

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BETTY JARVIS,

Plaintiff,

v.

Civil Action No. 09-C-770
Judge: Zakaib

WEST VIRGINIA STATE POLICE,
D. M. NELSON, A. S. PERDUE, and
C. E. AKERS,

Defendants.

consolidated for purposes of discovery and pleadings with:

WANDA CARNEY,

Plaintiff,

v.

Civil Action No. 09-C-771
Judge: Zakaib

WEST VIRGINIA STATE POLICE,
D. M. NELSON, A. S. PERDUE, and
C. E. AKERS,

Defendants.

ORDER

On June 16, 2009, a hearing was held on the motion to dismiss filed by Defendants West Virginia State Police, D. M. Nelson, A. S. Perdue, and C. E. Akers. Present at the hearing were Lonnie C. Simmons and Robert M. Bastress, III, counsel for Plaintiffs Betty Jarvis and Wanda Carney, and Michael L. Mullins, counsel for Defendants.

After considering the pleadings and argument of counsel, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

In 2004, the West Virginia State Police were conducting a major drug enforcement investigation in the Matewan area of Mingo County. In connection with this investigation, Carla Collins became a cooperative witness for the police. Collins was introduced to law enforcement by George Lecco. Lecco owned a restaurant where law enforcement officers had recovered drugs and money assumed to have been procured through the sale of drugs. Lecco was not arrested, initially, but instead was being used by law enforcement officers to try to build a case against his drug supplier. Lecco continued to deal drugs.

Collins disappeared in April 2005. Simultaneous with her disappearance an abandoned trailer burned to the ground in a rural area. Law enforcement officers suspected that Collins had been murdered at or around the trailer but could not initially locate her body or develop hard evidence establishing that she had been killed. On June 17, 2005, her body was located near the trailer by Defendants herein. Through the ensuing investigation into the death, law enforcement officers developed evidence that Valerie Friend murdered Ms. Collins at the direction of Lecco.¹ Carmella Blankenship and Patricia Burton were present during the murder. Charles Burton was eventually convicted of burning evidence related to the murder. Walter Harmon was convicted eventually convicted of burning the trailer, destroying evidence and digging a grave for Collins' dead body.

Walter Harmon was represented by Attorney Michael Clifford. Mr. Clifford retained Wanda Carney as an investigator. Betty Jarvis, the aunt of Walter Harmon and a relative to several of the other suspects, offered to assist Mr. Clifford and Ms. Carney in their investigation.

¹ Friend and Lecco were convicted of capital murder by a federal jury. The convictions were recently set aside and presently they await a new trial.

As part of Ms. Carney's investigation on Harmon's behalf, Carney spoke to Carmella Blankenship and Valerie Friend. Both women told Carney that Harmon was not present at the murder of Ms. Collins. Carney alleges that during her investigation she learned that law enforcement officers were allegedly involved in drug trafficking and that Defendant Trooper Nelson purportedly had sexual relations with the murder victim. In her civil complaint she alleges that she felt compelled to explore those rumors.

While Friend was in jail as a murder suspect, Charles Burton, who at the time had not been arrested for his role in burning Collins' clothes after her murder, was asked by Jarvis and Patricia Jablensky to allow them into a house that he was renting to Friend.² The house had not been searched by the law enforcement and the defendants herein did not believe that they had probable cause to search Friend's house. Accordingly, law enforcement officers had not restricted access to Friend's house.³ Upon arrival at the home, Plaintiffs assert that the front door lock had been damaged and Burton entered through a window to allow Jarvis and Jablensky into the home. While they were inside, Carney sat outside of the home in a car with a private investigator. Jarvis admits that she removed a Bible, two pieces of paper that had been printed off the internet, two cameras, and two film canisters. Law enforcement officers believe that the items removed included a map to a key piece of evidence in the case. Jarvis and Carney deny the same. Law enforcement officers also believe that on the night of Collins' murder pictures were taken and speculate that the film and cameras may have had evidentiary value if properly seized and preserved. The items Jarvis took out of the home were eventually turned over to the United States' Attorney. When produced to the U.S. Attorney, the film and cameras contained no

² Jablensky cut a deal with the Prosecutor to testify against Carney and Jarvis.

