criminal charges dealing with sexual crimes.

That the Petitioners failed to protect the plaintiff's constitutional rights to "provide humane conditions of confinement" and did not "make reasonable measures to guarantee the safety of him as an inmate.

(JA0644).

- 4. The circuit court did not err by holding that qualified immunity can be overcome by a repealed regulation, because as addressed above thoroughly, the Plaintiff has clearly overcome any restraints on qualified immunity.**

The Petitioner claims 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). The Petitioner further claims that 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). The WVDCR's own Policy Directives #305.00 and #129.06 clearly shows the violations of their own policies and procedures which the Circuit Court found were clear violations of constitutional rights of the Respondent.

As addressed above, the circuit found multiple constitutional violations, multiple violations of the WVDCR's policy and procedure based off constitutional protections. What the Petitioners do not address is that Respondent's expert and the circuit court both found clearly that the staff was seriously understaffed on the night of the incident. *W.Va. Code §25-5-11*, Standards of operation; violations, states

**(a) The facility shall be staffed at all times. The staffing pattern shall be adequate to ensure intense supervision of inmates and maintenance of security within the facility.** The staffing pattern shall address the facility's operations and programs, transportation and security needs. In determining security need, considerations shall include, but not be limited to, the proximity of the facility to neighborhoods and schools.” (emphasis added).

This code further states:

**(c) In addition to the requirements of subsections (a) and (b) of this section, all facilities governed by this article shall be designed, constructed and at all times maintained and operated in accordance with standards and rules of the jail and correctional facility standards commission pursuant to section nine, article twenty, chapter thirty-one of the Code of West Virginia,** as amended: Provided, That any more stringent requirements mandated by the commissioner shall be complied with.” (emphasis added).

**(d) All facilities governed by this article shall at all times comply with all applicable federal and state Constitutional standards,** all applicable federal laws and rules and regulations, state laws and rules and local ordinances, building, safety and health codes.” (emphasis added).

The code section above clearly shows that the Petitioners violated applicable W.Va. Code, notwithstanding the alleged repeal of the W.Va. CSR codes argued by Petitioner. It is undisputed from the facts that the jail was clearly not staffed appropriately and had approximately 1/3 of the needed guards the date of the incident. The jail was not run in accordance with the standards and rules of the correctional facility standards commission as shown by the violations of their own policies and procedures above. Finally, the Petitioners clearly violated the constitutional rights of the Respondent. This argument of the Petitioners clearly fails.

**B. The Respondent presented sufficient evidence that Petitioners' acts and omissions violated Respondent's 8th Amendment Constitutional rights, and are thus not entitled to qualified immunity**

Apart from the above-referenced evidence and arguments that show Petitioners' acts and omissions violated clearly established statutory laws, the Circuit Court also properly acknowledged that the Petitioners' acts and omissions also violated the Respondent's constitutional rights and are, thus, not entitled to qualified immunity on this basis either. (JA0645-0654).

"Prison 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." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (emphasis added). Additionally, "[t]he Amendment also imposes duties on these officials, who . . . must 'take reasonable measures to guarantee the safety of the inmates.'" *Id.* citing, *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984).

Per *Farmer*, "[a] prison official may be held liable under the Eighth Amendment for acting with 'deliberate indifference' to inmate health or safety only 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.* at 511 U.S. 825, (1994).

In the present case, the Petitioners' employees, including the guard responsible for observing and supervising Respondent when he was severely beaten, testified that: (1) it is well known that an inmate charged with sexual crimes is at a substantial risk of serious harm by other inmates; and (2) for that reason, inmates with similar charges may be housed together. (JA0483, JA0398-9). However, it was not normal to assign an inmate with an institutional record like that

of Inmate Hughes Mr. Newbrough's housing unit. (JA0494). Based upon his record, Inmate Hughes was known to be dangerous and, immediately prior to Hughes' assignment to section C1, Hughes had just completed serving time on disciplinary segregation for possession of a weapon. *Id.*

Therefore, there is sufficient evidence that Petitioners knew that Respondent faced "a substantial risk of serious harm" because he was charged with sexual offenses, especially when housed with violent inmates, *e.g.*, Inmate Hughes. Moreover, Petitioners blatantly disregarded that substantial risk of serious harm when they failed to observe and supervise Newbrough and other inmates for hours. *Id.* Finally, following their blatant disregard for Respondent's health and safety, Petitioners acted with deliberate indifference by failing to act immediately upon learning that Respondent was in need of attention. *See* Resp. in Opp. to Mot. for Summary Judgment at Ex. A, p. 18.

