

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

24-757

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**The West Virginia Division of Corrections
And Rehabilitation,**

Petitioners,

v.

**Connie Hardy, as the Personal Representative
Or the Estate of Franklin Barnhouse,**

Respondent.

RESPONDENT'S RESPONSE BRIEF

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INTRODUCTION

The subject incident forming the basis of the Complaint below occurred while Franklin Barnhouse (“Respondent” or “Barnhouse”) was an inmate in the custody of the West Virginia Division of Corrections and Rehabilitation (“WVDCR” or “Petitioners”). Respondent was housed in the Eastern Regional Jail (“ERJ”) facility on misdemeanor charges of alcohol-related driving. Barnhouse was booked into ERJ at approximately 10:00 p.m., on June 22, 2019. Barnhouse was housed in a cell with three other inmates due to overcrowding (AP_1-15). A cavity search of one of the inmates was not performed and the inmate smuggled heroin into his anus cavity into ERJ. Barnhouse was found dead at 11:26 a.m., by a correctional officer the following day at 11:26 a.m. (Ap. 226-235).

Despite the known risks of not properly searching incoming inmates, the WVDCR and its officers failed to adequately protect Mr. Barnhouse from possible drug intake. (Ap. 110-170). Petitioners failed to appropriately assess the Respondent’s threat and risk factors he faced while in ERJ, and the Petitioner’s subsequently failed to observe and supervise Barnhouse and other inmates as required by law, the Constitution, and as required by the WVDCR’s own policies and procedures. (Id.)

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. (Id.) 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). (Ap. 170-175).

Specifically, the Circuit Court correctly ruled that the Petitioners were not entitled to qualified immunity. The Circuit Court ruled:

- That it was not reasonably foreseeable that the officials would believe at some point the decedent would ingest some controlled substances and that the ingestion would ultimately cause his death. Therefore, a claim of deliberate indifference is not substantiated, and the Court is of the opinion to and hereby does, ORDER that summary judgment be GRANTED on the constitutional claims as set forth in Count II of the Plaintiff's complaint.
- As relates to the issue of qualified immunity which has been asserted by Defendant, the standard to pierce qualified immunity requires more than mere negligence. It requires a violation of a statutory or constitutional duty which must be seen as reasonably foreseeable to an official or be something of which the official would be aware.
- That in this instance, Plaintiff has provided an affidavit of an agent indicating that several separate written policies regarding Mr. Barnhouse's placement which carries at least a question of fact sufficient to overcome the defendant's motion for Summary Judgment. (Id.).

The Court further ruled that the 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 Inmates to smuggle drugs into ERJ, causing The

Respondents death. (Id.). 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. (Id.).

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 ERJ.

(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 drugged or take drugs in a non-observation pod 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. (Ap. 170-175).

STATEMENT OF THE CASE

Statement of Facts

The subject incident forming the basis of the Complaint below occurred while Respondent was housed in the Eastern Regional Jail ("ERJ") facility on misdemeanor charges of alcohol-related driving. Barnhouse was booked into ERJ at approximately 10:00 p.m., on June 22, 2019. (Ap. 1-15). Barnhouse was housed in a cell with three other inmates due to overcrowding. A cavity search of one of the inmates was not performed and the inmate smuggled heroin into his anus cavity into ERJ. (Ap. 226-235). Barnhouse was found dead at 11:26 a.m., by a correctional officer the following day at 11:26 a.m. (Id.).

The investigation into the death of Barnhouse, carried out by a State Police criminal investigator, did not identify any actions or inactions by ERJ staff that contributed to the death of Barnhouse. The investigation failed to address obvious deficiencies on the part of ERJ staff. Any impartial, experienced, corrections official reviewing the available evidence should have immediately recognized several serious deficiencies relating to the intake and supervision practices at ERJ, which were pertinent to Barnhouse's death. (Ap. 110-170)

Detainee Curtis Wines was one of eight inmates who was assigned to a holding cell (H5) with Barnhouse in the intake area of ERJ. Mr. Wines has since been criminally charged and convicted of smuggling drugs into ERJ and providing a lethal dose of the drug to Barnhouse. (Ap. 226-235).

The expert for the Respondent, Edward Sweeney, found four primary concerns regarding the actions and inactions of the WVDOC. (Ap. 110-170). First, Barnhouse's cell assignment; second, the ongoing failure to perform regular rounds to monitor Barnhouse in his assigned cell as well as the falsification of a formal count; third, the failure to properly and fully utilize the body scanner equipment to identify drugs being smuggled into ERJ; and fourth, the failure to

have identified and acted upon Barnhouse's condition throughout the morning arraignment process. (ID.).

