

In the Circuit Court of Logan County, West Virginia

Tammy Watkins (formerly Mounts),
Administratrix,
Plaintiff,

v.

Case No. CC-23-2022-C-96
Judge Kelly Codispoti

Tim Secrist,
Defendant

**INTEGRATED ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT
AND DENYING DEFENDANTS' MOTION TO DISMISS**

CAME THIS, the 12th day of October, 2023, the defendants, Tim Secrist and West Virginia Department of Health and Human Resources (DHHR), by counsel, Jan Fox and Brittany Smith, and the plaintiff Tammy Watkins (formerly Mounts), Administratrix of the Estate of William McKinsey May, by counsel, Robert B. Kuenzel, this date and time previously having been set aside for a hearing on defendants' Motion to Dismiss and plaintiff's Motion to Amend Complaint.

WHEREUPON, the Court proceeded to a hearing on the matter.

THEREUPON, the parties argued their respective positions.

WHEREUPON, the Court, after considering the pleadings filed herein, the position of the parties, and the relevant legal and statutory authority does hereby **FIND** and **ORDER** as follows:

1. First, as it relates to plaintiff's Motion to Amend Complaint, the defendants did *not* object to granting this relief if the Motion to Dismiss was denied.
2. Therefore, defendants' Motion to Dismiss as a result of plaintiff's failure to allege that recovery is being sought "up to the applicable insurance policy limits" is **MOOT** as defendants consent to the relief being sought by plaintiff in the event that the remaining

Motion to Dismiss is denied.

3. Next defendants argue that the plaintiff is unable to obtain relief from defendants pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.
4. Specifically, the defendants assert that there is no set of facts that would entitle plaintiff to relief.
5. The Court begins by noting that the Supreme Court of Appeals of West Virginia holds, "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint *unless it appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (Emphasis added) Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va., 244 W. Va. 508; 854 S.E.2d 870; 2020 W. Va. LEXIS 809; 2020 WL 7223357 (Syl. Pt. 2)(2020), *citing*, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), Chapman v. Kane Transfer Co., 160 W. Va. 530, 236 S.E.2d 207 (Syl. Pt. 3)(1977).
6. Additionally, as it relates to the notice pleading standard recognized by our state courts, our Supreme Court holds, Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure. State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995); *citing*, Mandolidis v. Elkins Indus., Inc., 161 W. Va. 695, 246 S.E.2d 907 (1978); John W. Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978). *See also*, Conley v. Gibson, 355 U.S. 41, 47-48, 78 S. Ct. 99, 102-03, 2 L. Ed. 2d 80, 85-86 (1957).
7. The defendants assert that the acts alleged against Defendant Secrist are discretionary acts in which Defendant Secrist and Defendant DHHR are entitled to qualified immunity.
8. The Court notes, "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full

force and effect." State ex rel. Biafore v. Tomblin, 236 W. Va. 528, 530, 782 S.E.2d 223, 225 (Syl. Pt. 6)(2016), *Citing*, Syl. Pt. 2, State v. Epperly, 135 W.Va.877, 65 S.E.2d 488 (1951).

9. Additionally, "In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." White v. Wyeth, 227 W. Va. 131, 133, 705 S.E.2d 828, 830 (Syl. Pt. 2)(2010) *Citing*, Syl. Pt. 2, Smith v. State Workmen's Compensation Commissioner, 159 W. Va. 108, 219 S.E.2d 361 (1975).
10. The case at hand asserts claims against DHHR and its agent, Defendant Secrist. Thus, the plaintiff points to W.Va.Code §9-6-2(d) in opposition to defendants' Motion to Dismiss.
11. Specifically, W.Va.Code §9-6-2(d) states in pertinent part, "(d) An adult protective services caseworker may not be held personally liable for any professional decision or action arrived at in the performance of his or her official duties as set forth in this section or agency rules promulgated: *Provided, That nothing in this subsection protects any adult protective services worker from any liability ... for any loss caused by willful and wanton misconduct or intentional misconduct.*" (Emphasis added).
12. In the case at hand, the plaintiff alleges that the decedent, "William McKinsey May was a person who suffered from mental retardation and, as such, was a "vulnerable adult" as defined in West Virginia Code §9-6-1(5)." See, Complaint CC-23-2023-C-75 at ¶9.
13. The plaintiff further alleged that a referral was made to Adult Protective Services (APS) "regarding allegations of abuse/neglect involving the decedent, William McKinsey May." Complaint CC-23-2023-C-75 at ¶11.
14. Then, with particularity, the plaintiff asserts allegations of conduct against Defendant Secrist, who was acting as an agent, servant and/or employee of Defendant DHHR.

