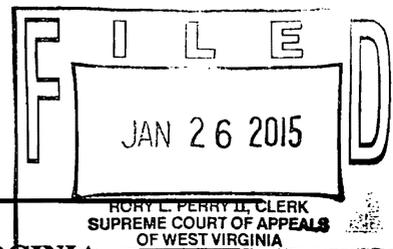


No. 14-1113



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

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**DEPUTY J.K. MASTON, TYLER COUNTY SHERIFF'S DEPARTMENT,  
TROOPER S. CURRAN AND WEST VIRGINIA STATE POLICE,  
Defendants Below, Petitioners,**

v.

**THOMAS JEFFERSON WAGNER,  
Plaintiff Below, Respondent.**

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From the Circuit Court of Tyler County  
The Honorable David W. Hummel  
Civil Action No. 11-C-12

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**PETITIONERS' BRIEF**

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**SUBMITTED BY:**

Gary E. Pullin, Esq. WV State Bar No. 4528  
Emily L. Lilly, Esq. WV State Bar No. 11045  
Michelle Rae Johnson, Esq. WV State Bar No. 11869  
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301  
Telephone: (304) 344-0100  
Facsimile: (304) 342-1545  
E-mail: [gpullin@pffwv.com](mailto:gpullin@pffwv.com)  
E-mail: [elilly@pffwv.com](mailto:elilly@pffwv.com)  
E-mail: [mjohnson@pffwv.com](mailto:mjohnson@pffwv.com)  
**Counsel for Deputy J.K. Maston, Tyler County  
Sheriff's Department, Trooper S. Curran and West  
Virginia State Police**

**DATE:** January 26, 2015

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### **ASSIGNMENTS OF ERROR**

- A. The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Defendants Deputy Maston and Corporal Curran are both entitled to qualified immunity as a matter of law.
- B. The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Defendants West Virginia State Police and Tyler County Sheriff's Department are entitled to qualified immunity.
- C. The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Defendant law enforcement officers did not violate the Plaintiff's constitutional rights, in light of clearly established law and the information possessed by the officers at the time of the allegedly wrongful conduct.
- D. The Circuit Court of Tyler County erred when it denied Defendant Deputy Maston's Motion for Summary Judgment because Plaintiff's claims against Defendant Deputy Maston are barred by West Virginia Code § 29-12A-5(b).

### **STATEMENT OF THE CASE**

Plaintiff filed his Complaint on or about March 31, 2011, against Deputy J.K. Maston, Tyler County Sheriff's Department, Corporal S. Curran<sup>1</sup> and The West Virginia State Police. Plaintiff's claims arise from his April 11, 2009 arrest, which occurred in Middlebourne, Tyler County, West Virginia. In Count I of the Complaint, Plaintiff alleged Deputy Maston and Corporal Curran did "intentionally, maliciously, wantonly, willfully, recklessly, unlawfully and/or negligently attack, assault and/or batter the Plaintiff." (See, Appendix at p. 2). In Count II, Plaintiff appears to allege failure to train, discipline, and reprimand Deputy Maston and Corporal Curran by Defendants West Virginia State Police and Tyler County Sheriff's Department. (Appendix at p. 4). In Count III, Plaintiff alleged Deputy Maston committed "assault, battery, intentional infliction of emotional distress/outrage, and abuse of process" and Corporal Curran committed "intentional infliction of emotional distress/outrage and abuse of process, and/or assisted, ratified and condoned the conduct of Deputy J.K. Maston in an assault

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<sup>1</sup> Since the date the Complaint was filed, Trooper First Class Curran was promoted to Corporal.

and/or battery of the Plaintiff.” (Appendix at p. 5). In Count IV, Plaintiff alleges malicious prosecution against all Defendants. (Appendix at pp. 6-9). In Count V, Plaintiff alleges conduct on the parties and the Defendants to accomplish unlawful purposes. (Appendix at p. 9). In Count VI, Plaintiff alleged his liberty and/or freedom of movement was restricted unlawfully by the Defendants. (Appendix at p. 9). And Count VII, Plaintiff alleged Defendants violated Plaintiff’s rights under the West Virginia Constitution. (Appendix at p. 10).

On April 11, 2009, Corporal S. Curran and Deputy J.K. Maston received information from Tyler County Communications of a possible physical altercation that was occurring on Main Street in Middlebourne. *See Deposition of Corporal Curran* at p. 14, l. 14; *See Deposition of Deputy Maston* at p. 16, l. 11-20. Corporal Curran and Deputy Maston responded to the call in Corporal Curran’s police cruiser. *Deposition of Corporal Curran* at p. 14, lines 18-19. Upon arriving at the scene, Corporal Curran and Deputy Maston observed a male and a female, who appeared to be intoxicated exit and re-enter Big C’s Lounge, a local bar. *Deposition of Corporal Curran* at p. 20-21; *Deposition of Deputy Maston* p. 22-23. Approximately five minutes after the male and female reentered the bar, the officers observed a male subject (Plaintiff) come from the bar and walk south along the sidewalk perpendicular to the police cruiser along West Virginia Route 18 (Main Street). *Deposition of Corporal Curran* at p. 21, l. 8-9; p. 26. l. 9. From across the street, Deputy Maston, identified Plaintiff by his build and advised Corporal Curran of his identity. *Deposition of Corporal Curran* at p. 21, l. 18-20. Corporal Curran and Deputy Maston observed Plaintiff staggering down the road, unsteady on his feet and appearing intoxicated. *Deposition of Corporal Curran* at p. 36, l. 14-15; p. 37, l. 5-7; *Deposition of Deputy Maston* at p. 36, l. 13-14.

