STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

November 12, 2026

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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

West Virginia Division of Corrections and Rehabilitation, and Joseph Wood, Superintendent, North Central Regional Jail,
Defendants Below, Petitioners

v.) **No. 24-274** (Kanawha County No. CC-20-2021-C-1078)

Constance Boone, as Administrator of the Estate of Robert Newbrough,
Plaintiff Below, Respondent

and

West Virginia Division of Corrections and Rehabilitation,
Defendant Below, Petitioner

v.) **No. 24-757** (Kanawha County No. CC-20-2021-C-537)

Connie Hardy, as the Personal Representative of the Estate of Franklin Barnhouse,
Plaintiff Below, Respondent

MEMORANDUM DECISION

In the first of these consolidated appeals (the "Newbrough suit"), Petitioners West Virginia Division of Corrections and Rehabilitation ("DCR") and Joseph Wood, Superintendent, North Central Regional Jail, appeal from the Circuit Court of Kanawha County's April 12, 2024, order denying their motion for summary judgment. DCR and Superintendent Wood argue that the circuit court erred in denying their motion because they are qualifiedly immune from the claims of Respondent Constance Boone, as Administrator of the Estate of Robert Newbrough[1] (the

[1] The Newbrough suit was initially brought by Ms. Boone as Mr. Newbrough's attorney-in-fact and next friend. However, during the pendency of this appeal, Mr. Newbrough passed away. Ms. Boone, now as administrator of his estate, has been substituted as a party under Rule 41(a) of the Rules of Appellate Procedure.

"Newbrough plaintiff").[2] In the second consolidated appeal (the "Barnhouse suit"), Petitioner DCR appeals from the portion of the Circuit Court of Kanawha County's November 25, 2024, order denying its motion for summary judgment. Here, too, DCR argues that it is qualifiedly immune from the claims of Respondent Connie Hardy, as the Personal Representative of the Estate of Franklin Barnhouse (the "Barnhouse plaintiff").[3] This Court has carefully considered the briefs and oral arguments of the parties, the appendix record, and the relevant authorities. Upon our review, we determine that a memorandum decision reversing the circuit courts' orders is appropriate under the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure.

I. Factual and Procedural History

A. *The Newbrough Suit* (No. 24-274)

In December 2019, Robert Newbrough was in DCR custody and incarcerated at North Central Regional Jail ("NCRJ"). During a period of approximately two hours on December 5 and into December 6, 2019, fellow NCRJ inmates, including Nathan Hughes, assaulted Mr. Newbrough in his cell and inflicted serious injuries upon him. In December 2021, the Newbrough plaintiff sued DCR and Superintendent Wood, claiming that DCR and its officials failed to adequately assess Mr. Newbrough's risk of victimization due to his charges for sex offenses against a minor and, therefore, failed to properly classify and house him; failed to take steps to protect him; and failed to adequately supervise him. These allegations gave rise to seven asserted causes of action: negligence; violations of the West Virginia Constitution; intentional infliction of emotional distress; extreme and outrageous conduct; negligent hiring, retention, and supervision; cruel and unusual punishment under the West Virginia Constitution; and unconstitutional policies and practices. In asserting violations of the West Virginia Constitution, Mr. Newbrough maintained that the claim "alleges a state constitutional tort action," and he specifically disavowed filing the claim "pursuant to 42 U.S.C. §[]1983 or any other related federal statute" or "creat[ing] any federal cause of action."

Following discovery, DCR and Superintendent Wood filed a motion for summary judgment arguing that they were entitled to summary judgment for various reasons, including qualified immunity.[4] DCR and Superintendent Wood argued that they were entitled to qualified immunity from all of the Newbrough plaintiff's claims because the acts or omissions giving rise

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[2] DCR and Superintendent Wood are represented by Kelly C. Morgan, Esq.; Charles R. Bailey, Esq.; Celeste E. Webb, Esq.; and Adam K. Strider, Esq. The Newbrough plaintiff is represented by Joseph H. Spano Jr., Esq.; and S. Brooks West II, Esq.