³ Plaintiffs believe that others had entered the home prior to their arrival and removed items as well. This was brought to law enforcement officer's attention by Plaintiffs during the course of the criminal investigation which followed. This allegation was not confirmed.

useable pictures. Friend did not give Jarvis permission to enter the home and asked that she be arrested.

Carmella Blankenship, who was present during the murder and cooperating with law-enforcement officers, was allegedly temporarily relocated from Mingo County to Kanawha County by Plaintiffs Jarvis and Carney.⁴ Law enforcement officers believe that she was relocated during a key time period in which the case was about to be solved. She eventually provided additional information and was a key witness in the murder investigation. There was no evidence adduced at trial that the temporary removal of Blankenship was for the purpose of preventing her from speaking to the police. Blankenship did in fact meet with law enforcement officers upon her return to Mingo County several days later.

A cooperating witness, Alola Boseman, advised law enforcement officers that Carney told her she might be killed by the police; that Defendant Troopers Nelson, Perdue and Akers had been sexually intimate with Collins, and that, consequently, Defendant Troopers Nelson, Perdue and Akers were involved in attempting to cover up Collins' murder; and that Defendant Trooper Nelson had impregnated Collins. Carney denies Boseman's allegations. Ms. Boseman further advised law enforcement officers that Plaintiff Jarvis had indicated that Defendant Trooper Nelson was trying to cover up some of the facts of the Collins' murder because he was sexually involved with the victim; that Jarvis had taken Blankenship into her home to protect Blankenship from the police; and, that Jarvis offered to similarly allow Boseman to stay with her in her home. Boseman did not take Jarvis up on this alleged offer. Jarvis denies these

⁴ The record is unclear as to where Ms. Blankenship was located upon going to Kanawha County, but the Defendant Officers believed at the pertinent time, and continue to believe, that she stayed at Jarvis' home.

allegations. Law enforcement officers testified at the criminal trial that they believed that Carney and Jarvis' alleged actions interfered with their investigation.

West Virginia State Police Sgt. J.C. Dotson, who is not a party to this case, completed a Report of Criminal Investigation regarding the alleged breaking and entering. Arrest warrants were issued charging Jarvis with burglary, conspiracy to burglary, petit larceny and petit larceny for the entry into the home and removal of the items set forth above. Carney's arrest warrant was for assessor for burglary, conspiracy to burglary, petit larceny and conspiracy to petit larceny.

Thereafter, the grand jury indicted both Plaintiffs were charged with obstruction and conspiracy to obstruct a police officer. These charges were presented to a grand jury and true bills were returned. Plaintiffs moved to dismiss the criminal charges before trial arguing, in part, that they were merely exercising their First Amendment Rights. The Mingo County Circuit Court denied this Motion. Plaintiffs similarly moved at the close of the State's evidence and that Motion was denied as well. Plaintiffs were convicted of both charges by a jury. Plaintiffs filed post trial Motions alleging, in part, that they were merely exercising their First Amendment Rights. That Motion was denied as well. Plaintiffs' convictions were overturned by the West Virginia Supreme Court of Appeals in a unanimous *per curium* opinion.

Plaintiffs filed the instant lawsuit alleging that they were wrongfully arrested, prosecuted and convicted in retaliation for their First Amendment actions. Defendants were witnesses at their criminal trial. In their complaint, Plaintiffs allege that throughout discovery in the criminal case, at various times, comments were made by Defendants or the Prosecutor regarding Carney's connection to West Virginia Wants to Know and that Plaintiffs were in Mingo County to make

trouble for the police and public officials there. Plaintiffs further allege that in their joint criminal trial, a significant part of the State's theory was based upon questions Plaintiffs asked various witnesses and the discussions they had with witnesses of the various rumors going around Mingo County. Defendants dispute these allegations.