Barnhouse was arrested on June 22, 2019, for the charge of Aggravated DUI. The criminal investigation report and the DUI information sheet, which detail the facts associated with the arrest, were prepared by Berkeley County Sheriff Deputy R.M. Kolb. (Id.). The reports indicate that Barnhouse was driving at "a high rate of speed," his "vehicle was all over the road as well as running cars off the road, ... ran over top of the curb and was stumbling through the parking lot." (Id.).

Barnhouse, who was obviously intoxicated, subsequently failed every component of the administered field sobriety test and blew a .239 on the breathalyzer; three times the legal limit of .08. His breathalyzer result was 62% above the .15 cutoff level to support the charge of Aggravated DUI. (Id.). Barnhouse thereafter refused to provide a blood sample and he was immediately placed under arrest at 9:17 pm. He was booked into ERJ about 90 minutes later, at 10:35 pm. (Id.).

The WV state code states "There shall be written policies and procedures for the safe handling of intoxicated or drugged inmates committed to the jail facility when such persons are charged with offenses other than or in addition to public intoxication, the policies shall include requirements that ... b. Such persons are segregated from the general inmate population until they can be safely integrated without danger to themselves or others." *W.Va. Code of State Rules 95*.

Mr. Sweeney found there is good reason for separating and closely monitoring intoxicated commitments. Their judgment is impaired, and they are at increased risk of harm. (Id.)

ERJ has four holding cells (H1, H2, H3, H4) located directly in front of the correctional officer's workstation, and two large holding cells located around the corner, and down a short hallway; one for males (H5), and one for females (H6). Holding cells H1 through H4 are intended to be used for new commitments that require more intensive monitoring. (Id.).

The written communication from ERJ to the state Division of Corrections and Rehabilitation affirmed that when Barnhouse arrived at ERJ he was "intoxicated from alcohol." (Ap. 226-235).

ERJ Associate Superintendent of Security Strider Ouimet, in his deposition testimony, acknowledged that a person who is charged with aggravated DUI, having a breathalyzer reading of .15 or above is highly intoxicated. (Id.) ERJ policy 17001 affirms the standard practice that the booking officer reviews the commitment papers which contain the criminal charges. (Ap. 110-170).

ERJ Captain Jason Roberson, in his deposition testimony, responded "Yes" to the question "if someone is extremely intoxicated, would they be placed in one through four?" (Id.). ERJ Superintendent Didymus Tate, in his deposition testimony stated that intoxicated persons arriving at ERJ will be assigned to one of the four observation holding cells (H1-H4) "if there is space." (Id.).

According to the testimony of ERJ Captain Ryan Springer, the placement of intoxicated commitments into H5 is their typical procedure, despite their written local policy which mimics the state regulation in this regard. (Ap. 191-197).

Although Barnhouse was highly intoxicated upon his arrival at ERJ, after his intake processing, Barnhouse was not assigned to one of the four holding cells where he could be

directly monitored by COs at their workstation, but rather he was assigned to a more remote group holding cell, H5, at 10:58 pm. (Ap. 110-170).

Barnhouse was issued a mat and he laid on the floor in H5. None of the deposed ERJ defendants offered any plausible reason as to why the intoxicated Barnhouse was not issued a mat and assigned to H-1 through H-4, even if that meant lying on the floor. (Id.). The video shows H-1 through H-4 throughout the night and none of them appeared to have been overcrowded. (Id.).

It is clear from the evidence that the ERJ supervisory defendants knew that intoxicated detainees, like Barnhouse, should have been assigned to one of the holding cells located directly in front of the officer's workstation, however, they regularly failed to take any corrective action. (Id.).

Sweeney found that had Barnhouse been assigned by the on-duty ERJ staff to an observation cell, H1, H2, H3, or H4, he would likely be alive today. (Id.).

Sweeney found that the performance of rounds or welfare/safety checks in jails is fundamental to effective jail management. The checks are done to ensure that detainees are not being victimized, attempting self-harm, making weapons, fighting, using drugs, in medical distress, etc. (Id.).

The contemporary West Virginia Regional Jail and Correctional Facility Authority policy, Effective Date: October 25, 2016, Chapter: Admission and Orientation, Subject: Inmate Admission Procedures, details the process for the handling of new commitments. Procedure N., 3., states that "The Shift Supervisor will ensure that new inmates are personally observed by a correctional officer at least every thirty minutes." (Id.).

