IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION

PHILIP J. TOMASHEK, II v. CIVIL ACTION NO. 2:17-cv-01904 RALEIGH COUNTY EMERGENCY OPERATING CENTER, et al.,

MEMORANDUM OPINION AND ORDER I. Introduction

Pending before the court is Motion of West Virginia Regional Jail and Correctional Facility Authority, David A. Farmer, Southern Regional Jail, Michael Francis, and John Doe Correctional Officers to Dismiss [ECF No. 15]. The plaintiff filed a response [ECF No. 24], and the defendants filed a reply [ECF No. 31]. This matter is now ripe for adjudication. For the following reasons, the Motion is GRANTED in part and DENIED in part.

II. Factual Background

During the early morning of November 22, 2014, 911 and requested that the dispatcher send an ambulance to transport the plaintiff, unusual behavioral and mood changes and she feared he suffered an injury to his head or inadvertent poisoning from the use of volatile automotive paint and cleaners in his Not. Removal Ex. A Part 1, at ¶ 17 -1]. A short

time lat 911 again and canceled the request for medical assistance, advising the dispatcher she was taking the plaintiff to the hospital herself. Id. ¶ 18.

ves, A.S. Meadows and J.D. Johnson . Id. ¶¶ 19 20. When they arrived, the plaintiff was closing the driveway gate, and his wife and their daughters were in the vehicle, already en route to take the plaintiff to the hospital. Id. ¶ 20. One of the officers asked the plaintiff to get into his vehicle, and when he refused, the officer grabbed him, Id. ¶¶ 22 24. The other officer then tased and pepper sprayed him. Id. ¶ 25.

The plaintiff was arrested on two counts of assault of an officer and obstructing. Id. ¶ 28. The plaintiff was later taken to the Southern Regional Jail where he was accepted into custody by one or more correctional officers. Id. ¶ 31 Id. ¶¶ 31 32. detained, he was unnecessarily restrained in a manner causing extreme pain,

discomfort, emotio Id. ¶ 31.

The plaintiff made multiple requests for medical care to the correctional officers as well as other officials. Id. ¶ 32. also numerous occasions to stress her concern for his health and his need for immediate

Id. The evening after he was arrested, the plaintiff was transported to

the hospital. Id. ¶ 37. He was admitted there for ten days and diagnosed with encephalopathy, acute liver injury, and acute rhabdomyolysis. Id. ¶ 38.

The assault and obstruction charges brought against the plaintiff were eventually dropped. Id. ¶ 41. Thereafter, the plaintiff brought this civil action against several parties. The defendants that are relevant to this motion include: the West Virgini C A. Farmer, Michael Francis, and John Doe Correctional Officers, who are all sued in

both their individual and official capacities.

III. Legal Standard

The defendants move for dismissal with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Mot. WVRJCFRA, Farmer, SRJ, Francis, & John Doe Corr. Officers

The defendants attached one exhibit to their motion. Id. Ex A [ECF No. 15-1]. Under Federal Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion mhe mere submission or service of extraneous materials, however, does not by itself convert a motion to dismiss into a motion for summary judgment. Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Corp., 109 F.3d 993, 995 96 (4th Cir. 1997) (citations omitted) (internal quotation marks omitted). Instead, a 12(b)(6) motion

supported by extraneous materials is only regarded as one for summary judgment if the district court converts the motion by indicating that it will not exclude from its Id. at 997. Thus, it wholly ignore[] such at Covey v.

Assessor of Ohio Cnty., 777 F.3d 186, 193 n.7 (4th Cir. 2015). Here, the court declines motion will be regarded as one to dismiss.

A motion to dismiss filed under Rule 12(b)(6) tests the legal sufficiency of a complaint or pleading. Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). A g that the

-defendant- unlawfully-harmed- Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly faced with a Rule 12(b)(6) motion to dismiss . . . courts must . . . accept all factual allegations in Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

Ashcroft, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). To achieve facial

plausibility, the plaintiff must plead facts allowing the court to draw the reasonable inference that the defendant is liable, moving the claim beyond the realm of mere possibility. Id. Twombly, 550 U.S. at 555.

IV. Discussion

a. Unnamed Correctional Officers The defendants argue that the against unnamed John Doe correctional officers Mem. Law Supp.

9 ([ECF No. 16]. The defendants rely mainly on Price v. Marsh, No. 2:12-cv-05442, 2013 WL 5409811 (S.D. W. Va. Sept. 25, 2013). In Price, the plaintiff asked the court for leave to amend his complaint in order to add the identity of defendants who were previously unidentified. 2013 WL 5409811, at *2. The court leave to amend. Id. at *3. The court went on to dismiss the counts against the

unnamed defendants, holding that judgment cannot be entered against an unnamed party. Id. at *4 6.

