

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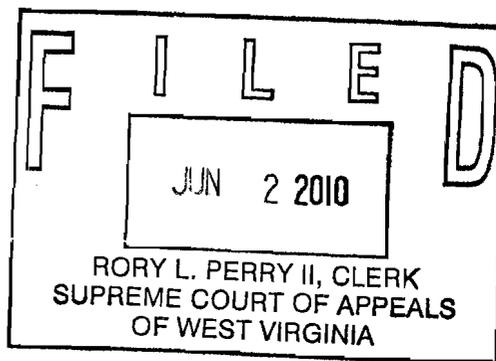
From the Circuit Court of Kanawha County  
The Honorable Louis H. Bloom  
Civil Action No. 09-C-18

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**PLAINTIFF / APPELLEE'S RESPONSE BRIEF IN SUPPORT OF THE CIRCUIT  
COURT'S DENIAL OF THE WEST VIRGINIA DIVISION OF CORRECTIONS'  
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Submitted by:

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West Virginia Division of Corrections Policy Directive 100.00.

West Virginia Rule of Appellate Procedure 3

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## II. FACTUAL AND PROCEDURAL HISTORY

In mid-January 2007, plaintiff-appellee, Frenchie Hess, was incarcerated at the Stevens Correctional Center in McDowell County, West Virginia. The Stevens Correctional Center is owned and operated by the McDowell County Commission (“MCC”), but the West Virginia Division of Corrections (“WVDOC”) houses various of its inmates at the Stevens Correctional Center pursuant to a contractual agreement existing between the MCC and the WVDOC. At the time of his incarceration, the plaintiff was an inmate in the WVDOC correctional system but was confined at the Stevens Correctional Center pursuant to the contractual agreement between the WVDOC and the MCC.

In mid-January 2007, plaintiff-appellee slipped and fell on stagnant water that was located near the shower facilities at the Stevens Correctional Center. Plaintiff-Appellee was left in the stagnant water for several minutes. As a result of slipping and falling in this stagnant water, plaintiff-appellee suffered several injuries, including, but not limited to, a bacterial infection. Prior to the January 2007 incident, several complaints had been made concerning the stagnant water, but nothing had been done to correct the problem.

After the January 2007 incident, plaintiff-appellee was released from his incarceration and was discharged from the control of both the WVDOC and the MCC. Following his release from incarceration, plaintiff-appellee filed a lawsuit against the defendant-appellant WVDOC on January 9, 2009, to recover for the damages that he suffered as a result of his injury. On March 12, 2009, the appellant WVDOC filed with the Kanawha County Circuit Court a motion to dismiss plaintiff-appellee’s complaint. The WVDOC based its motion to dismiss partly on the grounds that WVDOC was immune from suit due to the doctrine of qualified immunity and also

on the ground that plaintiff was barred from filing his suit due to the operation of the West Virginia Prisoner Litigation Reform Act.<sup>1</sup> On April 30, 2009, The Kanawha County Circuit Court denied petitioner's motion to dismiss. On December 21, 2009, the WVDOC filed its petition for appeal of the April 30, 2009, order to this court.<sup>2</sup> The plaintiff-appellee responded by noting that the WVDOC's petition for appeal was untimely as the WVDOC filed its petition more than four months after the circuit court entered its order and was thus in violation of not only Rule 3(a) of the West Virginia Rules of Appellate Procedure but also W.Va. Code § 58-5-4,-a statute which sets a jurisdictional time period for appeal which cannot be altered. *See also, Coonrod v. Clark*, 189 W.Va. 669, 434 S.E.2d 29 (1993). On March 4, 2010, this Court accepted the WVDOC's petition for appeal of Judge Bloom's order.

### III. STANDARD OF REVIEW

Appellate review of a circuit court's order denying a motion to dismiss a complaint is *de novo*. *Ewing v. Board of Education of County of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998).

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<sup>1</sup> The WVDOC also asserted in its motion to dismiss that the plaintiff had not given the WVDOC proper pre-suit notification of his suit in accordance with W.Va. Code § 55-17-3. However, as evidenced by the circuit court's order denying the WVDOC's motion to dismiss, WVDOC waived its pre-suit notification argument at the motion to dismiss hearing. The WVDOC has not raised the pre-suit notification issue as part of this appeal in either its petition for appeal or in its brief filed in support of its appeal, and thus the appellee considers the issue regarding whether proper pre-suit notification was given to be waived, moot, and to not be at issue in this appeal.