Plaintiff stopped at an intersection and without provocation turned towards the police

cruiser and began shouting. *Deposition of Corporal Curran* at p. 35, l. 1-6. Corporal Curran lowered his window in an attempt to hear what the Plaintiff was saying. *Deposition of Deputy Maston* at p. 50, l. 22-23; *Deposition of Corporal Curran* at p. 37, line 18; p. 38, l. 2-5. Corporal Curran and Deputy Maston heard Plaintiff yell “What the fuck are you doing?” *Deposition of Deputy Maston* at p.54, l. 10-13; *Deposition of Corporal Curran* at p. 39, l. 2-8. It appeared to Corporal Curran that Plaintiff was acting in a manner as to provoke an altercation. *Deposition of Corporal Curran*, p. 28, l. 15. Plaintiff began raising his hands in the air, shaking them back and forth, and continued to shout and curse causing Corporal Curran to direct him to go home. *Deposition of Corporal Curran* at p. 39, l. 18; p. 40, l. 18; *Deposition of Deputy Maston* at p. 56, l. 3-16. Plaintiff continued to throw his arms in the air and yell curse words. *Deposition of Corporal Curran* at p. 42, l. 2-9. After advising the Plaintiff again, that he needed to return home, Plaintiff refused and began to yell louder, causing Corporal Curran to advise the Plaintiff to “stay right there.” *Deposition of Corporal Curran* at p. 42, l. 2-9.

As Corporal Curran proceeded into the intersection and made a left turn onto south West Virginia Route 18 Plaintiff began to run south down the sidewalk adjacent to the road. *Deposition of Corporal Curran* at p. 43-44; *Deposition of Deputy Maston* at p. 64, l. 7-11. At this time, Deputy Maston advised the claimant to stop, which appeared to make Plaintiff run faster. *Deposition of Corporal Curran* at p. 45, l. 18-20. After Corporal Curran parked the cruiser, Deputy Maston pursued Plaintiff for 50 yards before he was able to pin him against the covered porch railing of an apartment complex, which Plaintiff owns. *Deposition of Corporal Curran* at p. 47, l. 14-19; *Deposition of Deputy Maston* at p. 80, l. 7. Deputy Maston used a wristlock to get Plaintiff’s hands, which he was holding in front of his body, behind his back in order to gain control and hand cuff him. *Deposition of Deputy Maston* at p. 80, l. 7-14. Plaintiff

was resisting Deputy Maston's attempts to put his hands behind his back. Deputy Maston testified he used a wristlock to gain control of plaintiff so he didn't flee any further. *Deposition of Deputy Maston*, p. 81, l. 1-14. Once Deputy Maston reached Plaintiff he was screaming, cursing and resisting. *Deposition of Deputy Maston* at p. 82-84. Deputy Maston gained control of Plaintiff's right arm, and Corporal Curran restrained the left arm once he reached the porch. *Deposition of Corporal Curran* at p. 52, l. 16-18; *Deposition of Deputy Maston* at p. 82-84. Plaintiff continued to resist the officers. *Deposition of Corporal Curran* at p. 53, l. 9.

The fact that Plaintiff began to run gave Deputy Maston the feeling that something was not right, so the officers sought to detain Plaintiff who appeared to be intoxicated and evading the police. *Deposition of Deputy Maston* at p. 74, l. 9-14. *Deposition of Corporal Curran* at p. 48, l. 20. The officers could smell alcohol on Plaintiff's breath and he was attempting to free himself from the officers' grip. *Deposition of Corporal Curran* at p. 49, l. 22-23 and p. 59, l. 18-24; *Deposition of Deputy Maston* at p. 94, l. 11-13. Corporal Curran also noted the plaintiff's speech to be slurred and his eyes to be red and glassy. *Deposition of Corporal Curran*, p. 60, l. 21-23. Plaintiff was moved to the front of the cruiser where he was searched. *Deposition of Deputy Maston* at p. 87, l. 4-6. Plaintiff was advised of his Miranda rights by Corporal Curran and advised that he was under arrest for public intoxication, fleeing on foot and disorderly conduct. *Deposition of Deputy Maston* at p. 90, l. 1-3; *Deposition of Corporal Curran* at p. 65, l. 9-21. After the arrest, Plaintiff complained of pain in his right arm and advised that he wanted medical attention. *Deposition of Deputy Maston* at p. 91, l. 2-4. The officers moved the cuffs from behind his back to in front of his body as Plaintiff was complaining of arm pain. p. 93, l. 16-19. Corporal Curran transported Plaintiff to Sistersville General Hospital. *Deposition of Deputy Maston* at p. 91, l. 10-12; *Deposition of Corporal Curran* at p. 62.