As Judge Chambers explained in Sweat v. West Virginia, No. 3:16-5252, 2016 WL 7422678, at *3 (S.D. W. Va. Dec. 22, 2016), the holding in Price is not applicable Id.

iscovering complaint. 8 [ECF No. 24]. The plaintiff is entitled to the opportunity to discover

who these defendants are. If after adequate time the plaintiff fails to amend his complaint, then dismissal may be proper. For now, however, dismissal is not complaint.

b. Sovereign Immunity

i. The WVRJCFA States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another State, or by created by the Amendment protects both the State itself and its agencies, divisions,

dep Jail & Corr. Facility Auth., No. 3:16-cv-3705, 2016 WL 7645588, at *7 (S.D. W. Va.

Dec. 6, 2016). [CF]A is an agency of the State of West Virginia Cantley v. Corr. Facility Auth., 728 F.

Supp. 2d 803 Holbrook, 2016 WL 7645588, at *8. None of these

exceptions, however, apply here. Therefore, WVRJCFA has Eleventh Amendment sovereign immunity from all claims asserted both directly and indirectly against it in this matter.

ii. SRJ This court has previously held that SRJ

is not facility operated by the [West Virginia Regional Jail and Correctional Facility Authority] and used jointly by two or more counties for the confinement, custody, supervision or control of adult persons convicted of misdemeanors or awaiting trial or awaiting transportation to As such, it is not an entity capable of being sued. Edwards v. West Virginia, No. 2:00-cv-0775, 2002 WL 34364404, at *6 (S.D. W. Va. Mar. 29, 2002) (citing W. Va. Code § 31 20 2(o)). The court has further explained that even if SRJ was an entity capable of being sued, it would receive Eleventh Amendment sovereign immunity. Id. Therefore, dismissal is warranted as to all claims asserted both directly and indirectly against SRJ in this matter.

iii. Official Capacity Claims Against Individual Defendants

n his official capacity is also immune from Edwards, 2002 WL 34364404,

at *5. The unnamed correctional officers are employed by the state. Am. Compl. ¶ 14. also employed by the state. Id. ¶¶ Farmer . . . is and was . . . at all times relevant hereto, Executive Director of

WVRJCFA. . . . Michael Francis . . . is and was . . . at all times relevant hereto, . 1

Therefore, dismissal is warranted as to all counts asserted against Francis, Farmer, and the unnamed correctional officers in their official capacities.

c. Count Six Negligence Count Six alleges that Francis and Farmer were negligent. Am. Compl. ¶¶ 84 91. Francis and Farmer argue that they are entitled to qualified immunity for the

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8. The West Virginia Su an immunity standard for a public official needs to encompass all types of public official liability, not just the

1 Moreover, state employees sued in their official capacity are not considered people subject to suit under 42 U.S.C. § 1983. Edwards, 2002 WL 34364404, at *5. Therefore, notwithstanding their Eleventh Amendment immunity, dismissal is also warranted as to the plaintiff s 42 U.S.C. § 1983 claims against the state defendants in their official capacities. 2 questions for a fact-finder and certainly [are] not amenable to Jarvis v. W. Va. State Police, 711 S.E.2d 542, 551 (W. Va. 2010), the West Virginia

Supreme Court had to determine whether ence claims. The court found that the lower court erred by not granting the motion to dismiss and remanded the case for entry of an order Id. at 552. Thus, qualified immunity is appropriately considered on a Rule 12(b)(6) motion, and the court must determine whether the defendants are entitled to it at this stage.

Clark v. Dunn, 465 S.E.2d 374, 379 (W. Va. 1995) (quoting State v. Chase Sec., Inc., 424 S.E.2d 591, 599 (W. Va. 1992)). Under the doctrine of qualified immunity for a state law 3

claim, the discretionary actions of government agencies, officials and employees performed in an official capacity are shielded from civil liability so long as the actions do not violate a clearly established law or constitutional duty. West Virginia State Police v. Hughes, 796 S.E.2d 193, 198 (W. Va. 2017).