<sup>2</sup> In its March 4, 2010 notice which granted the petition for appeal, this Court noted that the appellant filed its petition for appeal with the Court on December 30, 2009, though the petitioner, on the face of its petition, noted that the petition was filed on December 21, 2009.

## IV. ARGUMENT

### (A) The Appellant's Appeal Was Untimely and Should be Dismissed

The appellant WVDOC filed its motion to dismiss in this case on March 12, 2009. As previously mentioned, part of the basis for the WVDOC's motion related to the issue of whether the circuit court had jurisdiction over the WVDOC given the doctrine of qualified immunity. On April 30, 2009, the circuit court denied the WVDOC's motion to dismiss. The WVDOC then filed its appeal of the order on December 21, 2009,—more than four months after the April 30, 2009 order was entered.

W.Va. Code § 58-5-1 states that appeals may be taken in civil actions from “a final judgment of any circuit court or from an order of any circuit court constituting a final judgment.” In this court's recent opinion in Robinson v. Pack, 223 W.Va. 828, 679 S.E.2d 660 (2009), the court held that rulings that a circuit court makes regarding the availability of qualified immunity are “final judgments” and those rulings should be appealed once they are issued. A party should not wait until the case is resolved to appeal a ruling regarding qualified immunity. “Postponing review of a ruling denying immunity to the post-trial stage is fruitless, as the United States Supreme Court reasoned in Mitchell, because the underlying objective in any immunity determination (absolute or qualified) is immunity from suit.” Robinson at 833, 665 (citing, Mitchell v. Forsyth, 472 U.S. at 526-527, 105 S.Ct. at 2806 (1985)).

Rule 3(a) of the West Virginia Rules of Appellate Procedure and W.Va. Code § 58-5-4 require that a petition for appeal in civil cases be presented to this Court by no later than four (4) months after the circuit court order being appealed from is entered. Coonrod v. Clark, 189 W.Va. 669, 434 S.E.2d 29 (1993); Moten v. Stump, 220 W.Va. 652, 648 S.E.2d 639 (2007).

While Rule 3(a) states that this four month time period can be extended by the circuit court so that the total time for appeal from a circuit court order can total six months, neither a request for appeal nor an order granting such an extension were filed or entered in this case. Yet, even if they had been, the WVDOC's appeal to this court in this case would still be untimely. The WVDOC waited until December 21, 2009, -- nearly eight months after the April 30, 2009, order was entered, and well past a six month window - to file its appeal of the April 30, 2009, order. It is clear that the WVDOC's appeal in this case was made untimely.

Importantly, W.Va. Code § 58-5-4 makes the time period for appeal jurisdictional and something that cannot be enlarged, absent the exception referred to in Rule 3(a) which is not applicable in this case. The parties to this case cannot "confer jurisdiction on this Court directly or indirectly where it is otherwise lacking." Syl. Pt. 1, Moten v. Stump; Syl. Pt. 2, James M.B. v. Carolyn M., 193 W.Va. 289, 456 S.E.2d 16 (1995). Likewise, the court itself cannot unilaterally enlarge a jurisdictional time period for appeal. "An appellate court is without jurisdiction to entertain an appeal after the statutory appeal period has expired." Cronin v. Bartlett, 196 W.Va. 324, 326, 472 S.E.2d 409, 411 (1996).

In this case, the court improvidently granted an appeal that was filed untimely. As this court has held in the past, "where an appeal has been granted and it appears from the face of the record that it was improvidently awarded, the case will be dismissed." Syl. Pt. 3, Moten v. Stump; Syllabus, Angelo v. Rodman Trust, 161 W.Va. 408, 244 S.E.2d 321 (1978). Dismissal is the appropriate means to dispose of appellant's appeal in this case and the appellee urges the court to do so as this appeal was improvidently granted.

In its sur-reply to plaintiff's response to the appellant's petition for appeal, the WVDOC argues that, given the rule set forth by this court in Eblin v. Coldwell Banker Residential Affiliates, Inc., et al., 193 W.Va. 215, 455 S.E.2d 774 (1995), the WVDOC had more than four months after the circuit court ruled on its motion to appeal that ruling to this court. The WVDOC's argument is misplaced as the facts of Eblin are substantially different than the facts in this case, and Rule 54, RCP, which the WVDOC uses as its justification for why it had more than four months to appeal the circuit court's decision, is inapplicable in this case.