Ryan Springer in his deposition testimony indicated that officers need only pass by cells when performing their rounds. (Ap. 191-197).

Sweeney found that it is fundamental corrections practice to maintain a logbook or form to record the performance of welfare checks. (Ap. 110-170).). The initiation and preservation of such records reduce liability for staff but more importantly, it reinforces the importance of performing the rounds and recording observations. The completed logs or forms provide supervisors with a point of reference to make sure line staff are performing required job functions. Many correctional facilities have installed electronic watch clock-type systems, with barcodes or buttons affixed at set locations that require officers to touch these contact points with a wand, to record the round electronically. (Id.). The wands are then downloaded daily to allow managers to review the data and take corrective action if the staff has missed any required rounds. (Id.). Recorded video media can also be used to check if staff is routinely performing their required rounds.

ERJ has no paper nor electronic system in place to record the performance of welfare/safety checks for detainees. (Id.). They also have no system of accountability in place to ensure that line staff is carrying out this critical job function. (Id.).

Sweeney found that contrary to the varied representations made by ERJ officials in their deposition testimony, it is readily apparent from watching the video recordings of the cameras located in the booking area, over two shifts, that the ERJ takes a very lackadaisical approach to the performance of rounds, to check on the health and safety of the incarcerated population. (Id.).

Associate superintendent, and chief correctional officer, Strider Ouimet, confirmed in his deposition testimony that all persons in the custody of ERJ are required to be personally observed by a correctional officer at least every 30 minutes. (Ap. 206-225).

Ryan Springer, in his deposition testimony stated that the holding cell checks during lockdown hours, between 11 pm and 4:35 am, can be hourly. (Ap. 191-197).

Sweeney found that an intoxicated new commitment, like Barnhouse, should be checked at least once every 30 minutes, and more than a passing glance is required to do a proper safety check (Ap. 110-170).

Sweeney found that the video recording shows that no ERJ staff person stopped and looked in the cell door window where Barnhouse was assigned, between 11:24 pm and 1:26 am (2 hours and 2 minutes), between 2:24 am and 3:50 am (1 hour and 26 minutes), between 3:54 am and 6:10 am (2 hours and 15 minutes), and between 6:32 am and 8:06 am (1 hour and 34 minutes). (Id.).

Sweeney found that had the ERJ staff been diligently performing their safety checks, they may well have interrupted the criminal use of the smuggled drugs, or the involved staff member may have recognized that Barnhouse was in medical distress. Either finding would have likely saved Barnhouse's life. (Id.).

The handwritten notes of the investigator performing the criminal investigation, who watched the video, states that at 7:07 am "CO Kendle looks into H-5 (visual inspect)." The investigator's note is inaccurate. (Id.). The video will speak for itself. Other than the 7:07 am "visual inspect" notation, the investigator's summary does not contradict my summation of the lengthy gaps in time between the required cell checks. (Id.).

Even after this information detailing the significant gaps was provided to the ERJ officials, via the CID report, no ERJ official addressed the obvious repeated failures to perform the welfare checks. No responsive corrective action was apparently undertaken. (Id.).

All ERJ deponents stated that Officer Kendle was required to perform a formal count of detainees in the booking area at the start of his 7:00 am shift. The deponents stated further that when counting the individuals, Kendle was required to have taken the time to monitor each person for a few moments to confirm that the subject is alive. (Id.). As described by all deponents, when performing a formal count, the responsible officer must observe living breathing flesh.

Sweeney found that the video recording of CO Kendle walking down the hallway, where cells H5 and H6 are located, at 7:07 am that morning, is very clear. CO Kendle never approaches the H5 cell door, in fact, he never even breaks his stride, walking right past the cell front. Kendle also only momentarily looked into cell H6. (Id.).

Sweeney found that considering that CO Kendle entered the booking area just 20 seconds before starting his count, and he had no document in his hands while walking around the area, it is apparent that he did not even know how many inmates were assigned to each cell for him to be counting to verify a proper count. (Id.). After CO Kendle strolled past H5 at 7:07 am., the next time any staff person came close to the cell door was at 8:07 am, long after the 7:00 am formal institutional count was completed. (Id.).