15. The plaintiff alleges that some of Defendant Secrist's actions were ministerial functions which are violative of statutory duties pursuant to W.Va. Code §9-6-14; thus, the plaintiff asserts that Defendant Secrist's ministerial actions are not qualifiedly immune.
16. Additionally, the plaintiff asserts allegations that Defendant Secrist's conduct was done in a willful, wanton and/or intentional manner.
17. W.Va. Code §9-6-2(d) specifically excepts adult protective service workers from liability protections; thus, a worker *cannot* be immune if the loss was caused by the worker's "willful and wanton misconduct or intentional misconduct."
18. Accordingly, as plaintiff asserts that Defendant Secrist's actions were willful, wanton and/or intentional, such actions particularly are excepted from immunity pursuant to W.Va. Code §9-6-2(d).
19. In West Virginia a "violation of a statute is prima facie negligence and not negligence per se." Gillingham v. Stephenson, 209 W. Va. 741, 748, 551 S.E.2d 663, 670 (2001), *Citing*, Spurlin v. Nardo, 145 W. Va. 408, 415, 114 S.E.2d 913, 918 (1960). *See* Waugh v. Traxler, 186 W. Va. 355, 358, 412 S.E.2d 756, 759 (1991).
20. "While a statutory violation gives rise to a prima facie case of negligence, 'the determination as to whether there was in fact a violation and whether the violation was the proximate cause of the injury is within the province of the jury.'" Kizer v. Harper, 211 W. Va. 47, 52, 561 S.E.2d 368, 373 (2001), *citing*, Simmons v. City of Bluefield, 159 W.Va.451, 225 S.E.2d 202, 88 A.L.R.3d 105 (Syl. Pt. 3)(1975); Jones v. Two Rivers Ford, Inc., 171 W.Va.561, 301 S.E.2d 192 (Syl. Pt. 3, in part)(1983).
21. Accordingly, if, as asserted by plaintiff, Defendant Secrist's actions were ministerial functions which are violative of statutory duties pursuant to W.Va. Code §9-6-14, then Defendant Secrist may be held liable and this is a matter for jury consideration.
22. Additionally, the Supreme Court of Appeals of West Virginia has held, "Questions of

negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.” Birdsell v. Monongahela Power Co., 181 W. Va. 223, 224, 382 S.E.2d 60, 61 (Syl. Pt. 1)(1989) *Citing*, Syl. pt. 5, Hatten v. Mason Realty Co., 148 W.Va. 380, 135 S.E.2d 236 (1964)" Syllabus Point 3, Dawson v. Woodson, 180 W.Va. 313, 376 S.E.2d 321 (1988).

23. Further, "Where evidence exists from which it may be concluded that a defendant [] was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously did some wrongful act which resulted in injury to another, the question of whether he was guilty of wilful and wanton conduct is for jury determination." Korzun v. Shahan, 151 W. Va. 243; 151 S.E.2d 287; 1966 W. Va. LEXIS 219 (Syl. Pt. 5)(1966).
24. Accordingly, if, as asserted by plaintiff, Defendant Secrist's actions were willful, wanton and/or intentional pursuant to W.Va. Code §9-6-2(d), then these allegations present questions of fact for jury consideration.
25. The defendants assert that Defendant Secrist is a "redundant" defendant and should be dismissed.
26. In response, the plaintiff asserts that the theory of "redundant" defendant is not recognized in West Virginia and the authority presented by defendants is not binding on this Court.
27. Specifically, the plaintiff points to Woodrum v. Johnson, 210 W. Va. 762, 772, 559 S.E.2d 908, 918 (2001), which references a settlement with a primarily liable defendant and the ability to pursue a claim against a lesser, "redundant" defendant.

28. The Court finds Woodrum v. Johnson persuasive under the circumstances.
29. Lastly, the defendants argue that the plaintiff's claim for punitive damages should be stricken pursuant to W.Va. Code §55-17-2(2).
30. On the other side, the plaintiff argues that the defendants are seeking to dismiss Defendant Secrist as a redundant defendant against whom punitive damages can be awarded, if proven, while punitive damages against the DHHR, an insured state agency, are not available. See, W.Va. Code §55-17-2(2).

ACCORDINGLY, based upon the foregoing, the defendants' Motion to Dismiss based upon qualified immunity be, and hereby is, **DENIED**; the defendants' Motion to Dismiss based upon the theory of redundant defendant be, and hereby is, **DENIED**; the defendants' Motion to Strike Punitive Damages based upon redundant defendant related to Defendant Secrist be, and hereby is, **DENIED**; the defendants' Motion to Strike Punitive Damages related to Defendant DHHR be, and hereby is, **GRANTED**, pursuant to W.Va. Code §55-17-2(2); and, based upon the defendants' agreement to allow the filing of an Amended Complaint to assert that plaintiff's claims against the DHHR are being sought up to the insurance policy limits only, the plaintiff's Motion to Amend Complaint be, and hereby is, **GRANTED**.

Prepared and presented by:

/s/ Robert Kuenzel

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/s/ Kelly Gilmore Codispoti
Circuit Court Judge
7th Judicial Circuit

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