In Eblin, there were multiple defendants in the case. As the case was progressing, some of those defendants moved for summary judgment while others did not. As a result of the circuit court's ruling on these summary judgment motions, the plaintiffs continued bringing their cases against some defendants while other defendants were dismissed from the case. Because there were multiple parties involved in the case and because, at the summary judgment ruling phase of the case all of the claims in the case were not resolved, this court held that Rule 54, RCP, and cases interpreting the application of that rule, such as Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991), applied to govern the time limits for appeal. Based on this authority, this Court held that a petitioner could wait until more than four months had passed following the date a summary judgment order was entered to appeal the summary judgment decision.

Importantly, Rule 54 and Durm only apply to cases involving multiple defendants and situations where there are multiple claims. By its very language, Rule 54 states that:

**When more than one claim for relief is presented, the court may direct entry of a final judgment as to one or more but fewer than all of the claims . . . In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than **all the claims** or the rights and liabilities of fewer than **all the parties** shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision**

at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of **all** the parties. (Emphasis added).

Rule 54, Durm, and Eblin do not apply to cases involving only one defendant and only one plaintiff where all of the claims are addressed by a dispositive motion hearing, such as the one that took place in this case on April 30, 2009, before the Kanawha County Circuit Court. At the April 30, 2009, hearing in this case, **all** of the claims of **all** of the defendants (there is only one defendant - the WVDOC) were addressed and nothing remained to be resolved. Put simply, Rule 54 cannot and does not extend the time period for appeal in this case as urged by the WVDOC.

Moreover, to extend the rationale put forth by the court in Durm and Eblin to this case would create an absurd result. If this court adopted the WVDOC's rationale for appeal time periods, there would be inconsistent time periods for appeal. For example, if the circuit court had granted the WVDOC's motion to dismiss on April 30, 2009, how long would the plaintiff have had to appeal this ruling? There is likely no dispute that the plaintiff would have had four months and only four months to appeal such a ruling. However, given the WVDOC's rationale, because the WVDOC lost this motion, it should have more than four months to appeal. There is no public policy, legal, or other rationale as to why the defendant should have more time to appeal a ruling than a plaintiff. Indeed, given the principles of procedural due process, each side should have the same appeal time period. This conclusion is particularly true given the absence of Eblin and Durm case facts in the present case. To not hold otherwise would create a violation of the plaintiff-appellee's right of due process.

**(B) The Circuit Court Was Correct When it Found That the Qualified Immunity Doctrine Does Not Prevent the Plaintiff from Bringing His Suit Against the WVDOC.**

Normally, the doctrine of qualified immunity protects the State from lawsuits in which a plaintiff alleges that the State has negligently injured someone through its exercise of one or more legislative, judicial, or administrative functions that involve the determination or exercise of a fundamental governmental policy. There are several important exceptions, however, to the qualified immunity doctrine that do allow a plaintiff to pursue a case against the State for damages that would otherwise be barred by the doctrine. Specifically, this Court has held that qualified immunity will not bar a suit when one or more of the following exceptions apply: (1) the State has insurance coverage for the acts complained of, (2) the State is not engaging in legislative, judicial, or administrative functions which determine fundamental government policy, (3) the injuries complained of by a plaintiff were the result of intentional acts by the State, and/or, (4) the State engaged in actions which violated the plaintiff's clearly established rights.

Importantly, the existing exceptions to the application of the common law qualified immunity doctrine under West Virginia law appear to be disjunctive, rather than conjunctive. For example, if the State engaged in actions which violated the plaintiff's clearly established rights, it does not matter whether these actions were done in a negligent fashion or an intentional fashion, the State is still liable for the results and the civil damages that result therefrom in the sense that qualified immunity will not prevent a suit based on those facts. If the State has engaged in actions which violate clearly established statutory or constitutional laws, the doctrine of qualified immunity will not prevent the State from being held civilly liable for damages

resulting from those actions, regardless of whether insurance is present. Also, if the State, or one of its officials, is engaging in administrative, judicial, or executive actions which do not involve the determination of fundamental governmental policy, the doctrine of qualified immunity does not apply to bar the lawsuit.

(1) There is No Qualified Immunity for WVDOC's Acts Because There is Insurance Coverage for Those Acts.

