

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**FRENCHIE HESS, JR.,**

**Plaintiff,**

v.

**WEST VIRGINIA DIVISION OF CORRECTIONS,**

**Defendant.**

Civil Action No. 09-C-18  
Judge Louis H. Bloom

FILED  
2009 APR 30 PM 3:08  
CATHY S. GAINES, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**ORDER ON MOTION TO DISMISS**

On this the 17th day of April, 2009 came the plaintiff, by counsel, Larry O. Ford, and came the defendant, the West Virginia Division of Corrections ("WVDOC"), by counsel, Lou Ann S. Cyrus, on WVDOC's Motion to Dismiss under Rule 12(b) of the West Virginia Rules of Civil Procedure ("WVRCP"). WVDOC's Motion to Dismiss was based upon three grounds: (1) the WVDOC is immune from liability for plaintiff's claim under the doctrine of qualified immunity; (2) Mr. Hess failed to provide the requisite pre-suit notice pursuant to West Virginia Code § 55-17-3; and (3) Mr. Hess failed to pursue administrative remedies required by the West Virginia Prisoner Litigation Reform Act.

WHEREUPON, the Court announced 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 administrative remedies are better left to the summary judgment stage of the case under WVRCP 56, and therefore, deferred a ruling on same.

The Court further suggested that, while the defendant had properly quoted the law with regard to the issue of the failure to provide the requisite pre-suit notice pursuant to West Virginia Code § 55-17-3, under the circumstances, because the remedy would be a dismissal that could be followed immediately by re-filing of the suit upon payment of a filing fee, if the state would be willing to waive that issue, it would save time and resources. After conferring with in-house counsel for WVDOC, WVDOC's counsel announced that it would agree to waive the issue of the failure to provide the requisite notice under W.Va. Code 55-17-3, and therefore, the argument in that regard is withdrawn.

Accordingly, it is hereby ORDERED that WVDOC's argument on the issue of the failure to provide the requisite notice under W.Va. Code 55-17-3 is hereby WITHDRAWN.

It is further hereby ORDERED that the remaining issues in WVDOC's Motion to Dismiss on the grounds of the doctrine of qualified immunity, the failure to pursue administrative remedies are hereby DENIED. The WVDOC may raise the issues again pursuant to WVRCP 56 at the appropriate time.

The WVDOC's objections and exceptions to this Order are duly noted.

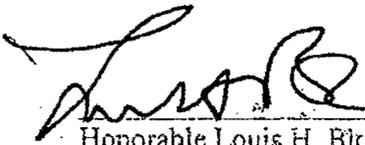
The clerk is directed to send copies of this Order to the following counsel of record:

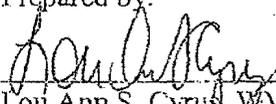
D. Adrian Hoobster, II, Esquire  
The Hoosier Law Firm, P.L.L.C.  
6609 MacCorkle Ave., S.E., Ste. 100  
Charleston, WV 25304  
Co-counsel for Plaintiff

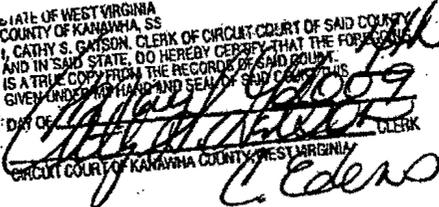
Larry O. Ford, Esquire  
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Co-counsel for Plaintiff

Lou Ann S. Cyrus, Esquire  
Jason Wandling, Esquire  
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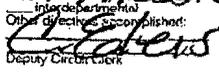
Entered this 30 day of April, 2009.

  
Honorable Louis H. Bloom  
Judge, 13th Judicial Circuit

Prepared by:  
  
Lou Ann S. Cyrus, WV Bar No. 6558  
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Counsel for Defendant

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 COUNTY,  
GIVEN UNDER MY HAND AND SEAL OF SAID COUNTY THIS  
DAY OF April 2009.  
  
CLERK  
C. Gatson

Reviewed and Approved by:  
  
Larry O. Ford, WV Bar No. 1241  
Meyer, Ford & Glasser  
120 Capitol St.  
Charleston WV 25339-1090  
Co-counsel for Plaintiff

5/14/09  
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Deputy Circuit Clerk