Accordingly, Respondent established sufficient evidence showing that Petitioners violated Respondent's 8th Amendment constitutional rights when they failed to protect Respondent from violence at the hands of other prisoners (*Farmer*) and failed to take reasonable measures to guarantee his safety. (*Id.* citing *Hudson*).

Additionally, in further support of his claims, the Respondent disclosed Edward Sweeney, CJM, CCHP, an independent criminologist, engaged in criminal justice policy and procedure. Mr. Sweeney opined that Petitioners did not follow accepted corrections practice and "failed to meet their obligation to take reasonable steps to keep Newbrough safe from harm. The denial of such basic protection for Newbrough was tantamount to punishment." *See* Resp. in Opp. to Mot. for Summary Judgment at Ex. A, p. 3.

Further, Mr. Sweeney noted that: “The defendants were aware of the substantial risks, and they knowingly moved an inmate onto Newbrough's housing unit who just completed serving time on disciplinary segregation for possession of a weapon. They disregarded the known risk and failed to take reasonable steps to abate it.” *Id.*

Given the evidence presented, the Circuit Court correctly determined summary judgment was not appropriate on qualified immunity grounds. (JA0645-0654). The Circuit Court properly analyzed the constitutional claim, and given these issues of material fact, properly denied the Petitioner's claim of qualified immunity.

**C. Petitioners are not entitled to qualified immunity because there is a bona fide dispute involving foundational or historical facts underlying Respondent's claims that Petitioners' acts and omissions were otherwise fraudulent, malicious, or oppressive.**

The doctrine of qualified immunity generally “bars a claim of mere negligence against a State agency” and bars a claim “with respect to the discretionary judgments, decisions, and actions” of a state officer. Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). However, the doctrine does not bar actions based on discretionary acts or omissions where the conduct “violate[d] clearly established laws of which a reasonable official would have known” or was “fraudulent, malicious, or otherwise oppressive.” Syl., in part, *State v. Chase Sec., Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992). As stated in *A.B.*:

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.

234 W. Va. at 497, 766 S.E.2d at 756.

Respondent has clearly demonstrated that Petitioners and their employees committed acts or omissions that were fraudulent, malicious, or oppressive. These include, but are not limited to:

- Abandoning Mr. Newbrough, a vulnerable inmate, for over three hours in the presence of one or more dangerous inmates, permitting him to be violently and severely assaulted and left without medical attention for over two-and-a-half hours. *See Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 7.* 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.” And, “If the assault happened before the staff could react, staff would have been able to intervene in the early stages of the assault.” *Id* at p. 5.
- Failing to respond for nearly an hour after Inmate Beaver informed NCRJ staff that someone in Respondent’s cell was in need of assistance. (JA0506-7). Also *See Resp. in Opp. to Mot. for Summary Judgment at Ex. A, p. 6, 8.*
- Housing Respondent, a vulnerable inmate, with violent inmates such as Inmate Hughes, who had just completed serving time on disciplinary segregation for possession of a weapon (JA0233, JA0596) and who had a history of otherwise being a problem inmate. (JA0613).

- Housing inmates who are known to be “career criminals” in “like charges” sections with vulnerable inmates, without sufficient consideration of their potential threat. (JA0599, JA0185)
- Failing to have a mechanism in place, or failing to sufficiently enact to such a mechanism, which would adequately address staffing emergencies (JA0607-9, JA0514), resulting in staffing levels that were “inadequate, absurd, and unsafe...” *See* Resp. in Opp. to Mot. for Summary Judgment at Ex. H, p. 5. 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.” And, “If the assault happened before the staff could react, staff would have been able to intervene in the early stages of the assault.” *Id.*
- Petitioner Wood’s failure to ensure the jail is properly staffed which, among other things, left a vulnerable inmate like Respondent in danger of being attacked/assaulted. (JA0569-70).
- Petitioner Wood’s failure to ensure that the proper number of counts were done per day which, among other things, left a vulnerable inmate like Respondent in danger of being attacked/assaulted. (JA0573).
- Failing to ensure that NCRJ guards are properly and sufficiently trained, which failure, among other things, left a vulnerable inmate like Respondent in danger of being attacked/assaulted. (JA0346).
- Failing to ensure that inmates remain housed in their assigned cells - essentially throwing up their hands - when inmates relocated themselves to other cells in the pods, which left a vulnerable inmate like Respondent in danger of being attacked/assaulted. (JA0589-90).