Conclusions of Law

Defendants have moved to dismiss the complaints filed by Plaintiffs on the following grounds:

1. Plaintiffs have failed to state a cognizable constitutional tort claim for wrongful prosecution;
2. Defendants cannot be held liable under the doctrine of qualified immunity; and
3. Plaintiffs have no cognizable claim for negligence.

The Court has determined, based upon the applicable standard of review for a motion to dismiss and the lack of factual development at this early stage in the litigation, Defendants' motion to dismiss is denied on all grounds asserted.

A. Plaintiffs have asserted a viable state constitutional tort action

Plaintiffs allege Defendants violated their free speech rights, in violation of the West Virginia and United States Constitutions, by criminalizing, through the underlying prosecution, their protected speech. This Court can find no law which is directly on point establishing what law it is to follow on Plaintiffs' claims. This Court finds that historically, in employment cases, where a plaintiff asserts he or she suffered some adverse consequence for exercising free speech rights, the West Virginia Supreme Court has followed the burden-shifting formula outlined in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20

L.Ed.2d 811 (1968). This procedure is designed to protect the significant constitutional right at stake while, at the same time, recognizing there may be important governmental interests, which occasionally may require a constitutional rights claim to be defeated.

For example, in Syllabus Point 3 of *McClung v. Marion County Commission*, 178 W.Va. 444, 360 S.E.2d 221 (1987), the West Virginia Supreme Court outlined the elements of a wrongful discharge action, based upon an alleged violation of constitutional rights:

In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct.

See also Syllabus Points 4, 5, and 6, *Alderman v. Pocahontas County Board of Education*, 675 S.E.2d 907 (2009); *Neely v. Mangum*, 183 W.Va. 393, 396 S.E.2d 160 (1990); *Freeman v. Poling*, 175 W.Va. 814, 338 S.E.2d 415 (1985); Syllabus Points 3 and 4, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996).

Thus, as applied in this case, under *Mt. Healthy*, to establish a criminal prosecution in violation of Plaintiffs' free speech rights, Plaintiffs will be required to prove the following, by a preponderance of the evidence:

1. Plaintiffs exercised her constitutionally protected free speech rights;
2. A substantial or motivating factor for Defendants to pursue the criminal prosecution of Plaintiffs was based upon Plaintiffs' exercise of her free speech rights; and
3. As a proximate cause of Defendants' actions, Plaintiffs suffered damages.

To defend against this claim, Defendants may attempt to show Plaintiffs would have been prosecuted in the absence of the alleged protected conduct. Applying this standard, this Court cannot dismiss this action at this stage. Defendants argue Plaintiffs should be required to prove an additional element—the lack of probable cause for the arrest and prosecution. In support of their argument, Defendants rely upon several different malicious prosecution cases as well as the United States Supreme Court decision in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006).

Plaintiffs agree that in a malicious prosecution action, the plaintiff must prove there was no probable cause for the prosecution. Syllabus Point 3, *McCammon v. Oldaker*, 205 W.Va. 24, 516 S.E.2d 38 (1999). Defendants' position that the findings of the grand jury, the pretrial rulings of the criminal court, the conviction and the post trial rulings of the criminal court conclusively establish probable cause is well founded. See Syllabus Pt. 2, in part, *Boxer v. Slack*, 124 W.Va. 149, 19 S.E.2d 606 (1942) and Syl. Pt. 2, *Hoffman v. Hastings*, 116 W.Va. 151, 178 S.E. 812(1935). However, in the present case, Plaintiffs have not asserted a malicious prosecution action. Instead, Plaintiffs have alleged a state constitutional claim alleging their arrest and conviction was in retaliation for exercising their First Amendment rights. Therefore, this Court decides that Defendants' reliance on these decisions in the present case is misplaced.

