

No. 35496

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

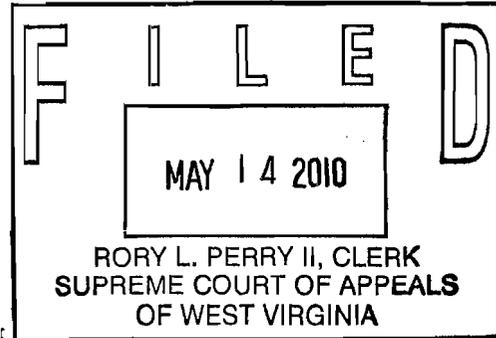
**FRENCHIE HESS, JR.,**

**Plaintiff / Appellee,**

v.

**WEST VIRGINIA DIVISION OF CORRECTIONS,**

**Defendant / Appellant.**



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From the Circuit Court of Kanawha County  
The Honorable Louis H. Bloom  
Civil Action No. 09-C-18

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**THE WEST VIRGINIA DIVISION OF CORRECTIONS' BRIEF IN SUPPORT OF ITS  
APPEAL OF THE CIRCUIT COURT'S DENIAL OF THE WVDOC'S MOTION TO  
DISMISS MR. HESS' COMPLAINT**

Submitted by:  
Dwayne E. Cyrus (WVSB # 5160)  
Jason Wandling (WVSB # 9259)  
Shuman, McCuskey & Slicer, P.L.L.C.  
P. O. Box 3953  
Charleston, WV 25339-3953  
304-345-1400

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## STATEMENT OF THE CASE

This is an interlocutory appeal from Judge Louis H. Bloom's April 30, 2009 Order denying the West Virginia Division of Corrections' Motion to Dismiss the Plaintiff's Complaint because it failed to state a claim upon which relief can be granted pursuant to West Virginia Rule of Civil asserted that (1) the WVDOC is entitled to qualified immunity from Mr. Hess' negligence claims and (2) Mr. Hess failed to pursue administrative remedies required by the West Virginia Prisoner Litigation Reform Act, codified at West Virginia Code § 25-1A-2.<sup>1</sup>

Frenchie Hess, Jr. filed his Complaint on January 6, 2009. He alleged he was incarcerated at Stevens Correctional Center (SCC") in McDowell County, West Virginia. Pursuant to a contract between WVDOC and the McDowell County Commission, which owns SCC, inmates such as Hess are confined at SCC under the custody and control of servants, agents and employees of the McDowell County Commission. *See*, Complaint, Para. 4-6. The Complaint alleges that, "on or about mid-January 2007, Hess slipped and fell on stagnate [sic] water that had collected near the shower facilities. Upon information and belief, several complaints had been made about the stagnate [sic] water." *Id.* at Para. 12. Hess alleges that he was "left injured and unattended in stagnate water for several minutes," and his injury was compounded by the fact that he contracted a "bacterial infection" caused by the water in the shower. *Id.* at Para. 13-15. He alleges that the infection caused "various significant and permanent injuries" without specifying the nature of same. *Id.* at Para. 16.

The Complaint sounds in negligence against WVDOC by claiming, "Hess's injury and

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<sup>1</sup>At oral argument, the WVDOC waived its arguments regarding the requirement of pre-suit notice pursuant to West Virginia Code § 55-17-3. Pre-suit notification is not at issue in this Petition for Appeal.

bacterial infection was [sic] a direct and proximate result of the negligence of WVDOC.” *Id.* at Para.

17. Specifically, the Complaint alleges that WVDOC was negligent in the following ways:

a. Failing to ensure that Stevens Correctional Center had the appropriate number of officers for the size of the prison population;

b. Failing to ensure that Stevens Correctional Center had adequate means to ensure the safety of prisoners; and

c. Failing to ensure that Stevens Correctional Center took proper steps to remedy unsafe conditions.

(*Id.* at Para. 18.)