Sweeney found it is clear from the video that no count of the inmates in H5 was performed that morning. It is also clear that Kendle did not confirm that the inmates in H5 were alive and well when he started his shift, as he represented after Barnhouse was discovered deceased more than five hours later. (Id.). The performance of daily counts is fundamental to corrections. The fact that CO Kendle so brazenly failed to carry out this basic task is quite shocking. It must be noted that CO Kendle was not alone in the booking area when he performed his so-called count. (Id.). At least three other staff members were present. None of the present

staff raised any concerns about the impropriety of his count at the time, nor did any of them apparently raise any concerns after learning of Barnhouse's death. (Id.).

Sweeney found that after learning of Barnhouse's death, no ERJ official acknowledged having reviewed the recorded video, identified concerns, and addressed the obvious failure on the part of CO Kendle to perform a legitimate count. (Id.). Nor did they address Officer Kendle's blatant falsification of count information, which he must have thereafter provided, for the morning institutional count to have cleared. (Id.).

Sweeney found that had Officer Kendle performed a responsible count at 7:00 am, ensuring that all inmates were present and alive, he may have been able to recognize that Barnhouse was in crisis and save his life. (Id.).

Sweeney found that Barnhouse's death certificate states that the immediate cause of his death was "combined intoxication by heroin, fentanyl, and alcohol." The certificate also represents in the description of how the injury occurred that Barnhouse "abused illicit heroin and non-prescribed fentanyl by unknown route of administration; and over-consumed alcoholic beverages." (Id.).

One of the greatest risks to operating safe and secure facilities is the introduction and movement of contraband. (Id.). Dangerous contraband, whether it be weapons, tools used to aid escape attempts, or illegal drugs is a serious concern that requires constant line level and management level attention. One of the most important contraband control practices is the diligent search of new commitments.(Id.).

Sweeney found that performing effective body searches on detainees who are charged with drug use/possession-related offenses has long been recognized as critical work to protect the

incarcerated population. (Id.) Even as strip search laws changed across the corrections industry, one criterion has perennially remained. If the subject is charged with drug possession, there is reasonable suspicion to strip-search the subject upon entry to jail. That is because drug users are notorious for hiding drugs in all parts of their clothing and body. Curtis Wines, who was charged with ..., admitted to having a black tube filled with drugs in his rectum when he entered ERJ. (Id.).

The WV state code states “Written policies and procedures shall provide for searches of facilities and inmates to control contraband and provide for its disposition and to develop recommendations for corrective action. Procedures shall provide that ... b. Visual inspections are conducted only when there is a reasonable belief that the inmate is carrying contraband or other prohibited material, and c. Strip searches are done without specific authorization only upon entry to the facility and at all other times are based on articulated suspicion.” (Id.).

Sweeney found that some jails like ERJ have started utilizing body scanners to search all detainees and are only performing unclothed searches if they see something irregular in the scanned image. (Id.). Doing so requires the responsible jail officer to be well trained on the full use of the equipment and to be diligent when carrying out this critical function. Contrary to the conclusion of State Police Investigator Roper, Wines was not adequately searched upon entry. (Id.). The effort of the officer performing the scan on Curtis Wines was well below standard.

The officer performing the body scan of Curtis Wines failed to take a reasonable amount of time to review the scanned image. The SOTER body scan device does not provide the full image until after the moving sled, on which the subject is standing, comes to rest. The system then allows the operator to use a series of functions to zoom, scroll, adjust brightness, and change the contrast, to enhance and fully examine the scanned image. After the sled on which

Wines was standing came to rest, the assigned corrections officer performing the scan spent about eight seconds reviewing the scanned image. (Id.)

The scanned image of Wines was provided via evidence in this case. Even without utilizing the SOTER system image enhancement features, I can see what appears to be the tube of drugs that was secreted by Wines. If the ERJ CO who performed the body scan had taken his time and examined the image he would have likely detected the contraband and prevented the death of Barnhouse. (Id.).

Sweeney found that the video shows that at 9:03 am, on June 23, 2019, six detainees were removed from cell H5 for video court proceedings. Barnhouse of course was not among them.

Documents in evidence indicate that at 9:20 am, a preliminary arraignment took place for Barnhouse, during which he was committed to jail. Barnhouse did not attend this hearing as would typically be required, especially for a person who is already in custody. (Id.).

Sweeney found that the circumstances leave me to question whether the ERJ defendant staff was unable to wake Barnhouse for his preliminary arraignment, then conveyed to the court that Barnhouse was refusing to attend, prompting the court to proceed without him. (Id.). The commitment form was faxed to the jail at 9:57 am. At approximately 11:15 am, ERJ staff discovered Barnhouse unresponsive in his cell. (Id.).