- Failing to adequately assess inmates before housing assignment, including inmates who, like Inmate Hughes, were manipulating the transfer request system in order to gain access to particular pods in so they could bully vulnerable inmates such as Respondent. (JA0481).

**D. This case is virtually identical to Taylor and should be decided similarly**

Just last year, this Court decided an Appeal with virtually the same set of facts, most of the same Petitioners, the same defense lawyer, the same plaintiff's lawyers, and the same judge. *W. Va. Div. of Corr. & Rehab. v. Taylor*, 22-0263 (*W. Va.* May 02, 2023). And, just like this Court found in *Taylor*, the record, as discussed above, "supports the circuit court's assessment that there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination." *Taylor* at 3, citing Hutchison, 198 W. Va. at 144, 479 S.E.2d at 654, Syl. Pt. 1. Below are references to the *Taylor* opinion citing specific examples of factual and legal parallels.

In *Taylor*, "Two DOCR corrections officers later testified that inmates charged with sex crimes, such as respondent, are afforded protective custody because they are at substantial risk of harm by other inmates in the general population." Memorandum Order p. 1. In Newbrough, at least one correction officer confirmed that inmates charged with sex crimes are still at substantial risk of harm by other inmates, including one of the inmates residing in Newbrough's Unit that led the attack against him. (JA0185).

The record indicated in *Taylor* that, "No corrections officer checked on petitioner or the other inmates from noon until about 4:26 p.m., when respondent was found in his cell severely beaten." *Taylor* at ¶3. The facts in Newbrough are virtually identical, and the record indicates that no correctional officer checked on Newbrough for over two-and-a-half hour period. *See Resp. in Opp. to Mot. for Summary Judgment* at Ex. H, p. 7. What makes the facts in Newbrough even more outrageous is the fact that an inmate tipped off the corrections officer that Newbrough may

be in trouble. However, no correctional officer checked on Newbrough for another forty-five minutes. (JA0506-7). Moreover, when Newbrough was first checked on by a correctional officer, nearly three hours after the last time he had been observed, the correction officer didn't even notice that he had been beaten into essentially a vegetative state and proceeded as if Newbrough and his cell were in good order. (JA0349-50)

Also in *Taylor*, “Respondent contends that, due to his status as an alleged sex offender, several inmates repeatedly entered his cell and beat him resulting in permanent injuries.” *Taylor* at ¶3. Mr. Newbrough has made the same contention, that he was brutally beaten because of his status as a sex offender, and the record amply supports this contention.

Further, in *Taylor*, “Respondent asserts DOCR violated its regulations and policies when it failed to observe and supervise him and other inmates.” *Id.* The only difference Petitioners have argued here is that the regulations *Taylor* cited have been repealed. However, the record in the subject appeal demonstrates that WVDCR violated its own policies when it failed to supervise him and other inmates.

Just like in *Taylor*, where this Court found, “The record also supports the circuit court’s determination that DOCR had a constitutional duty to ‘provide humane conditions of confinement’ and must take ‘reasonable measures to guarantee the safety of the inmates,’ a duty that includes ‘protect[ing] prisoners from violence at the hands of other prisoners.’ *Farmer v. Brennan*, 511 U.S. 825, 832- 33 (1994).” the record in this case supports the same determination of the circuit court.

Finally, the Court in *Taylor* aptly found, “DOCR may be found to have denied ‘humane conditions of confinement’ if a DOCR employee ‘knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.’ *Id.* at 847.” *Id.*, citing *Farmer*. As stated above, the record indicates that Petitioners knew that Newbrough

faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. Not only did they know those accused of sexual offenses are at substantial risk of harm, but they also even failed to respond timely when received direct information that Newbrough was in immediate risk of serious harm. (JA0506-7)

### **CONCLUSION**

For the reasons set forth above, the Circuit Court's Order denying Petitioners' Motion for Summary Judgment on qualified immunity grounds should be affirmed. The Circuit Court properly found that the Respondent has put forth evidence and argument to show that there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination and that Petitioners' relevant acts and omissions were in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known that were violated or are otherwise fraudulent, malicious, or oppressive in accordance with *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014). Therefore, the Circuit Court's Order should be affirmed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

24-0274

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

**Petitioner,**

**v.**

**Appeal from the Order of the Circuit  
Court of Kanawha County  
(Court Case No. 21-C-1078)**

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

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Joseph H. Spano, Jr., counsel for Respondent, do hereby certify that service of the foregoing “*Respondent Robert Newbrough’s Response Brief*” in the above styled case have been made upon the following this the 26th day of September 2024, via United States mail, in a sealed envelope, postage prepaid:

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