[3] DCR is represented by Kelly C. Morgan, Esq.; and Celeste E. Webb, Esq. The Barnhouse plaintiff is represented by Joseph H. Spano Jr., Esq.

[4] Only the circuit court's immunity decision is before this Court for interlocutory review. *See City of Saint Albans v. Botkins*, 228 W. Va. 393, 397, 719 S.E.2d 863, 867 (2011) (limiting this Court's review "to the sole issue of qualified immunity" on appeal of an order denying summary judgment on qualified immunity grounds).

to the claims were discretionary functions, and DCR and Superintendent Wood did not violate any clearly established law. In response, the Newbrough plaintiff claimed that DCR and Superintendent Wood's acts and omissions were in violation of clearly established law, namely, West Virginia Code of State Rules § 95-1-11, the American Correctional Association's Performance-Based Standards for Adult Local Detention Facilities, a Division of Corrections Policy Directive 332.18 regarding screening for risk of sexual victimization and abusiveness, and the Eighth Amendment to the United States Constitution.

On April 12, 2024, the circuit court denied DCR and Superintendent Wood's motion for summary judgment. The court determined that the Newbrough plaintiff's identification of and evidentiary support for finding a violation of West Virginia Code of State Rules § 95-1-11, Division of Corrections Policy 332.18, and the Eighth Amendment's prohibition against cruel and unusual punishment precluded finding that DCR and Superintendent Wood were qualifiedly immune from the Newbrough plaintiff's claims. The court also found that "a genuine dispute clearly exists as to whether it would be clear to a reasonable officer that his conduct as alleged in this case would be otherwise fraudulent, malicious, or oppressive." DCR and Superintendent Wood appeal from the court's order denying their motion for summary judgment.

B. *The Barnhouse Suit* (No. 24-757)

On June 22, 2019, Franklin Barnhouse was arrested for driving under the influence ("DUI"), placed in DCR custody, and housed in Eastern Regional Jail ("ERJ"). After Mr. Barnhouse was placed in his cell, Curtis Wines was arrested and placed into Mr. Barnhouse's cell. Although searched and processed through a body scanner, Mr. Wines managed to conceal heroin and fentanyl in his rectum and smuggle them into the jail. Mr. Barnhouse ingested some of the drugs and was found dead in his cell the following morning of a suspected drug overdose.

The Barnhouse plaintiff filed suit against DCR, its John Doe employees, and Mr. Wines in June 2021, alleging that DCR failed to properly screen Mr. Wines and discover the drugs he secreted into ERJ. The Barnhouse plaintiff asserted six causes of action: negligence; violations of the West Virginia Constitution; intentional infliction of emotional distress; extreme and outrageous conduct; negligent hiring, retention, and supervision; and cruel and unusual punishment under the West Virginia Constitution. Similar to the complaint in the Newbrough suit, the Barnhouse plaintiff disclaimed any cause of action under 42 U.S.C. § 1983 "or any other related federal statute" or otherwise creating "any federal cause of action." Rather, the Barnhouse plaintiff asserted only "a state constitutional tort action" in claiming violations of the West Virginia Constitution.

After discovery, DCR moved for summary judgment on the basis of, among other grounds, qualified immunity.[5] Like its motion in the Newbrough suit, DCR argued that the Barnhouse plaintiff's claims arose from DCR's performance of discretionary functions, which were not in violation of any clearly established law. The Barnhouse plaintiff countered that DCR, in failing

[5] As in the Newbrough suit, only the circuit court's immunity determination is before this Court. *See supra* n.4.

to adequately search for and discover the drugs, violated its own policies, West Virginia Code of State Rules §§ 95-1-11 and 95-1-18, and the Eighth Amendment to the United States Constitution.