Procedural History

On or about July 12, 2021, Respondent filed her Complaint in the Circuit Court of Kanawha County, West Virginia. (Ap._0001-0015). Petitioner filed Answer on August 11, 2021. (Ap.0016- 0030). Petitioner filed their Motion for Summary Judgment and Memorandum of

Law in Support on June 13, 2022. (Ap.0043-0065). Respondent filed Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment on July 25, 2022. (Ap.0110-0119). On November the circuit court granted summary judgment in regards to Count II. Thus, it will not be addressed in this brief. Respondent subsequently filed an Amended Complaint naming Curtis Wines as a Defendant. (Ap.0031-0042). This did not substantively alter the allegations against Petitioner. The circuit court entered its Order denying Petitioner's Motion for Summary Judgment based on qualified immunity. (Ap.0170-0174).

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

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).

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.

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 Circuit Court ruled:

- That it was not reasonably foreseeable that the officials would believe at some point the decedent would ingest some controlled substances and that the ingestion would ultimately cause his death. Therefore, a claim of deliberate indifference is not substantiated, and the Court is of the opinion to and hereby does, ORDER that summary judgment be GRANTED on the constitutional claims as set forth in Count II of the Plaintiff's complaint.
 -
 - As relates to the issue of qualified immunity which has been asserted by Defendant, the standard to pierce qualified immunity requires more than mere negligence. It requires a violation of a statutory or constitutional duty which must be seen as reasonably foreseeable to an official or be something of which the official would be aware.
 -
 - That in this instance, Plaintiff has provided an affidavit of an agent indicating that several separate written policies regarding Mr. Barnhouse's placement which carries at least a question of fact sufficient to overcome the defendant's motion for Summary Judgment. (Id.).
- (Ap._170-175).

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

In the present case, as the expert report states, Mr. Barnhouse was admitted into the facility

DUI with a .239 BAC. (Ap_110-170). He was not placed one of the four observations rooms in the intake pod, but instead placed into the general intake pod. Through all deposition testimony, no proper count took place at 7:00am the next morning because there was no determination of "living, breathing flesh." (Id.). Mr. Barnhouse was not even discovered deceased in the cell until

11:15am, when he had been dead for multiple hours in the general intake pod. (Id.). These violations are well outlined in the expert report and they are clear violations of W.Va. Code. “Existing state regulations which govern certain aspects of the training, supervision, and retention of jail employees as set forth in the "West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails," West Virginia C.S.R. § 95-1-1 et seq. W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B., 234 W. Va. 492, 515, 766 S.E.2d 751, 774 (2014).

- 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 Barnhouse’s cell placement was a violation of his rights.**

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. (Ap._170-175). The Petitioner argues that this action of placing Barnhouse in the general population cell was not a violation of a clearly established right.

Second, The Petitioner’s argument is clearly flawed because they do not list the entire second part of the qualified immunity test from *Chase Securities*. The Petitioner states, “Second, the Court must determine if Plaintiff has alleged that the conduct violated a clearly established law.” This is not the entire second part of the test and the defendant conveniently leaves off “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.*” The Respondent can clearly show through their expert and testimony and has clearly plead that the defendant violated administrative law and that the Plaintiff’s Eighth Amendment rights to protection were violated in the jail.

It is clear from the evidence that the ERJ supervisory defendants knew that intoxicated detainees, like Barnhouse, should have been assigned to one of the holding cells located directly

in front of the officer's workstation, however, they regularly failed to take any corrective action. (Ap._110-170).

2. Respondent has shown that Wines' smuggling in contraband into the ERJ was a result of a violation of Barnhouse's rights.

Petitioner next argues that the respondent has failed to even identify a policy or procedure that was violated or an employee who committed any alleged wrongful acts. This is simply not true. The expert witness for the Respondent, Sweeney, states, "Performing effective body searches on detainees who are charged with drug use/possession-related offenses has long been recognized as critical work to protect the incarcerated population. (Id.). Even as strip search laws changed across the corrections industry, one criterion has perennially remained. (Id.). If the subject is charged with drug possession, there is reasonable suspicion to strip-search the subject upon entry to jail. (Id.). That is because drug users are notorious for hiding drugs in all parts of their clothing and body. Curtis Wines, who was charged with ..., admitted to having a black tube filled with drugs in his rectum when he entered ERJ." (Id.).

Wv. Code states, "59. The WV state code states "Written policies and procedures shall provide for searches of facilities and inmates to control contraband and provide for its disposition and to develop recommendations for corrective action. Procedures shall provide that ... b. Visual inspections are conducted only when there is a reasonable belief that the inmate is carrying contraband or other prohibited material, and c. Strip searches are done without specific authorization only upon entry to the facility and at all other times are based on articulated suspicion." (Id.).