Here, the plaintiff alleges that Francis and Farmer were negligent by: (1) failing to adequately investigate officers before hiring them; (2) failing to provide appropriate training and enforce compliance therewith; (3) failing to provide sufficient oversight and supervision; and (4) failing to develop policies to safeguard the plaintiff and the public from injury due to the negligence of correctional officers. Am. Compl. ¶ 86. These acts may involve discretionary governmental functions, in which case the defendants may be entitled to qualified immunity. They may also, however, have merely been the result of omissions to act, a failure to decide or to Wood v. Harshbarger, No. 3:13-21079, 2013 WL 5603243, at *11 (S.D. W. Va. Oct. 11, 2013) (quoting Hess v. West Virginia Div. of Corr., 705 S.E.2d 125, 130 (W. Va. 2010)). The court lacks sufficient facts to determine the nature of the governmental acts that give rise to these claims. Therefore, Francis

3 The parties seem to confuse federal qualified immunity which applies to 42 U.S.C. § 1983 claims, and qualified immunity which applies to state law claims.

and Farmer are not entitled to qualified immunity at this time for the plaintiff s negligence claims.

d. Count Eight Outrage Count Eight alleges outrage against the unnamed correctional officers. Am. Compl. ¶¶ 98 103. West Virginia recognizes a cause of action for outrage, which is the equivalent of intentional infliction of emotional distress. Kerr v. Marshall Univ. Bd. Governors, No. 2:14-cv-12333, 2015 WL 1405537, at *14 (S.D. W. Va. Mar. 26, 2015). In order to recover for outrage in West Virginia,

atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. Travis v. Alcon Labs., Inc., 504 S.E.2d 419, 425 (W. Va. 1998).

Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury Id. (citations omitted). Thus, t outrageous

as to constitute the intentional or reckless infliction of emotional distress Kerr, 2015 WL 1405537, at *14 (citations omitted). In order for conduct be considered outrageous outrageous in character, and so extreme in degree, as to

go beyond all possible bounds of decency, and to be regarded as atrocious and utterly Id. (quoting H l Bank Fairmont, 289 S.E.2d 692, 705 (W. Va. 1982)). Cases involving the tort of outrage Id.

Here, the plaintiff custody of the [p]laintiff despite him being in clear need of medical attention

requir[ing] treatment by a physician, injuring the [p]laintiff while in the course of holding him as a pre-trial detainee, denying him necessary medical care and refusing to promptly present the [p]laintiff to the magistrate 100. The plaintiff has not alleged any actions by the defendants that are outrageous in character, and so extreme in degree, as to go beyond all possible bounds

of decency, and to be regarded as atrocious and utterly intolerable in a civilized Kerr, 2015 WL 1405537, at *14 (citations omitted). Therefore, dismissal is warranted as to Count Eight.

e. Count Ten Negligent Infliction of Emotional Distress Count Ten alleges negligent infliction of emotional distress against the unnamed correctional officers. Am. Compl. ¶¶ 109 13 recognizes two types of negligent infliction of emotional distress: 1) emotional distress

based upon the fear of contracting a disease, and 2) emotional distress based upon Wood, 2013 WL 5603243, at *9 (citations omitted). Neither type applies here. Thus, dismissal is warranted as to Count Ten.

f. Count Fifteen Excessive Force Count Fifteen is a 42 U.S.C. § 1983 claim which alleges that the unnamed correctional officers used excessive force against the plaintiff in violation of the Fourteenth Amendment. Am. Compl. ¶¶ 148 61. The defendants argue that they are entitled to qualified immunity. At this stage, the defendants are entitled to qualified immunity if the complaint fails to state facts that present a plausible violation of the Fourteenth Amendment.

Under the doctrine of federal [g]overnmental officials performing discretionary functions are shielded from liability for money damages so rights of which Maciariello v. Sumner, 973

F.2d 295, 298 (4th Cir. 1992) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Supreme Court has established a two-step sequence for determining whether a government official is entitled to qualified immunity:

First, a court must decide whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right. . . . Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was s alleged misconduct.

Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). The answer to both questions must be in the affirmative in order for a plaintiff to defeat dismissal on qualified immunity grounds.

Under the first prong, a court must determine whether the facts as alleged, taken in the light most favorable to plaintiff, demonstrate the violation of a constitutional right. Cline v. Auville, No. 1:09-0301, 2010 WL 1380140, at *3 (S.D. W. Va. Mar. 30, 2010). It the Due Process Clause [of the Fourteenth Amendment] protects a pretrial detainee from the use of excessive force Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015) (quoting Graham v. Connor, 490 U.S. 386, 395 n.10 (1989)). In this context, Id. (quoting Bell v. Wolfish intent to punish, a pretrial detainee can nevertheless prevail by showing that the

Id. (quoting Bell,

441 U.S. at 561).

When a pretrial detainee brings an excessive force claim, he must show that the force purposely or knowingly used against him was objectively unreasonable. Aliff v. West V , No. 2:15-cv-13513, 2016 WL 5419444, at *6 (S.D. W. Va. Sept. 26, 2016) (quoting Kingsley, 135 S. Ct. at 2473). The Supreme Court has

provided several factors for courts to consider when determining the reasonableness of a correctional officer s actions including:

the relationship between the need for the use of force and the amount of force uss injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. Kingsley, 135 S. Ct. at 2473 (citing Graham, 490 U.S. at 396).