The circuit court, by order entered November 25, 2024, granted, in part, and denied, in part, DCR's motion for summary judgment. The court granted DCR summary judgment on the Barnhouse plaintiff's claim that it violated the West Virginia Constitution; however, it denied summary judgment as to the remaining counts. The court found that the Barnhouse plaintiff had identified "several written policies regarding Mr. Barnhouse's placement which carries at least a question of fact sufficient to overcome" DCR's assertion of qualified immunity. DCR now appeals from that order to the extent it denied summary judgment on qualified immunity grounds.[6]

II. Standard of Review

Although an order denying summary judgment is interlocutory and, consequently, not generally appealable, "[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). Therefore, the circuit courts' respective orders are reviewable at this stage, and our review is de novo. Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

III. Discussion

DCR and Superintendent Wood, in the Newbrough suit, and DCR, in the Barnhouse suit, argue that the circuit courts erred in denying their respective motions for summary judgment because the alleged acts and omissions underlying the claims asserted in both lawsuits did not violate any clearly established law, nor were they otherwise fraudulent, malicious, or oppressive.

In determining whether a state agency, such as DCR, and its officials and/or employees are entitled to qualified immunity, we first characterize the nature of the acts or omissions giving rise to the Newbrough suit and the Barnhouse suit. *See* Syl. Pt. 10, in part, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (requiring that "a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit"). Where the acts or omissions involve discretionary functions, the second step requires a reviewing court to

> 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.

A.B., 234 W. Va. at 497, 766 S.E.2d at 756, Syl. Pt. 11, in part.

[6] By order entered September 8, 2026, this Court consolidated the appeals for purposes of oral argument, consideration, and decision.

The Newbrough plaintiff and the Barnhouse plaintiff (collectively, the "Respondent Inmates") do not discuss the first step of our qualified immunity analysis. Instead, they first address whether DCR (and Superintendent Wood, in the Newbrough suit) violated clearly established law, effectively conceding that the acts or omissions giving rise to their respective suits involve discretionary functions.[7] Indeed, we have stated that correctional officers' general functions "are *broadly* characterized as discretionary, requiring the use of his discretionary judgments and decisions." *Id.* at 509, 766 S.E.2d 768. Also, "the broad categories of training, supervision, and employee retention . . . easily fall within the category of 'discretionary' governmental functions." *Id.* at 514, 766 S.E.2d at 773. The challenged actions or inactions underlying both the Newbrough suit and the Barnhouse suit involve the manner in which inmates were classified or their specific housing unit was selected, the manner in which inmates were monitored, the manner in which inmates were searched at intake, and the manner in which employees were trained and supervised—functions that require DCR's, its officials', and its correctional officers' discretionary judgments and decisions. Accordingly, to have withstood summary judgment, the Respondent Inmates were required to demonstrate that the challenged actions or inactions violated "clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive." *Id.* at 497, 766 S.E.2d at 756, Syl. Pt. 11, in part.

Below, the Newbrough plaintiff identified West Virginia Code of State Rules §§ 95-1-11 (repealed Feb. 11, 2019); Division of Corrections Policy Directive 332.18, dated January 1, 2014; and the Eighth Amendment as the clearly established law that DCR and Superintendent Wood violated.[8] Similarly, in the Barnhouse suit, the Barnhouse plaintiff identified West Virginia Code of State Rules §§ 95-1-11 and 95-1-18 (repealed Feb. 11, 2019), a 2016 Regional Jail and Correctional Facility Authority policy regarding inmate placement, and the Eighth Amendment. The identified authority does not constitute clearly established law to defeat DCR's (and Superintendent Wood's) assertion of qualified immunity in either suit.

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[7] In each one of their briefs, large portions of which are verbatim copies of substance, the Inmate Respondents state, "First, the court clearly found that the alleged conduct was not discretionary." There is no citation to the respective appendix record to support that claim, and we find it to be inaccurate. Further, the Inmate Respondents do not offer any argument that DCR's or Superintendent Wood's actions or omissions involved anything other than discretionary functions.

[8] For the first time before this Court, the Newbrough plaintiff argues that DCR also violated West Virginia Code of State Rules § 95-1-12 (repealed Feb. 11, 2019); Policy Directives 305.00 and 129.06, for which the Newbrough plaintiff provides no citation to the appendix record and which do not appear to be included there; and a statute applicable to private prisons, West Virginia Code § 25-5-11. "Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Whitlow v. Bd of Educ. of Kanawha Cnty.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). Consistent with this rule, we decline to address these newly raised arguments.