On April 11, 2009, Plaintiff was ultimately charged with public intoxication, disturbing the peace, fleeing on foot, and obstructing/fleeing an officer. (Appendix at p. 125-129). In Judge David W. Hummel, Jr.'s June 5, 2012 order, he granted Defendants' joint motion as related to Plaintiff's causes of action for false arrest/imprisonment, but denied Defendants' motion based on qualified immunity. (Appendix at p. 18). In Judge Hummel's September 25, 2014 order, he found that the record was "laden with genuine issues of material fact"; however, he failed to indicate what those facts were. (Appendix at p. 306).

### **SUMMARY OF ARGUMENT**

The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Defendants Deputy Maston and Corporal Curran are both entitled to qualified immunity as a matter of law. The Court below opined that the record is "laden with genuine issues of material fact," with which the Petitioners disagree. Although the Respondent's account of events is different than the account provided by Deputy Maston and Corporal Curran, there are no material facts in dispute which preclude the Court from determining that the Petitioners are entitled to qualified immunity. The officers had an articulable suspicion, which caused them to stop the Respondent for questioning; however, he left the location where he had been instructed to halt. Deputy Maston had to pursue the Respondent for some distance before he was able to stop his forward movement. Additionally, the Plaintiff smelled of alcohol, his eyes were red and glassy, and his speech was slurred. These factors give probable cause for his arrest. The officers did not use excessive force as they were attempting to restrain an uncooperative, strong suspect of substantial bodyweight, who had recently disobeyed the order to halt and smelled of alcohol.

The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Respondents West Virginia State Police and Tyler County Sheriff's Department are entitled to qualified immunity. Based upon the reasoning listed above, the West Virginia State Police and Tyler County Sheriff's Department are entitled to qualified immunity as Deputy Maston and Corporal Curran are immune. The West Virginia State Police and Tyler County Sheriff's Department cannot be liable for negligent hiring, training and supervision or malicious prosecution as those claims all derive from allegations against Deputy Maston and Corporal Curran, for which they are immune.

The Circuit Court of Tyler County erred when it denied Defendants' Joint Motion for Summary Judgment by failing to find the Defendant law enforcement officers' actions were reasonable and permissible under the circumstances entitling the Defendants to qualified immunity. The officers' actions were reasonable and permissible as they arrested Plaintiff for public intoxication. The Court below fails to note the reasonableness of the officers' action in spite of the fact that medical records made immediately following the arrest indicate that the Plaintiff had the "strong smell of ETOH." Additionally, the Respondent's sister testified that he appeared to be intoxicated when she arrived at the hospital after his arrest. Therefore, the Court below erred in failing to find that the officers conducted themselves in a reasonable matter when pursuing and arresting the Plaintiff for public intoxication.

The Circuit Court of Tyler County erred when it failed to find the Petitioner law enforcement officers acted in an objectively reasonable manner in pursuing and arresting Respondent. Based upon the information available to the officers at the time of the Respondent's arrest, they acted in an objectively reasonable manner. First, the officers had been advised of a possible physical altercation occurring on Main Street in Middlebourne. The officers responded

to the call observing the area of Main Street near Big C's Lounge, a local bar. Second, the officers observed Respondent exit the Big C's Lounge, staggering down the street and appearing unsteady on his feet. Finally, once the Respondent reached the street corner, he began yelling, waving his arms, and cursing toward the police cruiser. Although the Respondent was instructed to halt, in his own words, he instead turned and began to "hustle" toward his apartment building. Therefore, the officers were behaving in an objectively reasonable manner by pursuing and arresting the respondent, who appeared drunk and disorderly while standing on the public street.

The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Petitioner law enforcement officers did not violate the Respondent's constitutional rights, in light of clearly established law and the information possessed by the officers at the time of the allegedly wrongful conduct. At the time of the Respondent's arrest, the officers used appropriate force to effectuate an arrest based upon probable cause. The officer's use of force was appropriate based upon West Virginia State Policy & Procedure 10-1. The officers responded with the use of physical presence, verbal commands and empty hand tactics.

The Circuit Court of Tyler County erred when it denied Petitioner Deputy Maston's Motion for Summary Judgment because Plaintiff's claims against Petitioner Deputy Maston are barred by West Virginia Code § 29-12A-5(b). Deputy Maston is not liable in his individual capacity as he was not acting manifestly outside the scope of his employment or with a malicious purpose. The West Virginia Code clearly states that an employee acting within the scope of his employment is in no instance to be named as a defendant. Deputy Maston pursued the Respondent based upon the information he and Corporal Curran received prior to the Respondent exiting the bar. Deputy Maston pursued the Respondent as he refused to halt when instructed

after he observed the Respondent, who appeared to be intoxicated, yelling and cursing. Upon getting close enough to the Respondent to stop his forward movement, Deputy Maston arrested him as he smelled alcohol on his breath. Therefore, Deputy Maston's behavior was within his scope of employment and without malicious purpose.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondents request oral argument. Cases suitable for Rule 19 argument include, but are not limited to:

(1) cases involving assignments of error in the application of settled law; (2) cases claiming an unsustainable exercise of discretion where the law governing that discretion is settled; (3) cases claiming insufficient evidence or a result against the weight of the evidence; (4) cases involving a narrow issue of law; and (5) cases in which a hearing is required by law.