The WVDOC's insurance policy states, in relevant part, that it will pay for:

“Bodily injury . . . caused by an “occurrence” . . . as long as the insured neither expected or intended to cause such injury. *WVDOC Insurance Policy, Coverage A, Subsection 1 (attached as Exhibit A).*

The policy continues on to define “occurrence” as being an:

“accident, including continuous or repeated exposure to conditions which results in “bodily injury ....” *Id. at Section IV, “Definitions” (attached as Exhibit A).*

The “Wrongful Acts” section of the insurance policy states that the WVDOC's insurer will pay:

[O]n behalf of the “insureds,” . . . all sums which said “insureds” shall become legally obligated to pay as damages for a “loss” arising from a “Wrongful Act” of the insured. *Id. at Coverage E, Subsection 1 “Coverage-Wrongful Act Liability Insurance (attached as Exhibit A).*

In explanation of the Wrongful Acts section of the policy, the policy defines “loss” as “any amount which the “insureds” are legally obligated to pay . . . for a claim or claims made against an “insured” for a Wrongful Act. *Coverage E, Section 4, “Additional Definitions” (attached as Exhibit A).* A “Wrongful Act” is further defined by the policy to mean “any actual or alleged act, breach of duty, neglect, error, misstatement, misleading statement or omission by the “insured” in the performance of their duties for the “Named Insured”. *Coverage E, Subsection 4, Additional Definitions.* “Insured” is defined to include “any employee” of the

Named Insured and “any person or organization qualifying as an insured in the ‘persons insured’ provision of the applicable insurance coverage”. *Coverage E, Subsection 3, “Persons Insured”; Section IV-Definitions*. And, the “Named Insured” means the “organization named in Item 1 of the Declarations of this Policy.” *Section IV, Definitions of the Policy (attached as Exhibit A)*.<sup>3</sup> The State of West Virginia appears to be the organization named in Item 1 of the Declarations of the Policy. And, the WVDOC is, according to other portions of the policy, an additional named insured to the policy.

From the WVDOC’s insurance policy, therefore, it is clear that one way by which the WVDOC enjoys insurance coverage is if: (1) there is an accident, which (2) results in bodily injury, and (3) the WVDOC cannot have expected or cannot have intended to cause such injury.

In his complaint, the plaintiff alleges that: (1) he had an accident at a WVDOC affiliated facility as an inmate at that facility, which (2) resulted in bodily injury to the plaintiff. The plaintiff further alleges that the WVDOC did not expect or intend to cause this injury. While the plaintiff admittedly did not explicitly state this in his complaint, if the WVDOC’s insurance policy does apply, which Plaintiff does allege, the plaintiff seeks recovery in this case only up to the limits of the WVDOC’s insurance policy.

This court has held in multiple cases that where the State’s insurance policy provides insurance coverage, there is no immunity from suit. See, e.g., Pittsburgh Elevator v. West

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<sup>3</sup> While the Wrongful Act section of the WVDOC’s insurance policy may or may not cover bodily injury caused by one employee of the WVDOC to another employee of the WVDOC (See Coverage E, “Wrongful Acts”, Subsection 3 “Persons Insured”, Part C), it is clear that this limitation, should it exist, would not be relevant to the present case. The Plaintiff in this case was not an employee of the WVDOC; he was an inmate of the WVDOC whenever he was injured by the WVDOC.

Virginia Board of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983); Clark v. Dunn, 195 W.Va. 272, 465 S.E.2d 374 (1995). As enuciated above, the plaintiff's allegations have invoked the WVDOC's insurance coverage, and thus the WVDOC does not enjoy protection from suit via the qualified immunity doctrine as a result.

2. There Is No Qualified Immunity for WVDOC's Acts Because Plaintiff Has Not Alleged That WVDOC Was Engaging in Legislative, Judicial, or Administrative Functions Which Determine Fundamental Government Policy.

This Court held in J.H. v. West Virginia Division of Rehabilitation Services, 224 W.Va. 147, 660 S.E.2d 392 (2009), that one must answer two questions to determine whether qualified immunity exists: (1) does the State's insurance policy waive common law immunity for tort liability, and (2) was the State exercising a legislative, judicial, or administrative function involving the determination of a fundamental governmental policy when it injured a plaintiff? J.H. at 402. If the State's insurance policy waives common law immunity, then there is no immunity from suit. If the State was not exercising a legislative, judicial, or administrative function involving the determination of a fundamental governmental policy, then there is no immunity from suit.