To begin, the cited regulations, West Virginia Code of State Rules §§ 95-1-11 and -18, were repealed in February 2019, *before* the events giving rise to either the Newbrough suit or the Barnhouse suit. As they were repealed and no longer exist, they were not clearly established rights or laws of which a reasonable person would have known, and the circuit courts erred in denying summary judgment on the basis of repealed regulations.

With respect to the 2014 Division of Corrections Policy Directive and the 2016 Regional Jail and Correctional Facility Authority policy, we have held that "[f]or purposes of qualified immunity, internal agency policies, procedures, manuals, guidelines, or similar documents that have not been legislatively approved are not, and cannot be used to create, clearly established statutory rights or law of which a reasonable person would have known." Syl. Pt. 4, *W. Va. Dep't of Hum. Servs. v. David B. ex rel. J.B.*, 251 W. Va. 217, 911 S.E.2d 884 (2024). Even if these policies had, at one point, been legislatively approved, the policy relied upon by the Newbrough plaintiff below was dated January 1, 2014, and applicable to the West Virginia *Division of Corrections*—an entity abolished in July 2018 that was distinct from the Regional Jail and Correctional Facility Authority, which, before the July 2018 establishment of DCR, oversaw NCRJ. *See* W. Va. Code § 15A-3-2(b). In other words, the 2014 Division of Corrections Policy Directive was simply not applicable to NCRJ. Likewise, in July 2018, the "powers and authority of the Regional Jail and Correctional Facility Authority Board, in relation to all functions of correctional operations," were abolished, *id.* § 15A-8-1(a)(1), and transferred to DCR. *Id.* at § 15A-3-2(c). The 2016 Regional Jail and Correctional Facility Authority policy also was inapplicable to ERJ as a DCR facility. Thus, these expired, inapplicable policies are not clearly established laws for qualified immunity purposes.

In regard to the Eighth Amendment, the Respondent Inmates' respective complaints each contained a cause of action only for violations of the *West Virginia* Constitution, not the United States Constitution. In fact, the Respondent Inmates explicitly disavowed any federal claims, stating plainly that they "clearly and unambiguously ha[d] not created any federal cause of action." As a result, they have waived reliance on the federal Constitution. *See David B. ex rel. J.B.*, 251 W. Va. at 227 n.13, 911 S.E.2d at 894 n.13 ("Plaintiffs in this Court raise several constitutional rights they claim DHS violated and that were clearly established. But, having affirmatively (and, indeed, emphatically) declined in their complaint to rely on the United States Constitution, . . . they have waived these constitutional arguments, and they cannot rely on them in this Court." (citing *Maynard v. Gen. Elec. Co.*, 486 F.2d 538, 539 (4th Cir. 1973) ("[W]e will not consider new causes of action raised for the first time on appeal . . . ."))). The Respondent Inmates, therefore, cannot now raise an Eighth Amendment claim to defeat DCR's (and Superintendent Wood's) assertion of qualified immunity.

Finally, the Newbrough plaintiff also argues that the circuit court properly denied summary judgment to DCR and Superintendent Wood because their acts or omissions were otherwise fraudulent, malicious, or oppressive. Similar to our finding with respect to her assertion of the Eighth Amendment, however, the Newbrough plaintiff has not identified for this Court that she pled a claim of fraudulent, malicious, or oppressive conduct, nor does our review of the Newbrough plaintiff's complaint reveal such a claim. The words "malicious," "fraudulent," or "oppressive" do not appear in the Newbrough plaintiff's complaint, nor do any variations of those words. *See W. Va. Dep't of Health v. Cipoletti*, 250 W. Va. 1, 10 n.13, 902 S.E.2d 133, 142 n.13