W. Va. R. App. Pro. 19(a). Here, the appeal concerns a narrow issue of law. The appeal also involves an assignment of error in the application of settled law. Therefore, Petitioners request oral argument.

### **ARGUMENT**

#### **A. Standard of Review**

An order denying a motion for summary judgment is interlocutory and is generally not appealable except in special instances. Syl. Pt. 8, Aetna Casualty & Surety Co., 148 W.Va. 160, 133 S.E.2d 770 (1963). This Court has specifically recognized that “[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the ‘collateral order’ doctrine.” Syl. Pt. 2, Robinson v. Pack, 223 W.Va. 828, 679 S.E.2d 660 (2009). The Court observed in Robinson that allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing

them with “the right not to be subject to the burden of trial.” *Id.* at 833, 679 S.E.2d at 665 (citation omitted).

The standard of review applied in these special instances is stated in syllabus point one of Findley v. State Farm Mutual Automobile Insurance Company, 213 W.Va. 80, 576 S.E.2d 807 (2002): “This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.” Likewise, the review undertaken follows the general principle applicable to any summary judgment ruling: “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, Aetna Casualty & Surety Co., 148 W.Va. at 160, 133 S.E.2d at 771.

**B. The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Defendants Deputy Maston and Corporal Curran are both entitled to qualified immunity as a matter of law.**

Qualified immunity is an immunity afforded to government officials for discretionary activities taken in the individual’s official capacity. “*Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.*” A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted<sup>2</sup> in damages if he does.” Syl. pt. 1, Goines v. James, 433 S.E.2d 572, 573 (W.Va. 1993)(citing Syl. pt. Bennett v. Coffman, 361 S.E.2d 465 (W.Va. 1987)(emphasis added)).

Once the qualified immunity defense is asserted, the burden then shifts to the Plaintiff to defeat the immunity. Underlying qualified immunity is the need to enable government officials to act decisively without undue fear of judicial second guessing. Swanson v. Powers, 937 F.2d

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<sup>2</sup> Mulct: A fine or penalty. See Black’s Law Dictionary, Abridged 7<sup>th</sup> Ed. (2000).

965, 967 (4th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); Akers v. Caperton, 998 F.2d 220, 225-226 (4th Cir. 1993).

In Anderson v. Creighton, 483 U.S. 635, 639-640 (1987), the United States Supreme Court described the substantial threshold showing necessary to defeat a defense of qualified immunity. The standard turns on the “objective legal reasonableness” of the official’s conduct, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) and protects “all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1986). *In particular, qualified immunity protects law enforcement officers from “bad guesses in gray areas,” and it ensures that they may be held personally liable only “for transgressing bright lines.”* Maciarelo v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992)(emphasis added).

“Immunities 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. The 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.” Hutchison v. City of Huntington, 479 S.E.2d 649, 658 (W.Va. 1996)(citing Swint v. Chambers County Commission, 514 U.S. 35 (1995)). The Hutchison 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 on immunity does not lead to loss of right that cannot be corrected on appeal.

479 S.E.2d at fn 13, 659. In Saucier v. Katz, 533 U.S. 194 (2001), the United States Supreme Court clarified the contours of the qualified immunity defense and reiterated the need to resolve the issue of qualified immunity early in the litigation. The Saucier Court stated:

In a suit against an officer for an alleged violation of a constitutional right, the

requisites of a qualified immunity defense must be considered in proper sequence. *Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The privilege is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if the case is erroneously permitted to go to trial. Ibid. As a result, we repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. Hunter v. Bryant, 502 U.S. 224, 227 (1991)(per curiam).*

Id. at 200-201 (emphasis added).

In addressing the issue of qualified immunity the Court must, in the light most favorable to the Plaintiff, address the threshold issue of whether the facts alleged show the individual Defendants' conduct violated a constitutional right. Siegert v. Gilley, 500 U.S. 226, 232 (1991). The second step in the analysis is to determine if the constitutional right allegedly violated was clearly established; hence, the salient inquiry is “. . . whether it would be clear to a reasonable officer that his conduct was unlawful in the situation being confronted.” Saucier, 533 U.S. at 202; (see also Wilson v. Layne, 526 U.S. 603, 615 (1999)). As succinctly stated by the Saucier Court, “[i]f the law did not put the officer on notice that his conduct would be **clearly unlawful**, summary judgment based upon qualified immunity is appropriate.” Id. (emphasis added).

In Cloaninger v. McDevitt, the Fourth Circuit Court of Appeals stated that:

We note that the Supreme Court has now clarified that these two steps need not be taken in the sequence set forth in Saucier, and that “[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs ... should be addressed first in light of the circumstances in the particular case at hand.”

