

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITY OF SAINT ALBANS, a
West Virginia municipal corporation,
B.L. TAGAYUN and A.C. TRUITT,

*Petitioners and
Defendants below,*

v.

DAVID A. BOTKINS

*Respondent and
Plaintiff below.*

From the Circuit Court of Kanawha County
The Honorable James C. Stucky
The Honorable John S. Hrko sitting by temporary assignment
Civil Action No. 09-C-1432

FILED
2010 DEC 23 PM 4:14
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

CITY OF ST. ALBANS, a West Virginia Municipal Corporation,
B.L. TAGAYUN, AND A.C. TRUITT'S
PETITION FOR APPEAL

DUANE J. RUGGIER II (WVSB # 7787)
DAVID A. HOLTZAPFEL (WVSB #10515)
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
Telephone: 304-344-0100
*Counsel for Petitioners City of St. Albans,
B.L. Tagayun, and A.C. Truitt*

TABLE OF CONTENTS

Table of Authorities..... iii

Kind of Proceeding and Nature of the Rulings in the Lower Tribunal2

Statement of the Facts2

Assignments of Error.....11

Standard of Review.....11

Arguments15

A. The Circuit Court of Kanawha County erred when it denied the City of St. Albans, B.L. Tagayun, and A.C. Truitt’s *Motion for Summary Judgment* because Defendants B.L. Tagayun and A.C. Truitt are both entitled to qualified immunity as a matter of law because the wrong standard was applied by the Circuit Court.....15

(i) A.C. Truitt is entitled to Qualified Immunity.....18

(ii) B.L. Tagayun is entitled to Qualified Immunity.....23

B. The Circuit Court of Kanawha County erred when it denied the City of St. Albans, B.L. Tagayun, and A.C. Truitt’s *Motion for Summary Judgment* because the Court did not, in fact, rule upon the other arguments proffered within the Defendants’ *Motion for Summary Judgment*.....27

(i) The state common law claims against individual Defendants Tagayun and Truitt should be DISMISSED as employees are immune from suit pursuant to W.Va. Code Section 29-12A-5(B).....27

(ii) Pursuant to the Tort Reform Act, political subdivisions are NOT liable for the intentional acts of their employees.....29

(iii) The facts do NOT show that the Plaintiff has experienced severe emotional distress as a result of his experience during the incident.....29

Conclusion and Prayer for Relief..... 31

TABLE OF AUTHORITIES

A. UNITED STATES SUPREME COURT CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....16

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 14

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)12

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....16

Hunter v. Bryant, 502 U.S. 224 (1991).....17

Malley v. Briggs, 475 U.S. 335 (1986).....16

Mitchell v. Forsyth, 472 U.S. 511 (1985).....17

Pearson v. Callahan, 555 U.S. 223 (2009)..... 18

Saucier v. Katz, 533 U.S. 194 (2001).....passim

Siegert v. Gilley, 500 U.S. 226 (1991).....17

Swint v. Chambers County Commission, 514 U.S. 35 (1995).....17

Wilson v. Layne, 526 U.S. 603 (1999).....18

B. UNITED STATES FEDERAL COURT OF APPEALS CASES

Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993)..... 16

Cloaninger ex rel. Estate of Cloaninger v. McDevitt,
555 F.3d 324 (4th Cir. 2009)..... 27

Maciarelo v. Sumner, 973 F.2d 295 (4th Cir. 1992)..... 16

Stults v. Conoco, Inc., 76 F.3d 651 (5th Cir. 1996)..... 14

Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991)..... 16

C. WEST VIRGINIA SUPREME COURT OF APPEALS CASES

Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York,
133 S.E.2d 770 (W.Va. 1963) 12