(2024) (concluding that the complaint did not sufficiently assert that conduct was fraudulent, malicious, or oppressive to deny qualified immunity under similar circumstances). Furthermore, aside from citing authority holding that there is no immunity for acts or omissions that are fraudulent, malicious, or oppressive, and concluding in summary fashion that a fact finder "could determine [that DCR and Superintendent Wood's acts or omissions] violated clearly established rights or laws of which a reasonable person would have known or were otherwise fraudulent, malicious, or oppressive," the Newbrough plaintiff did not actually argue below that the DCR's or Superintendent Wood's acts or omissions were fraudulent, malicious, or oppressive. Rather, the Newbrough plaintiff's argument centered on the three unavailing sources of authority addressed above.[9] To the extent the circuit court's finding that "a genuine dispute clearly exists as to whether it would be clear to a reasonable officer that his conduct as alleged in this case would be otherwise fraudulent, malicious, or oppressive" was, in fact, a determination that there was evidence in the record to support a finding of fraudulent, malicious, or oppressive conduct itself, that finding was in error. We have cautioned that "[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 174, 786 S.E.2d 188, 193 (2016) (quoting *Johnson v. Killmer*, 219 W. Va. 320, 323, 633 S.E.2d 265, 268 (2006)). In her summary judgment briefing, the Newbrough plaintiff did nothing more than summarily conclude that DCR and Superintendent Wood's acts were, if not in violation of clearly established law, "otherwise fraudulent, malicious, or oppressive." Accordingly—and particularly where the Newbrough plaintiff has not pled a claim of fraudulent, malicious, or oppressive conduct[10]—the court erred in denying DCR and Superintendent Wood summary judgment on this basis.[11]

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[9] Correspondingly, in arguing to this Court that DCR and Superintendent Wood's actions/inactions were fraudulent, malicious, or oppressive, the Newbrough plaintiff does not provide "citations [to the record on appeal] that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal," affording yet another basis for disregarding this argument. W. Va. R. App. P. 10(c)(7).

[10] In *West Virginia Division of Natural Resources v. Dawson*, 242 W. Va. 176, 832 S.E.2d 102 (2019), this Court provided explanation of what must be shown to establish malicious conduct in the qualified immunity context. *See id.* at 190–91, 832 S.E.2d at 116–17. In *David B. ex rel. J.B.*, we set forth what must be shown to avoid summary judgment on a claim of oppressive conduct where the State is asserting qualified immunity. 251 W. Va. at 219, 911 S.E.2d at 887, Syl. Pt. 5. Suffice it to say that the Newbrough plaintiff's mere invocation of the words "fraudulent," "malicious," or "oppressive" was insufficient to meet the requisite elements.

[11] The Newbrough plaintiff also argues that this case "is virtually identical" to *West Virginia Division of Corrections & Rehabilitation v. Taylor*, No. 22-0263, 2023 WL 3196364 (W. Va. May 2, 2023) (memorandum decision), in which this Court affirmed the denial of summary judgment on qualified immunity. The Newbrough plaintiff, however, acknowledges one critical, determinative distinction: "the regulations *Taylor* cited have been repealed" since the *Taylor* decision. Further, "qualified immunity is not a 'one-size-fits-all' proposition," and "nuances and variations within our caselaw" exist due to the "highly fact-specific nature of the

IV. Conclusion

For the foregoing reasons, we reverse the Circuit Court of Kanawha County's April 12, 2024, order denying DCR and Superintendent Wood's motion for summary judgment in the Newbrough suit and remand for entry of an order granting DCR and Superintendent Wood summary judgment on qualified immunity grounds. Further, we reverse the Circuit Court of Kanawha County's November 25, 2024, order granting, in part, and denying, in part, DCR's motion for summary judgment in the Barnhouse suit and remand for entry of an order granting DCR summary judgment on qualified immunity grounds.

Reversed and remanded.

ISSUED: November 12, 2026

CONCURRED IN BY:

Chief Justice C. Haley Bunn
Justice William R. Wooton
Justice Charles S. Trump IV
Justice H. L. Kirkpatrick
Justice James W. Flanigan

qualified immunity analysis." *W. Va. Dep't of Health & Hum. Res. v. Payne*, 231 W. Va. 563, 571 n.17, 746 S.E.2d 554, 562 n.17 (2013).