The WVDOC responded to Plaintiff’s Complaint by filing a Motion to Dismiss pursuant to West Virginia Rule of Civil Procedure 12(b)(6). The Motion and Memorandum of Law in Support advanced three arguments: First, the WVDOC is entitled to qualified immunity from Mr. Hess’s sole claim of negligence. Second, the WVDOC argued that Mr. Hess failed to provide the required pre-suit notice pursuant to West Virginia Code § 55-17-3. Third, the WVDOC argued that Mr. Hess failed to pursue administrative remedies required by the West Virginia Prisoner Litigation Reform Act.

The circuit court turned aside the WVDOC’s arguments and held, “that, after due and mature consideration of the memoranda filed in this matter, the Court is of the opinion that the issues in the WVDOC’s Motion to Dismiss on qualified immunity and exhaustion of remedies are better left to the summary judgment stage of the case under West Virginia Rule of Civil Procedure 56, and therefore, deferred a ruling on same.” *See*, Order at 1.

#### **ASSIGNMENTS OF ERROR**

1. The circuit court erred when it denied the WVDOC's motion to dismiss because the WVDOC is entitled to qualified immunity as a matter of law.
2. The circuit court erred when it denied the WVDOC's motion to dismiss because the WVDOC is entitled to dismissal of the plaintiff's suit as a matter of law because the suit was filed in violation of the West Virginia Prisoner Litigation Reform Act, codified at West Virginia Code § 25-1A-2.

### **ARGUMENT AND LEGAL AUTHORITIES**

**A. The standard of review regarding the circuit court's order is *de novo*.**

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." *Gallapoo v. Wal-Mart Stores, Inc.*, Syl. Pt. 1, 197 W.Va. 172, 475 S.E.2d 172 (1996).

**B. The circuit court erred when it denied the WVDOC's motion to dismiss because the WVDOC is entitled to qualified immunity as a matter of law.**

The circuit court erred when it denied the WVDOC's Motion to Dismiss because the WVDOC is, as a matter of law, entitled to dismissal pursuant to the common-law doctrine of qualified immunity.

Qualified immunity is designed to protect state agencies and its public officials from the threat of litigation resulting from administrative, discretionary decisions made in the course of their employment. *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). The West Virginia Supreme Court has firmly held 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.<sup>2</sup>

Syl. Pt. 6. (emphasis added). In order to sustain a viable claim against a state agency sufficient to overcome this immunity, it must be established that the agency knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. *Parkulo v. W. Va. Bd. of Probation*, 199 W.Va. 161, 483 S.E.2d 507 (W.Va. 1996). In other words, the state, its agencies, officials, and employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they do not violate any known law or act with malice or bad faith. *Id.* Syl. Pt. 8.

The common law doctrine of qualified immunity was scrutinized in detail by this Court in *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (W.Va. 1992). In *Chase*, West Virginia brought suit against Chase Securities, Inc. (“Chase”), a brokerage firm, to recover damages for losses sustained by the Consolidated Fund. *Id.* 424 S.E.2d at 592. Chase filed a third-party complaint against the State Board of Investments, alleging that Board members’ approval of certain large transactions which resulted in financial losses to the State rendered Board members liable. *Id.* The Circuit Court of Kanawha County dismissed Chase’s third-party complaint against the Board on the ground that the Board was immune from suit. *Id.* Chase appealed. *Id.* This Court upheld the Board’s dismissal from the suit, finding that members of the Board were entitled to qualified

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<sup>2</sup> The WVDOC is a state agency, and therefore, not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act. Specifically, West Virginia Code § 29-12A-3 (1986) defines “State” as used in the Act as:

(e) “State” means the state of West Virginia, including, but not limited to, the Legislature, the supreme court of appeals, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges, and universities, institutions, and other instrumentalities of the state of West Virginia. “State” does not include political subdivisions.

immunity for the discretionary decisions they made regarding investments. *Id.* at 597. This Court relied upon federal courts' discussions of the purposes of qualified immunity and commented that qualified immunity is designed to "insulate the decision making process from the harassment of prospective litigation." *Id.* at 596. "The provision of immunity rests on the view that the threat of liability will make federal officials timid in carrying out their official duties, and that effective government will be promoted if officials are freed from the costs of vexatious and often frivolous damages suits." *Id.* at 596, quoting *Westfall v. Erwin*, 484 U.S. 292, 295 (1988).