As indicated above, the plaintiff believes that the State's insurance policy waives the State's qualified immunity in this case. However, should this not be the case, the plaintiff believes that the existence of qualified immunity does not bar the plaintiff's suit because the plaintiff does not allege that the State was exercising a legislative, judicial, or administrative function involving the determination of a fundamental governmental policy whenever the State (i.e. the WVDOC) injured the Plaintiff. The WVDOC's brief conveniently fails to highlight that not only must the WVDOC's actions have been administrative actions, but they also must have

been administrative actions which determine fundamental government policy in order for those actions to be protected by the common law doctrine of qualified immunity.

The core of the plaintiff's complaint alleges three ways in which the WVDOC was negligent: (1) the WVDOC failed to ensure that the Stevens Correctional Center had the appropriate number of officers for the size of the prison population, (2) the WVDOC failed to ensure that the Stevens Correctional Center had adequate means to ensure the safety of prisoners, and (3) the WVDOC failed to maintain a safe premises and that the plaintiff slipped, fell, and injured himself as a result. The WVDOC's failure to ensure that the Stevens Correctional Center had adequate means to ensure the safety of prisoners, and the WVDOC's failure to maintain a safe premises are admittedly administrative functions of the WVDOC; however, those actions/omissions are hardly administrative functions which determine fundamental government policy. As such, the application of doctrine of qualified immunity to prohibit the plaintiff's suit against the WVDOC suit is improper, and this court should find that the circuit court was correct in allowing plaintiff's suit to proceed against the WVDOC.<sup>4</sup>

**(C) The WVDOC Violated Clearly Established Laws of Which a Reasonable Official Would Have Known.**

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<sup>4</sup> In its order denying the WVDOC's motion to dismiss, the circuit court chose to delay ruling on the qualified immunity question until the summary judgment stage. The appellee believes that the circuit court could have, with ample justification, simply concluded, as a matter of law at the motion to dismiss hearing that the WVDOC has no qualified immunity in this case which protects it from suit. Should this conclusion be incorrect, then the question of whether the WVDOC has qualified immunity is a factual one, involving the issue of whether the actions of the WVDOC involved the determination of "fundamental governmental policies" and the proper recourse would be for this case to proceed to trial in front of a fact finder to answer that, and other, questions.

The WVDOC also violated clearly established laws of which a reasonable person would have known. Specifically, the WVDOC failed to ensure the safety of the Plaintiff while it was incarcerating him at the Stevens Correctional Center.

There are multiple legal bases for this duty to keep the plaintiff safe. For example, the Eighth Amendment to the United States Constitution has been construed to require that prisoners not be exposed to environmental conditions that pose serious risks to health and safety. Keenan v. Hall, 83 F.3d 1083 (9<sup>th</sup> Circuit 1996), Ramos v. Lamm, 639 F.2d 559, 569-70 (10<sup>th</sup> Cir. 1980) (prisoners entitled to adequate ventilation); Gates v. Cook, 376 F.3d 323 (5<sup>th</sup> Cir. 2004); Reece v. Gragg, 650 F.Supp. 1297, 1304 (D. Kan. 1986); Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y. 1974) (prisoners entitled to not be subject to excessive heat); Jackson v. Arizona, 885 F.2d 639, 641 (9<sup>th</sup> Cir. 1989) (finding that allegation that drinking water was polluted was not a frivolous claim); Cody v. Hillard, 559 F.Supp. 1025 (D.S.D. 1984) (noting that prisoners were entitled to adequate ventilation of toxic fumes in inmate workplaces); DeSpain v. Uphoff, 264 F.3d 965, 977 (10<sup>th</sup> Cir. 2001), (noting that inmates were entitled to not be exposed to flooding and human waste). A number of other cases have noted that prisoners are entitled to basic sanitation and proper toilet facilities. See Gates v. Cook, 376 F.3d 323 (5<sup>th</sup> Cir. 2004); McBride v. Deer, 240 F.3d 1287 (10<sup>th</sup> Cir. 2001); Mitchell v. Newryder, 245 F.Supp.2d 200 (D. Me. 2003).

West Virginia's Constitution provides an incorporation of these same types of protections through the cruel and unusual punishment portion of Article III, Section 5. See, State v. Booth, 224 W.Va. 307, 685 S.E.2d 701 (2009). And, this court has held that when conditions at a facility of incarceration do not meet minimum standards, such conditions violate an inmates

Article III, Section 5 protections. See, e.g., Facility Review Panel v. Holden, 177 W.Va. 703, 356 S.E.2d 457 (1987).