555 F.3d 324, 331, fn. 9 (4th Cir. 2009)(citing Pearson v. Callahan, 555 U.S. 223 (2009)(emphasis added).

The Circuit Court failed to evaluate any of these elements in its September 25, 2014 Order. Judge Hummel ruled that “defendants’ joint motion rests on the contention that the Court should

apply qualified or statutory immunity to the ‘facts’ and determine that Plaintiff’s claims must be dismissed. If only it were that easy.” (Appendix at p. 305). Further Judge Hummel ruled as follows:

The Court truly respects the exigencies of time and circumstances which law enforcement officer in Tyler County, West Virginia, and around this Wonderful State must operate day-in and day-out. Without fail, each and every day those men and women who have sworn to serve and protect must make swift decisions and take immediate action to carry out their duties. Companion with the authority to act is the responsibility to do so reasonably and without violating a citizen’s constitutional rights.

Before the Court is a record laden with genuine issues of material fact. That is not to say that any person or persons who participated in or witnessed the matters that are the subject of the instant civil action are in any way being less than truthful.

**WHEREFORE**, it is the **ORDER** of this Court that Defendants’ joint Motion for Summary Judgment be and hereby is **DENIED**.

(Appendix at pp. 304-305).

The applicable case law firmly holds that qualified immunity is immunity from suit, not a mere defense to liability. Hutchison v. City of Huntington, 479 S.E.2d at 564. Regardless, the Order below lacks an analysis of the qualified immunity argument, which was not only provided in the briefs, but also argued at length upon hearing. The Order rules that the record is “laden with genuine issues of material fact;” however, there is no indication of how these disputed facts bar a claim of qualified immunity. In fact, there is no mention of how the facts allegedly in dispute have been unsuccessful in Petitioners’ argument for qualified immunity. Below, Petitioners will illustrate that there are no genuine issues of material fact as applied to the qualified immunity argument.

1. **Corporal Curran and Deputy Maston did not violate Respondent’s Constitutional rights.**

Based upon the evidence of record, Corporal Curran and Deputy Maston used only the amount of force necessary to make an arrest and, therefore, did not violate any of his Constitutional

rights. As addressed above, allegations of excessive force are brought before the Court as an alleged violation of the Respondent's Fourth Amendment Constitutional right. The Constitutional rights of the Respondent were not violated as the officers were permitted to use reasonable force to effectuate his arrest. The Respondent's expert, R. Paul McCauley, testified, "The Deputy was authorized and justified to use a reasonable level of force to stop and control Mr. Wagner. So yes the deputy may use force." (Appendix at p. 131).

A Report of Response to Resistance or Aggression was completed by Sgt. J.E. Shriver. (Appendix at p. 132). Whenever a State Police Trooper uses force to affect an arrest, the Trooper must report that to his superiors who then investigate the circumstances surrounding the use of force to determine if the force used was necessary and appropriate.

The supervisory officer, Sgt. Shriver, came to Sistersville General Hospital the same night to investigate the use of force. He spoke to Mr. Wagner and asked him if he would give a statement. Sgt. Shriver reported his encounter with Plaintiff as follows:

"On Saturday, April 11, 2009 at approximately 0020 hours Sgt. J. E. Shriver (undersigned officer) was notified by State Police Communications Moundsville to meet unit 459, TFC Curran at Sistersville General Hospital in regards to a Use of Force.

On this same date at approximately 0050 hours the undersigned officer arrived at Sistersville General and met with the suspect, TFC Curran and Deputy Maston of the Tyler County Sheriff's Department. The undersigned officer observed the suspect sitting in a chair inside the emergency room. The undersigned officer observed dried blood on the left cheek of the suspect and a small cut on the suspects left upper cheek. The suspect was stating that his arm was broke. The undersigned officers could smell a strong odor of alcohol coming from the suspect's breath. The suspect had red-blood shot eyes and was arguing with the hospital staff over his injured arm. The undersigned officer ask the suspect if he would give a written statement on how he came in contact with the officers that had arrested him. The suspect inquired who I was. The undersigned officer advised he was Sgt. Shriver with the West Virginia State Police and was investigating why a trooper had to use force and had to bring him to the hospital. The suspected responded by saying I was not qualified to take his statement and he did not want to talk with me."

(Appendix at p. 133).

Following his investigation, Sgt. Shriver concluded as follows:

“After reviewing all statements, observing the suspects’ injuries, attempted to speak with the suspect who refused and all facts surrounding this case, this supervisory member declares that the response to this incident was in compliance with Departmental Policy and Procedures.”

(Appendix at p. 134).

The officers responded with the use of physical presence, verbal commands and empty hand tactics. These tactics were properly used based upon the West Virginia State Police Policy & Procedure 10-1. (Appendix at p. 148). The officers only used such force as was necessary to overcome the resistance. As such, the Plaintiff’s constitutional rights were not violated.