Importantly, "[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all." *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649, 658 (1996). Indeed, "[t]he very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case." *Id.* (citing *Swint v. Chambers Co. Comm.*, 514 U.S. 35 (1995) (parallel citations omitted)). In *Hutchison*, this Court held:

An assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune – a trial – will, absent a pretrial ruling, occur and cannot be remedied by a later appeal. On the other hand, the trial judge must understand that a grant of summary judgment based upon immunity does not lead to a loss of right that cannot be corrected on appeal.

*Id.* at FN 13. Similarly, the United States Supreme Court held "[t]he privilege of immunity from suit is an immunity rather than a mere defense to liability; and like absolute immunity it is effectively lost if a case is erroneously permitted to go to trial. *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

Accordingly, unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles for tort liability for

acts or omissions in the exercise of a legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy. Syl. pt. 6, *Parkulo, supra*. The common-law immunity of the state in suits brought with respect to judicial, legislative, and executive or administrative policy-making acts and omissions is absolute and extends to judicial, legislative, and executive or administrative officials when performing those functions.

*Id.*

*Chase* adopted the test used by federal courts to determine the applicability of the qualified immunity for the acts of public officials. Specifically, this Court employed the standard developed by the United States Supreme Court in *Harlow v. Fitzgerald*, holding that “government officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Chase* at 597 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982)).

In this instance, Mr. Hess’ Complaint is barred pursuant to *State v. Chase Securities, Inc.* and its progeny because it is premised upon alleged negligence of WVDOC in performing administrative, discretionary acts. The Complaint specifically alleges that WVDOC was negligent in : “a. Failing to ensure that Stevens Correctional Center had the appropriate number of officers for the size of the prison population; b. Failing to ensure that Stevens Correctional Center had adequate means to ensure the safety of prisoners; and c. Failing to ensure that Stevens Correctional Center took proper steps to remedy unsafe conditions. *See*, Complaint at Para. 18. All of the alleged “failings” by WVDOC are administrative, discretionary decisions with regard to housing of offenders.

Moreover, Mr. Hess’ Complaint sounds purely in negligence, and there is no allegation that WVDOC violated any “clearly established statutory or constitutional rights of which a reasonable

person would have known,” nor is there any allegation that WVDOC’s acts were fraudulent, malicious or otherwise oppressive. *Chase* at 597 (citing *Harlow*, 457 U.S. 800, 812 (1982)).

Finally, the applicable insurance policy does not waive or alter the qualified immunity. The policy of insurance is attached hereto as Exhibit One. Specifically, the Certificate of Liability Insurance to the policy expressly states that “the additional insured [Division of Corrections] does not waive any statutory or common law immunities conferred upon it.”

Clearly, the applicable insurance policy does not waive WVDOC’s qualified immunity, and WVDOC is immune from liability in this case. Accordingly, WVDOC respectfully requests that this Court reverse the circuit court’s denial of the WVDOC’s Motion to Dismiss.

**C. The circuit court erred when it denied the WVDOC’s motion to dismiss because the WVDOC is entitled to dismissal of the plaintiff’s suit as a matter of law because the suit was filed in violation of the West Virginia Prisoner Litigation Reform Act, codified at West Virginia Code § 25-1A-2.**

The circuit court erred when it denied the WVDOC’s Motion to Dismiss because the WVDOC is, as a matter of law, entitled to a dismissal pursuant to the West Virginia Prisoner Litigation Reform Act.