Prior to the *Hartman* decision by the United States Supreme Court, there was a split amongst the circuits as to the elements of a retaliatory prosecution claim, filed pursuant either to 42 U.S.C. §1983 or *Bivens*,⁵ where a plaintiff claims he was criminally prosecuted in retaliation for the plaintiff exercising his free speech rights. Most of these cases involve a person, who has

⁵In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the United States Supreme Court held that a constitutional tort claim could be asserted against federal officials, who otherwise could not be held liable under 42 U.S.C. §1983.

criticized some agency or issue, and subsequently is criminally prosecuted by the target of such criticism.

Some courts, following the *Mt. Healthy* line of cases, held the plaintiff did not have to prove a complete lack of any probable cause for the arrest or prosecution. *See, e.g., Poole v. County of Otero*, 271 F.3d 955 (10th Cir. 2001); *Haynesworth v. Miller*, 820 F.2d 1245 (D.C.Cir. 1987). Other courts held a plaintiff's First Amendment retaliatory prosecution claim is defeated where there was probable cause for the prosecution. *See, e.g., Wood v. Kesler*, 323 F.3d 872 (11th Cir. 2003); *Keenan v. Tejada*, 290 F.3d 252 (5th Cir. 2002); *Mozzochi v. Borden*, 959 F.2d 1174 (2nd Cir. 1992).

In *Hartman*, the United States Supreme Court sought to address this split of authority as it relates to actions filed either under 42 U.S.C. §1983 or a *Bivens* claim alleging retaliatory or wrongful prosecution based upon an statements purportedly made under the First Amendment. Factually, *Hartman* involved a plaintiff, who owned a business which manufactured a multiline optical character reader that could be used in sorting mail. This plaintiff publicly criticized some of the plans by the United States Postal Service to use a single-line reader. Eventually, the Postal Service decided to switch to multi-line readers, but chose to give its contracts to companies other than this plaintiff. This plaintiff and his company later were criminally prosecuted, at the urging of several postal inspectors, but the criminal case was dismissed after a six week trial for a complete lack of evidence. The United States Supreme Court held in retaliatory prosecution cases filed pursuant either to *Bivens* or 42 U.S.C. §1983, the plaintiff does have to prove a complete lack of probable cause for the prosecution. This holding was not dictated by any legislative history, but rather was a policy decision made by a majority of that Court.

This Court finds that Hartman has never been relied upon or cited by the West Virginia Supreme Court and is not controlling authority in this state constitutional tort action. Furthermore, another factual distinction between *Hartman* and the present case is in *Hartman*, the plaintiffs alleged the defendants had retaliated against them based upon comments they had made by pursuing criminal charges against them whereas in the present case, Plaintiffs allege Defendants attempted to criminalize their protected speech. This Court finds that it should follow the *Mt. Healthy* burden-shifting model in cases involving alleged violations of constitutional and civil rights, consistent with the West Virginia Supreme Court's approach in the employment setting. Applying this burden-shifting approach in the present case is more protective of a person's constitutional rights, whereas under *Hartman*, the claim is defeated completely, regardless of the constitutional violation; if it can be shown there was any probable cause for the prosecution. Since the West Virginia Supreme Court consistently has followed the *Mt. Healthy* line of cases in employment actions alleging retaliatory discharge, and has never addressed what law to apply to a case such as the instant one and has not addressed whether or not it will follow the holding in *Hartman*, the Court determines that Plaintiffs do not need to establish a lack of probable cause to proceed and that, therefore, Defendants' Motion to Dismiss is DENIED.

B. The individual defendants are not entitled to qualified immunity

Defendants first assert they are entitled to be dismissed under the doctrine of qualified immunity from the state constitutional tort action. Qualified immunity requires the application of an objective test, as described by the West Virginia Supreme Court in the Syllabus of *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992):

A public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va.

Code, 29-12A-1, et seq., is entitled to qualified immunity from personal liability for official acts **if the involved conduct did not violate clearly established laws of which a reasonable official would have known.** There is no immunity for an executive official whose acts are fraudulent, malicious or otherwise oppressive. To the extent that *State ex rel. Boone National Bank of Madison v. Manns*, 126 W.va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled. (Emphasis added).