Here, the plaintiff alleges that the defendants used excessive force in two ways including: (1) accepting custody of him when he needed medical treatment, and (2) . The court has no trouble finding that merely accepting custody of the plaintiff cannot .e. that the correctional officer defendants physically restrained him, also fails to state an

Aliff, 2016 WL 5419444, at *6. on[s] while detained, he was unnecessarily restrained in a manner causing extreme pain, discomfort, Am. Compl. ¶ 31. The amended complaint does not even say how the plaintiff was restrained. Nor has the plaintiff offered any facts regarding when he was restrained,

how many times he was restrained, why he was restrained, how he was injured by the restraint, any effort made by the officers to temper or limit the amount of force, or whether he was resisting. In sum, the plaintiff has failed to

offer any detail that would allow the court to gauge the reasonableness of the

Excessive force claims are t have some knowledge of the circumstances surrounding a given use of force beyond the unadorned accusation that it was excessive . . . in order to draw the inference that such use of force was constitutionally Aliff, 2016 WL 5419444, at *7. t fails to both provide this context and state any facts showing a plausible claim that the defendants th Amendment rights. Therefore, the plaintiff failed the first prong of the qualified immunity analysis, and the defendants are entitled to

g. Count Seventeen Procedural Due Process Count Seventeen is also a 42 U.S.C. § 1983 claim which alleges that the unnamed correctional officers denied the plaintiff procedural due process in violation of the Fourteenth Amendment by failing to bring the plaintiff before a magistrate for an assessment of probable cause after he was arrested without a warrant. Am Compl. ¶¶ 175 186. provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due proc Morris v. United States, No. 12-2926, 2014 WL 1272104, at *8 (D. N.J. Mar. 27, 2014) (quoting

Albright v. Oliver, 510 U.S. 266, 273 (1994) (internal quotation marks omitted). Courts have extended the ruling to apply to procedural due process claims. Id.

The Supreme Court has previously held that the Fourth Amendment requires -arrest judicial determination of probable cause in cases of warrantless King v. Jones, 824 F.2d 324, (4th Cir. 1987) (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).

T grievance in Count Seventeen is that the correctional officers failed to bring him before a magistrate for an assessment of probable cause after he was arrested without a warrant. This claim is really one for violation of his Fourth Amendment right to a Gerstein hearing, not one for procedural due process under the Fourteenth Amendment. Therefore, the court will treat the Seventeen as one under the Fourth Amendment. See Souk v. City Mount Hope, No.

2:14-cv-26442, 2015 WL 5698509, at *6 (S.D. W. Va. Sept. 28, 2015). The plaintiff was arrested sometime during the morning of November 22, 2014 and was not arraigned until December 8, 2014. The court is aware that there are circumstances that occurred between these periods that may have made the delay reasonable. Based on the facts available at this time, however, dismissal is not warranted.

h. Count Twenty Constitutional Violations In Count Twenty, the plaintiff Francis and Farmer. The

court construes this claim to be one for supervisory liability.

This count is void of a single factual allegation regarding what Francis and Farmer

did that amounts to a constitutional violation. Instead, the pleading amounts to mere Twombly, 550 U.S. Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 575) (internal quotation marks omitted). Therefore, the dismissal of Count Twenty is warranted.

V. Conclusion

For the reasons stated herein, Motion of West Virginia Regional Jail and Correctional Facility Authority, David A. Farmer, Southern Regional Jail, Michael Francis, and John Doe Correctional Officers to Dismiss [ECF No. 15] is GRANTED in part and DENIED in part. The motion is GRANTED as to Counts Eight, Ten, Fifteen, and Twenty, which are dismissed in their entirety.

In regards to Count Five, the motion is GRANTED as to the West Virginia Regional Jail and Correctional Facility Authority and Southern Regional Jail and to the unnamed correctional officers in their official capacities, but DENIED as to the unnamed correctional officers in their individual capacities.

In regards to Count Six, the motion is GRANTED as to the West Virginia Regional Jail and Correctional Facility Authority and Southern Regional Jail and Michael Francis and David Farmer in their official capacities, but DENIED as to Michael Francis and David Farmer in their individual capacities.

In regards to Count Seventeen, the motion is GRANTED as to the unnamed correctional officers in their official capacities, but DENIED as to the unnamed correctional officers in their individual capacities.

The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: January 22, 2017