West Virginia Code § 25-1A-2, titled “Mandatory Exhaustion of Administrative Remedies,” provides in relevant part: “An inmate *may not* bring a civil action until the administrative remedies promulgated by the facility have been exhausted . . .” W. Va. Code § 25-1A-2A (emphasis supplied).

There is no evidence of any kind whatsoever that the Plaintiff ever contemplated, attempted or complied with this statutory requirement. Instead, the Plaintiff ignored West Virginia Code § 25-1A-2 and simply proceeded to file the subject lawsuit, thereby depriving the Defendant of the

universally recognized tradition of attempting to resolve a matter administratively before that matter results in litigation in the courts.

As recently as 2004, this Court emphasized the importance of exhaustion of administrative remedies before the filing of a lawsuit in its opinion in *State ex rel Fields v. McBride*, 609 S.E.2d 884, 216 W.Va. 623 (2004). In that case, Carlos Fields, an inmate at the Mount Olive Correctional Complex, filed suit against Thomas McBride, the Warden of Mount Olive, contending that good time credit had been improperly taken away from him and that he was the victim of physical abuse by prison guards. The Circuit Court of Cabell County dismissed the inmate's lawsuit, concluding that the inmate had not exhausted his administrative remedies. Consequently, the inmate filed a *habeas corpus* proceeding with the Supreme Court of Appeals. The Court stated in its holding that, "The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." *State ex rel Fields*, 609 S.E.2d at 886. Furthermore, this Court also indicated that the very existence of an administrative appeal is as important in determining the inappropriateness of extraordinary relief, such as *habeas corpus*, prohibition and *mandamus*, as is the existence of an alternative avenue of judicial relief. *See, Cowie v. Roberts*, 312 S.E.2d 35, 38, 173 W.Va. 64, 67 (1984).

This Court further noted that the records submitted by Inmate Fields in his proceeding showed no indication that he followed any of the enumerated administrative procedures. This Court noted that federal courts have long held that, "A prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the petition or, in the absence of documentation, describe with specificity the administrative

proceeding and its outcome.” *Knuckles v. Toombs*, 215 F.3rd 640, 642, (6<sup>th</sup> Cir. 2000). Thus, without any evidence that the inmate Fields had exhausted his administrative remedies, this Court stated that “We simply cannot reach the merits of the issues raised.” *State ex rel Fields*, 609 S.E.2d at 887.

Here, there is no valid excuse or exception under which the Plaintiff may avoid having to comply with the exhaustion of administrative remedies in the present action. Simply put, Mr. Hess skipped a required step in commencing this litigation. Therefore, Mr. Hess’s lawsuit against the WVDOC is premature. Accordingly, it appears from the face of his Complaint that he failed to exhaust administrative remedies as required by the West Virginia Prisoner Litigation Reform Act; this Court should reverse the circuit court’s denial of the WVDOC’s Motion to Dismiss and direct it to enter an Order dismissing the Plaintiff’s Complaint with prejudice.

#### **PRAYER FOR RELIEF**

The circuit court erred when it denied the WVDOC’s motion to dismiss because the WVDOC is entitled to qualified immunity as a matter of law and because the Plaintiff’s suit was filed in violation of the West Virginia Prisoner Litigation Reform Act. Accordingly, the WVDOC requests that this Court remand Mr. Hess’ case back to circuit court for dismissal with prejudice of Mr. Hess’ action.

**THE WEST VIRGINIA DIVISION  
OF CORRECTIONS**  
by counsel

*Jason Wandling*

\_\_\_\_\_  
Dwayne E. Cyrus (WVSB # 5160)

Jason Wandling (WVSB # 9259)

Shuman, McCuskey & Slicer, PLLC

P.O. Box 3953

Charleston, WV 25339

304-345-1400

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CERTIFICATE OF SERVICE

I certify that on May 14, 2010, I served this brief by United States Postal Service on the following:

Larry O. Ford  
Meyer, Ford & Glasser  
P.O. Box 11090  
Charleston, WV 25339-1090

Jason Wandling  
Jason Wandling (WVSB # 9259)

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**