In *Chase Securities*, 188 W.Va. at 364, 424 S.E.2d at 599, the West Virginia Supreme Court also concluded the previous distinction between a ministerial or a discretionary duty was “highly difficult and arbitrary to apply,” and, in any event, with this objective test adopted, “this distinction is not needed in order to apply the general qualified immunity standard developed in *Harlow*.”

This objective test is based upon the qualified immunity test established by the United States Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In *Safford Unified School District #1 v. Redding*, ___ U.S. ___, ___, slip op. at 11 (No. 08-479, 6/25/09), the United States Supreme Court repeated what is meant by clearly established law:

To be clearly established, however, there is no need that “the very action in question [have] previously been held unlawful.” *Wilson v. Layne*, 526 U.S. 603, 615 (1999). The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that “[t]he easiest cases don’t even arise.” *K. H. v. Morgan*, 914 F.2d 846, 851 (CA7 1990). But even as to action less than an outrage, “officials can still be on notice that their conduct violates established law...in novel factual circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

To “clarify” matters even more, the United States Supreme Court in *Safford*, ___ U.S. at ___, slip op. at 12, which granted the individual defendants qualified immunity for the strip search of a thirteen year old girl suspected of having Advil on her person while at school, explained, “We would not suggest that entitlement to qualified immunity is the guaranteed

product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in our prior statement of law.” Thus, there can be clearly established law, even where the courts addressing a particular issue are not in agreement as to what the law actually is.

As applied in the present case, this Court must determine whether there existed at the time these individual Defendants allegedly had Plaintiffs criminally prosecuted in violation of their constitutionally protected free speech rights clearly established law that such actions constituted a violation of Plaintiffs’ federal and State constitutional rights to be free speech?

In *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), the United States Supreme Court was asked to address whether an obstructing a police officer ordinance could criminalize the actions of an individual, who merely questioned what the police officer was doing. The United States Supreme Court concluded the First Amendment protected the right of all citizens to question the police, in an appropriate manner. “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” 482 U.S. at 462-63, 107 S.Ct. at 2510, 96 L.Ed.2d at 412-13.

The West Virginia Supreme Court faced a similar case involving a person charged with violating W.Va. Code §61-5-17, when he questioned a police officer for pulling traffic offenders off of the road and into the entrance of the Parkersburg Mall, which was owned by this individual. In *State ex rel. Wilmoth v. Gustke*, 179 W.Va. 771, 373 S.E.2d 484 (1988), this

defendant was convicted of obstructing a police officer in magistrate court, based upon these actions, and filed a petition for a writ of prohibition to stop the trial in circuit court.

In prohibiting the scheduled circuit court trial, the West Virginia Supreme Court held in the Syllabus:

A person upon witnessing a police officer issuing a traffic citation to a third party on the person's property, who asks the officer, without the use of fighting or insulting words or other opprobrious language and without forcible or other illegal hindrance, to leave the premises, does not violate *W.Va. Code* 61-5-17 [1931], because that person has not illegally hindered an officer of this State in the lawful exercise of his or her duty. To hold otherwise would create first amendment implications which may violate the person's right to freedom of speech. *U.S. Const.* amend. I; *W.Va. Const.* art. III, §7.

Since constitutionally protected activity is, by definition, **legal** activity, such activity cannot be the basis for an obstructing a police officer charge.

In reversing Plaintiffs' criminal convictions in the present case, the West Virginia Supreme Court cited *City of Houston* in *Wilmoth* for the proposition that constitutionally protected free speech cannot be criminalized under this State's obstructing a police officer statute, *W.Va. Code* §61-5-17. Defendants do not dispute that *City of Houston* and *Wilmoth* clearly established that constitutionally protected speech cannot be criminalized, but instead dispute that Plaintiffs were prosecuted for engaging in protected speech. Defendants further contend that Plaintiffs are required to prove a lack of probable cause, under *Hartman*, and since there is no dispute Plaintiffs were arrested with probable cause, the individual Defendants are entitled to qualified immunity. However, since the Court already has rejected the *Hartman* analysis, the Court concludes the individual Defendants are not entitled to qualified immunity.