Sweeney further states, "Some jails like ERJ have started utilizing body scanners to search all detainees and are only performing unclothed searches if they see something

irregular in the scanned image. (Id.). Doing so requires the responsible jail officer to be well trained on the full use of the equipment and to be diligent when carrying out this critical function. Contrary to the conclusion of State Police Investigator Roper, Wines was not adequately searched upon entry. The effort of the officer performing the scan on Curtis Wines was well below standard. (Id.). The officer performing the body scan of Curtis Wines failed to take a reasonable amount of time to review the scanned image. The SOTER body scan device does not provide the full image until after the moving sled, on which the subject is standing, comes to rest. The system then allows the operator to use a series of functions to zoom, scroll, adjust brightness, and change the contrast, to enhance and fully examine the scanned image. After the sled on which Wines was standing came to rest, the assigned corrections officer performing the scan spent about eight seconds reviewing the scanned image.” (Id.).

The Petitioner’s argument clearly fails.

3. The Respondent has not failed to show the lack of cell checks violated Barnhouse’s rights.

The Petitioner argues Respondent has failed to support the inference that the alleged lack of cell checks is tantamount to a constitutional violation.

Expert Sweeney stated the following about the violations committed at ERJ by WVDOC personnel, “Associate superintendent, and chief correctional officer, Strider Ouimet, confirmed in his deposition testimony that all persons in the custody of ERJ are required to be personally observed by a correctional officer at least every 30 minutes. (Id.). Ryan Springer, in his deposition testimony stated that the holding cell checks during lockdown hours, between 11 pm and 4:35 am, can be hourly. (Id.). In my experience, an intoxicated new commitment, like

Barnhouse, should be checked at least once every 30 minutes, and more than a passing glance is required to do a proper safety check.” (Id.).

Sweeney further states, “the video recording shows that no ERJ staff person stopped and looked in the cell door window where Barnhouse was assigned, between 11:24 pm and 1:26 am (2

hours and 2 minutes), between 2:24 am and 3:50 am (1 hour and 26 minutes), between 3:54 am and 6:10 am (2 hours and 15 minutes), and between 6:32 am and 8:06 am (1 hour and 34 minutes).

(Id.). Had the ERJ staff been diligently performing their safety checks, they may well have interrupted the criminal use of the smuggled drugs, or the involved staff member may have recognized that Barnhouse was in medical distress. (Id.). Either finding would have likely saved Barnhouse’s life. (Id.). The handwritten notes of the investigator performing the criminal investigation who watched the video, states that at 7:07 am “CO Kendle looks into H-5 (visual inspect).” The investigator’s note is inaccurate. The video will speak for itself. Other than the 7:07 am “visual inspect” notation, the investigator’s summary does not contradict my summation of the lengthy gaps in time between the required cell checks. (Id.). Even after this information detailing the significant gaps was provided to the ERJ officials, via the CID report, no ERJ official addressed the obvious repeated failures to perform the welfare checks. No responsive corrective action was apparently undertaken.” (Id.).

The Petitioner’s argument clearly fails.

VII. CONCLUSION

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.

"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).

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

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.

In the current matter, Respondent offers the musing of its expert who stated that “[h]ad the ERJ staff been diligently performing their safety checks, they may well have interrupted the criminal use of the smuggled drugs, or the involved staff member may have recognized that Barnhouse was in medical distress. Either finding would have likely saved Barnhouse’s life.” (Id). Respondent is equating a violation of policy with a constitutional violation, but the law is well-settled that this is not permissible.

Again, Respondent has failed to articulate how insufficient cell checks amount to a clearly established constitutional violation. Those arguments are irrelevant to the determination as to whether Petitioner violated Respondent’s constitutional rights. Respondent simply has not or cannot point to any action, or inaction, taken by Petitioner that overcomes qualified immunity.

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.

**FRANKLIN BARNHOUSE, by his
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

24-757

The West Virginia Division of Corrections
And Rehabilitation,

Petitioners,

v.

Connie Hardy, as the Personal Representative
Or the Estate of Franklin Barnhouse,

Respondent.

CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for Respondent, do hereby certify that service of the foregoing “*Respondent’s Response Brief*” in the above styled case have been made upon the following this the 9th of May 2025, via United States mail, in a sealed envelope, postage prepaid:

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