**2. Deputy Maston and Corporal Curran did not violate any clearly established right of the Respondent’s.**

Here, the officers’ conduct was neither unlawful nor a violation of Plaintiff’s constitutional rights. A reasonable officer would have proceeded as Deputy Maston and Trooper Curran did based upon the information available at the time of the arrest. Additionally, when the Plaintiff resisted the officers’ attempts to handcuff him, the officers used a wristlock which was taught to them at the Academy in order to effectively place Plaintiff’s hands behind his back. This technique was used in order to force Plaintiff’s hands behind his back, as he was not complying with the officers’ commands to put his hands behind his back. Defendants’ expert, Sam Faulkner, an expert in use of force and police tactics, testified as follows with regard to the use of a wristlock:

Q (Chad Haught) Okay. In this case, I think Deputy Maston stated he tried to execute a wristlock to handcuff Mr. Wagner. Is that your understanding?

A. (Sam Faulkner) Yes, sir.

Q. So a properly executed wristlock, would that cause an elbow injury?  
Mr. Pullin: Objection to the form of the question.

A. The wristlock itself wouldn't. The person's – it depends on how the person is resisting. Again believe me, sir, I'm not trying to be cute or smart in any way, but the least invasive move I have that's taught in law enforcement is called an escort position. It's a light placement on a wrist and an elbow to escort them. Like if I asked this young lady to go to the dance and we escorted to the dance.

There is nothing – no physical move less invasive than an escort position. I have had multiple cases of an officer escorting a person, the person fighting, elbow went or shoulder went.

Q. Are you going to offer any opinions regarding the causation of Mr. Wagner's injury?

A. I don't think anybody knows when it happened. When he went into the railing there, when the arms were coming back, when he was moving around. I don't know what caused it. But I will say that wristlocks are taught in police work because they do not routinely cause injury.

I've had wristlocks done a million times on me. I've done it millions of times on people. No injuries. Have I had an injury of a person in a wristlock in class? Yes, I have. Because they were going too hard, you know, and we had a wrist injury. I've had that.

Q. That was a wrist injury, though?

A. Yeah. I've had a – I have no idea – it happened in ground fighting where a person just – it was called a bridge to try to get the person off – I don't know if you've had any wrestling background – just did a bridge and had a dislocated shoulder. I had never seen that before. It was one of my basic cadets.

By the time you get in physical confrontation, I don't know the condition of the joint; I don't know how much trauma has been on it before. You see, there are so many factors involved. But we teach wristlocks because they do not routinely cause injury. We teach handcuffing because handcuffing does not routinely cause injury. Have there been injuries? Yes. But it's certainly not intended in a wristlock or in handcuffing.

(Appendix at p. 152).

When Plaintiff continued to complain of pain in his right arm, the officers place his hands

in front of his body in order to reduce pain and discomfort. They also transported Plaintiff to Sistersville General Hospital because he requested medical treatment. Not only did the officers have probable cause for arrest, but they also complied with the proper procedures for treating a suspect after force is used. Therefore, Defendants are entitled to qualified immunity, as there was no constitutional violation or unlawful behavior which a reasonable officer should have been aware of.

In City of St. Albans, a Saint Albans police officer and a reserve (volunteer officer, encountered plaintiff and his associates in a Taco Bell parking lot. City of St. Albans, 719 S.E.2d at 865. Plaintiff was empty handed (one hand was in a cast), however one of his associate was holding a Mag-lite flashlight and the other was holding a small bat. Id. They were standing in what appeared to be a confrontational posture facing three other males who were empty handed and standing outside of a pickup truck. Id. at 866. The six males faced off shouting obscenities at each other. Id. The officers ordered the group to get down on the ground, and all complied except plaintiff. Id. In his deposition testimony, plaintiff testified that Officer Tagayun ran up to him, threw his hands behind his back while kneeling him in the back, and hit him in the head with the butt of his drawn gun. Id. Plaintiff made various allegations which included constitutional tort actions for violations of federal and state constitutional rights; vicarious liability and negligent hiring on part of the city, battery and intentional infliction of mental, physical and emotional distress by the officers; and false arrest/malicious prosecution. Id.

The Court found that a reasonable officer may have believed that plaintiff's refusal to comply with directions to get on the ground were an attempt to obstruct the officer from performing an investigation to determine whether criminal activity was involved. Id. at 372. The U.S. Supreme Court also recognized in Graham v. Connor, "[o]ur Fourth Amendment jurisprudence has long

recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or treat thereof to effect it.” 490 U.S. at 396, 109 S.Ct. 1865. The Court held “[o]ur review of the facts and circumstances in the record support finding qualified immunity from suit, either because no constitutional violation is established by the facts alleged or because a reasonable officer confronting the same situation—without notice to the contrary—would have considered the action lawful.” City of St. Albans, 719 S.E.2d at 872.

Here, the officers observed the Respondent leave Big C’s, stumbling as he crossed the street. The Respondent denied stumbling and he also denied yelling at officers and cursing in a manner which could have been interpreted as hostile. When officers requested that the Respondent halt for investigation, he instead turned and began to “hustle” toward his home. As in City of St. Albans, where the officers had the right to investigate what appeared to be confrontation between two groups of men in a parking lot, here, the officers had a right to speak to the Respondent who appeared to be drunk and disorderly after leaving Big C’s. Upon catching up with the Respondent, Deputy Maston was able to smell alcohol on the Respondent’s breath. Although he denied drunkenness during his deposition, the Respondent’s sister testified that he appeared drunk when she encountered him in the hospital. Hospital personnel also confirmed the smell of alcohol on Plaintiff’s person. Dr. Fagundo, the emergency room physician on duty when the Respondent arrived in police custody testified as follows:

Q. If you could look at the notes of the triage nurse which are on page 2 of the records.

I understand that this is not your writing, but can you read for me what the triage nurse wrote under “Chief Complaint”?