Defendants believe that qualified immunity is broader than Plaintiffs and the Court. Defendants note that to strip them of qualified immunity Plaintiff must show that Defendants

violated clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed. 2d 396(1982). “Officials are not liable for bad guesses in gray areas of the law” and are only liable when they transgress bright lines. *Marciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Defendants rely upon the prosecutors decision to levy charges; the grand jury’s decision that the charges were just; the criminal court’s pretrial decision that the charges did not violate Plaintiffs’ First Amendment rights; the jury’s conviction; the Circuit Court’s refusal to reverse the jury’s decision based on allegations that the convictions were in contravention to the First Amendment to establish that, at the time, there was no clear law establishing that Plaintiffs could not be arrested for their conduct. Defendants also believe that because this state has not spoken as to what law applies in the instant civil action they were left with no clear guideposts. Finally, Defendants note that if this Court were to apply *Hartman*, as the United States Supreme Court would in the instant matter, probable cause existed for Plaintiff’s arrest thereby creating, at best, confusion as to whether these Defendants’ conduct was constitutional. Defendants believe that these factors place their conduct squarely within a gray area of the law and entitle them qualified immunity. However, because this Court finds this case is governed by the *Mt. Healthy* analysis, rather than *Hartman*, this Court rejects all of Defendants’ argument on this point.

C. The State Police are not entitled to qualified immunity

Defendants believe that if the individual officers are entitled to qualified immunity that their state agency employer should be entitled to qualified immunity as well. Plaintiffs believe that qualified immunity is only available to the individual defendants and not to their employer because qualified immunity under federal law is limited to individual defendants and the West Virginia Supreme Court repeatedly has held West Virginia’s law on qualified immunity should

follow federal law. This Court notes decisions by the West Virginia Supreme Court on this issue have not been very clear or consistent.

The West Virginia Supreme Court of Appeals has held that “the immunity of [the state agency] is coterminous with the qualified immunity of [the individual defendant] whose acts or omissions give rise to the case.” Syl. Pt. 9, in part, *Parkulo v. West Virginia Bd. Of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996), *see also*, *Clark v. Dunn* 195 W.Va. 272, 278-79, 465 S.E.2d 374, 380-81 (1995). However, in *Chase Securities*, this Court noted that this State should attempt to follow the federal law when applying qualified immunity. As explained in *Chase Securities*, one reason for having a uniform approach to immunity law stems from the fact that federal law is controlling when public officials are sued in state court for violations of federal rights under 42 U.S.C. 1983. *See also Robinson v. Pack*, ___ W.Va. ___, ___ S.E.2d ___ (No. 34340, 6/18/2009).

Under federal law, this Court finds that qualified immunity is only applicable to individuals and not to the State. *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (4th Circ. 2006); *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). This Court finds that the approach of the federal system is more persuasive and accordingly rules that even if the individual defendants were entitled to qualified immunity, the State is not entitled to qualified immunity. Accordingly, the West Virginia State Police’s Motion to Dismiss is denied.

Unquestionably, there is much confusion in the federal and state case law on qualified immunity. For example, as explained above, the United States Supreme Court adopted the objective test for qualified immunity in *Harlow* and this same objective test was adopted by the

West Virginia Supreme Court in *Chase Securities*. However, in *Harlow*, the United States Supreme Court discusses its previous holding in *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), where qualified immunity was analyzed with both an objective and subjective test, but does not explicitly overrule *Gomez*. Similarly, when the West Virginia Supreme Court adopted the objective test in *Chase Securities*, it cites and discusses *Martin v. Mullins*, 170 W.Va. 358, 294 S.E.2d 161 (1982), where the West Virginia Supreme Court adopted the objective and subjective test for qualified immunity. Again, at no point in *Chase Securities* does the West Virginia Supreme Court reconcile these conflicting holdings nor does *Chase Securities* explicitly or implicitly overrule *Martin*. The inherent confusion in the law has made it more challenging for trial court, lawyers, and public officials to have any certainty as to when qualified immunity actually should be applied to avoid further litigation.