In addition to these constitutional duties that the WVDOC had to provide the plaintiff with a safe environment, the common law and West Virginia's state regulatory law also imposed upon the WVDOC duties to maintain a safe environment for the plaintiff. As stated by this court in previous decisions, under West Virginia's common law, a landlord has a duty to maintain a safe premises for his tenants, invitees, and licensees. Marsh v. Riley, 118 W.Va. 52, 188 S.E. 748 (1936); Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436 (1999). With respect to codified statutory and regulatory law, WVDOC's Policy Directive 100.00, IV, C, states that "The West Virginia Division of Corrections adheres to the below-noted core values: (1) Our highest priority is protection of the public, staff, and offenders through the highest degree of professional performance at all times . . ." *Attached as Exhibit B*. This Policy Directives Manual is incorporated into state law by W.Va. Code of State Rules § 90-1-2.

The WVDOC's decision to maintain a facility that is unsafe and that leads to bacterial infections and other injuries, as happened in this case, is inappropriate and a violation of not only the WVDOC's Policy Directives Manual but also the West Virginia Code of State Rules, common law, and constitutional law.

**(D) The Circuit Court was Correct in Finding that Exhaustion of Administrative Remedies Under the Prisoner Litigation Reform Act Was Not Required of the Plaintiff as He Was Not An Inmate of the Correctional System at the Time He Filed His Lawsuit.**

As a second basis for why the plaintiff-appellee's case should have been dismissed by the circuit court, the WVDOC asserts that the plaintiff failed to perfect his administrative remedies, in accordance with the West Virginia Prisoner Litigation Reform Act before filing suit. The

WVDOC also quotes the relevant statute which says, *in pari materia*, “an inmate may not bring a civil action until the administrative remedies promulgated by the facility have been exhausted . . .” W.Va. Code § 25-1A-2 (emphasis added).

The plaintiff-appellee does not dispute that all “inmates” must perfect their administrative appeals in accordance with the Prisoner Litigation Reform Act before filing a civil suit. What is clear, however, is that the plaintiff was not an inmate at the time he filed his suit. What is also clear is that W.Va. Code § 25-1A-2 only applies to “inmates”. Because the plaintiff was no longer incarcerated at the time he filed his suit, he was no longer subject to the requirements of W.Va. Code § 25-1A-2 at that time. See Kerr v. Puckett, *supra*, (Federal Prison Litigation Reform Act did not apply to plaintiff who filed his suit after release from jail as that plaintiff was no longer a “prisoner” at that time.) See, also, Chase v. Peay, *supra*, (“The critical question is not whether the Maryland grievance process currently is available to Chase, but rather whether those remedies were available to him . . . at the time when he filed this suit in federal court.”) At the time the plaintiff filed his suit in circuit court, the administrative remedies offered through the WVDOC were no longer available to him as he was no longer an inmate. To have required him, or to require him at this moment, to comply with W.Va. Code § 25-1A-2 would have been, and would be today, both a practical and legal impossibility.

#### **V. PRAYER FOR RELIEF**

The appellant’s appeal was filed untimely and should be dismissed.

Should the Court create new law and determine that the Appellant’s appeal was filed timely, plaintiff-appellee urges the Court to find that the WVDOC is not protected from the plaintiff’s suit by the doctrine of qualified immunity.

The plaintiff-appellee also urges the Court to affirm the circuit court's ruling that the plaintiff-appellee did not have to exhaust administrative remedies before filing his suit because he was no longer subject to the jurisdiction of W.Va. Code § 25-1A-2 when he filed his suit.

Plaintiff-appellee respectfully requests that this Court remand this case back to the circuit court so that the case may proceed through discovery, and, if appropriate, to trial.

Plaintiff-Appellee,  
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Charleston WV 25339

No. 35496

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRENCHIE HESS, JR.

Plaintiff / Appellee,

v.

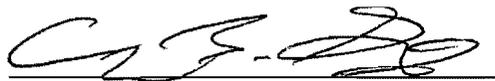
WEST VIRGINIA DIVISION OF CORRECTIONS,

Defendant / Appellant.

CERTIFICATE OF SERVICE

I certify that on June 1, 2010, I served this brief by United States mail, postage pre-paid, upon the following:

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