A. “Complaint of pain. Thinks right arm is broken. Strong smell of ETOH noted on patient.”

Q. I’m sorry, what did that say?

A. "Noted" –

Q. "Strong smell of ETOH noted on patient"?

A. "Noted on patient."

Q. And "ETOH" is what?

A. Alcohol.

(Appendix at p. 33). Therefore, based upon the information in evidence, an objective officer would have had reason to believe that it was necessary to pursue the Respondent to investigate his activity and determine if a crime had been committed. The purpose of qualified immunity is so that officers will not be held liable for bad guesses in grey areas. However, here, Petitioner argues that the decision to pursue the Respondent and arrest him was purely black and white. Objectively, the Respondent's actions warranted further investigation. However, the Respondent chose to flee rather than comply with the lawful command of an officer.

**C. The Circuit Court of Tyler County erred when it denied the Joint Motion for Summary Judgment because Defendants West Virginia State Police and Tyler County Sheriff's Department are entitled to qualified immunity.**

The West Virginia State Police and the Tyler County Sheriff's Department are entitled to qualified immunity for allegations of vicarious liability, as Corporal Curran and Deputy Maston are immune. The West Virginia State Police and the Tyler County Sheriff's Department are entitled to vicarious liability of allegations of negligent training, retention and supervision, as those are discretionary activities for which each entity is afforded immunity.

**1. The West Virginia State Police and Tyler County Sheriff's Department are entitled to qualified immunity for claims of vicarious liability as Corporal Curran and Deputy Maston are already entitled to qualified immunity.**

An individual officer's entitlement to qualified immunity generally extends to the agency that employs that officer:

In cases arising under *W.Va. Code § 29-12-5*, and in the absence of express provisions of the insurance contract to the contrary, the immunity of the State is

coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case. However, on occasion, the State will be entitled to immunity when the official is not entitled to the same immunity; in others, the official will be entitled to immunity when the State is not. The existence of the State's immunity of the State [sic] must be determined on a case-by-case basis. Syl. Pt. 6 of Pruitt v. West Virginia Dept. of Public Safety, 222 W.Va. 290, 664 S.E.2d 175 (2008). In the case at bar, Respondent's allegations against the West Virginia State Police appear to be derived entirely from the allegations against Corporal Curran. The West Virginia Supreme Court has described vicarious liability as follows:

An agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship. Of course, if he is acting within the scope of his employment, then his principal or employer may also be held liable.

Id. at 183. Thus, as the Respondent has merely alleged vicarious liability for the claims against West Virginia State Police. If Corporal Curran is entitled to qualified immunity, then Plaintiff's claims against the West Virginia State Police fail as a matter of law. The same theory applies for the Tyler County Sheriff's Department, as Deputy Maston is entitled to qualified immunity. Accordingly, Petitioners request qualified immunity be granted as the West Virginia State Police and the Tyler County Sheriff's Department are immune because Corporal Curran and Deputy Maston are entitled to qualified immunity.

**2. The West Virginia State Police and Tyler County Sheriff's Department are entitled to qualified immunity for claims of negligent training, retention, and supervision, as those are discretionary activities of each the individual agencies.**

Respondents are entitled to qualified immunity regarding their training, supervision and retention of Corporal Curran and Deputy Maston. This Court has recently handled this matter in WVRJCFA. West Virginia Regional Jail and Correctional Facility Authority v. A.B., No. 13-0037 at 1 (W.Va. Oct. 31, 2014). In that case, the court advised as follows:

Respondent's case suffers from the same fundamental flaw as did the case in

*Payne*: “[A]t no time do respondents identify a specific law, statute or regulation which the DHHR defendants violated.” 21 W.Va. at 574, 746 S.E.2d at 565. As such, we find that respondent’s failure to identify a “clearly established” right which the WVRJCFA violated through its training, supervision, and retention of D.H. is likewise fatal to her claim.

WVRJCFA v. A.B., No. 13-0037, at 18. In WVRJCFA, a prisoner was allegedly raped by an employee of the regional jail. Id. at 18. The respondent put forth evidence; however, it failed to establish that the WVRJCFA acted in a manner which violated a clearly established right of which a reasonable official would have known. Id. Instead, the respondent relied upon the actions of its employee, D.H., to allege the claim of negligent training, supervision and retention. Id. The Court found that D.H. violated all manner of clearly established rights upon raping a prisoner; however, the conduct relevant to the appeal was that of the WVRJCFA. Id. at 20.