E. Defendants are not immune from Plaintiffs' simple negligence claim

Defendants next argue they are entitled to qualified immunity on Plaintiffs' negligence claims. In support of that position, Defendants rely upon Syllabus Point 6 of *Clark* which states that

In the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va.Code § 29-12A-1, *et seq.*, and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.

Plaintiffs do not contest that the insurance policy in question does not waive qualified immunity. Once again, to the extent *Clark* can be read to apply qualified immunity to a negligence claim,

that reliance is misplaced. To determine if a defendant in his individual capacity is entitled to qualified immunity, “courts are required to resolve a threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.” *Scott v. Harris*, ___ U.S. ___, ___, 127 S.Ct. 1769, 1774, 167 L.Ed.2d 686 (2007), quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, ___ (2001). Under this test, only if the court “finds a violation of a constitutional right” does the court proceed to the next step, “whether the right was clearly established...in light of the specific context of the case.” *Id.* quoting *Saucier*, 522 U.S. at 201, 121 S.Ct. at 2156, 150 L.Ed.2d at ___. Therefore, qualified immunity is not a defense to a claim of negligence.

There is legitimate confusion, once again, on this issue because the West Virginia Supreme Court has issued at least three decisions—*Chase Securities*, *Clark*, and *Yoak v. Marshall University Board of Governors*, W.Va. , 672 S.E.2d 191 (2008)—where it appears qualified immunity was applied to individual defendants where no constitutional rights violations were alleged. For example, in *Chase Securities*, after citing several federal cases, all of which involved alleged violations of constitutional rights, the West Virginia Supreme Court adopted a Syllabus, cited above, which does not explicitly limit qualified immunity to constitutional violations. Had the West Virginia Supreme Court actually relied on §1983 decisions, it would have realized qualified immunity **only** applies to violations of constitutional rights. Unfortunately, this error initially committed in *Chase* was repeated in *Clark* and *Yoak*.

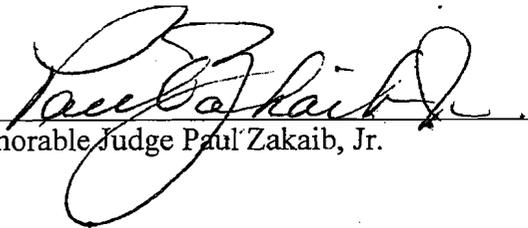
Regardless of this error, the individual Defendants still are not entitled to qualified immunity on the negligence claim. Negligence is based upon the basic concepts of duty, breach of that duty, and such breach as a proximate cause of the injury. How could any court ever

conclude that the general concepts of negligence do not constitute clearly established law? Is the concept of negligence so novel that Defendants or any other reasonable official could not have known about it? Therefore, the Court holds specifically that qualified immunity is not available as a defense to Defendants in response to Plaintiffs' negligence claims.

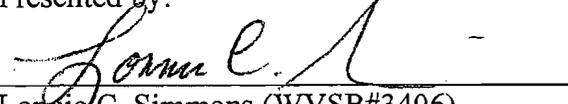
Conclusion

For the reasons set forth herein, Defendants' Motion to Dismiss is DENIED. The Objections and Exceptions of Defendants are noted. The Clerk is further ORDERED to mail a certified copy of this Order to all counsel of record.

ENTERED this 4th day of Aug, 2009.
per


Honorable Judge Paul Zakaib, Jr.

Presented by:


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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 6
DAY OF October, 2009
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA *clerk*

Inspected By:


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Date: 8/6/09
Certified copies sent to:
 counsel of record
 parties
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By: M. Mullins
 certified 1st class mail
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City Directives accomplished.
Chandler
Deputy Circuit Clerk