Here, as in WVRJCFA, Respondent has failed to identify any specific law, statute or regulation which the West Virginia State Police or the Tyler County Sheriff’s Department allegedly violated. Additionally, the Court below has failed to consider the actions of the Petitioners in its ruling. Instead, the focus was upon the actions of Corporal Curran and Deputy Maston. The Respondent has failed to establish a constitutional violation or a “clearly established” right, which Petitioners violated in training, retaining, supervising, or even hiring Corporal Curran or Deputy Maston. It is important to note that the facts important in this matter are the facts applicable to the training, supervising and retention of the officers, not the officers’ actions of the night of the Respondent’s arrest. As the Respondent has failed to prove that the Petitioners violated any clearly established right, his claims fail and the Petitioners are entitled to qualified immunity. Here, as in WVRJCFA, the Petitioners are entitled to qualified immunity.

**D. The Circuit Court of Tyler County erred when it denied Defendant Deputy Maston's Motion for Summary Judgment because Plaintiff's claims against Defendant Deputy Maston are barred by West Virginia Code § 29-12A-5(b).**

Although this point was thoroughly briefed below, the Court failed to address the argument in its September 25, 2014 Order. In addition to the reasons set forth above, Respondent's claims against Deputy Maston are barred by West Virginia law. West Virginia Code § 29-12A-5(b) affords immunity to employees of political subdivisions with several exceptions. The statute provides:

An employee of a political subdivision is immune from liability unless one of the following applies:

- (1) His or her acts or omission were *manifestly outside the scope of employment* or official responsibilities;
- (2) His or her acts or omissions were *with malicious purpose*, in bad faith, or in a wanton or reckless manner; or
- (3) Liability is expressly imposed upon the employee by a provision of this code.

(Emphasis added).

In essence, a police officer employed by a political subdivision must act beyond the scope of his authority or act in a wanton or reckless manner before he can be subjected to liability on a state law based claim. This conclusion is strengthened by the provision of W.Va. Code § 29-12A-13(b) which states:

Suits instituted pursuant to the provisions of this article shall name as defendant the political subdivision against which liability is sought to be established. **In no instance may an employee acting within the scope of his employment be named as defendant.** (Emphasis added).

Respondent's claims are based upon Deputy Maston's exercise of authority as a Deputy Sheriff; therefore, the first exception to immunity does not apply. Allegations regarding Deputy Maston's use of force or decision to pursue an arrest are part of his job duties, which makes them

within the scope of his employment and entitles him to qualified immunity. Deputy Maston did not act with malicious purpose, in bad faith, or in a wanton or reckless manner while effectuating the arrest of the Plaintiff as outlined above; therefore, the second element is not met. Deputy Maston merely pursued the Respondent, who he reasonably believed was fleeing, and used appropriate force to move his arms into a position which would allow the officers to handcuff him. Finally, there is no claim that liability is expressly imposed upon Deputy Maston by any West Virginia statute, so the last exception to the statutory immunity from liability does not apply. As such, Deputy Maston is immune from this suit pursuant to W.Va. Code §29-12A-5(b) and W.Va. Code §29-12A-13(b).

### **CONCLUSION**

Based upon the foregoing, the Petitioners and Defendants below, Deputy J.K. Maston, The Tyler County Sheriff's Department, Corporal S. Curran, and the West Virginia State Police, respectfully request that the Court **GRANT** the *Petitioners' Appeal* and **REMAND** this case back to the Tyler County Circuit Court for dismissal with prejudice.

**DEPUTY J.K. MASTON, TYLER COUNTY  
SHERIFF'S DEPARTMENT, TROOPER S.  
CURRAN AND WEST VIRGINIA STATE  
POLICE**

**By Counsel,**



Gary E. Pullin, Esq. (WVSB No. 4528)  
Emily L. Lilly, Esq. (WVSB No. 11045)  
Michelle Rae Johnson, Esq. (WVSB No. 11869)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301  
Telephone: (304) 344-0100  
Facsimile: (304) 342-1545

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1113

ON APPEAL FROM THE CIRCUIT COURT OF TYLER COUNTY

**DEPUTY J.K. MASTON, TYLER COUNTY  
SHERIFF'S DEPARTMENT, TROOPER S. CURRAN  
AND WEST VIRGINIA STATE POLICE,**

**Defendants' Below, Petitioners,**

v.

**THOMAS JEFFERSON WAGNER,**

**Plaintiff Below, Respondent.**

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Petitioners and Defendants below, does hereby certify that a true copy of the foregoing "**DEPUTY J.K. MASTON, TYLER COUNTY SHERIFF'S DEPARTMENT, TROOPER S. CURRAN AND WEST VIRGINIA STATE POLICE PETITIONERS' BRIEF**" was served upon counsel of record by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the 26<sup>th</sup> day of **January, 2015**.

Chad D. Haught, Esquire  
Jividen Law Offices, P.L.L.C.  
729 North Main Street  
Victorian Old Town  
Wheeling, WV 26003  
*Counsel for Respondent, Plaintiff Below*



Gary E. Pullin, Esq. (WVSB No. 4528)  
Emily L. Lilly, Esq. (WVSB No. 11045)  
Michelle Rae Johnson, Esq. (WVSB No. 11869)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301  
Telephone: (304) 344-0100  
Facsimile: (304) 342-1545