Cavendar v. Fouty, 464 S.E.2d 736 (W.Va. 1995)..... 14

Cox v. State, 460 S.E.2d 25 (W.Va. 1995).....14

Durm v. Heck’s, Inc., 401 S.E.2d 908 (W.Va. 1991) 12

Evans v. Mutual Mining, 485 S.E.2d 695 (W.Va. 1997)..... 13

Farm Family Mut. Ins. Co. v. Bobo, 486 S.E.2d 582 (W.Va. 1997)..... 13

Gardner v. CSX Transp., Inc., 498 S.E.2d 473 (W. Va. 1997)..... 13

Goines v. James, 433 S.E.2d 572 (W.Va. 1993).....16

Gooch v. West Virginia Dept. of Public Safety,
465 S.E.2d 628 (W.Va. 1995)..... 14

Harless v. First National Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982)....30

<u>Hutchison v. City of Huntington</u> , 479 S.E.2d 649 (W.Va. 1996)	17
<u>Jarvis v. West Virginia State Police</u> , 2010 WL 4730972 (W.Va. 2010).....	12
<u>Jividen v. Law</u> , 461 S.E.2d 451 (W.Va. 1995).....	14
<u>Mallamo v. Town of Rivesville</u> , 477 S.E.2d 525 (W.Va. 1996).....	29
<u>McKenzie v. Cherry River Coal & Coke Co.</u> , 466 S.E.2d 810 (W.Va. 1995).....	14
<u>McGraw v. St. Joseph’s Hospital</u> , 488 S.E.2d 389 (W.Va. 1997)	13
<u>Miller v. City Hospital, Inc.</u> , 475 S.E.2d 495 (W.Va. 1996).....	14
<u>Painter v. Peavy</u> , 451 S.E.2d 755 (W.Va. 1994).....	12
<u>Payne’s Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of West Virginia</u> , 490 S.E.2d 772 (W.Va. 1997)	13
<u>Powderidge Unit Owners Ass’n. v. Highland Properties, Ltd.</u> , 474 S.E.2d 872 (W.Va. 1996).....	14
<u>Robinson v. Pack</u> , 679 S.E.2d 660 (W.Va. 2009).....	passim
<u>Williams v. Precision Coil, Inc.</u> , 459 S.E.2d 329 (W.Va. 1995).....	14

D. FEDERAL REGULATIONS

42 U.S.C. § 1983	15
-------------------------------	----

E. WEST VIRGINIA CODE

W. Va. Code § 29-12A-4(c)(2)(1986).....29

W.Va. Code Section 29-12A-5(b)(1986).....26-28

W.Va. Code § 29-12A-13(b)(1986).....27, 28

F. WEST VIRGINIA RULES OF CIVIL PROCEDURE

Rule 56 of the West Virginia Rules of Civil Procedure..... 13

G. RESTATMENTS, TREATISES, AND OTHER ACEDMIC MATERIALS

Black’s Law Dictionary, Abridged 7th Ed. (2000) 15

Restatement (Second) of Torts § 46 (1965)..... 30

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITY OF SAINT ALBANS, a
West Virginia municipal corporation,
B.L. TAGAYUN and A.C. TRUITT,

*Petitioners and
Defendants below,*

v.

DAVID A. BOTKINS

*Respondent and
Plaintiff below.*

From the Circuit Court of Kanawha County
The Honorable James C. Stucky
The Honorable John S. Hrko sitting by temporary assignment
Civil Action No. 09-C-1432

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

2010 DEC 23 PM 4:15

FILED

PETITIONERS CITY OF ST. ALBANS, B.L. TAGAYUN, AND A.C. TRUITT'S
BRIEF IN SUPPORT OF THEIR APPEAL OF THE CIRCUIT COURT'S ORDER
DENYING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DUANE J. RUGGIER II (WVSB # 7787)
DAVID A. HOLTZAPFEL (WVSB #10515)
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
Telephone: 304-344-0100
*Counsel for Petitioners City of St. Albans,
B.L. Tagayun, and A.C. Truitt*

Petitioners and Defendants below, City of St. Albans, B.L. Tagayun, and A.C. Truitt, by counsel, Duane J. Ruggier II, David A. Holtzapfel, and Pullin, Fowler, Flanagan, Brown & Poe, PLLC, respectfully represent unto this Court that the Circuit Court of Kanawha County, West Virginia committed reversible error in the underlying action by denying summary judgment in favor of the Respondent and Plaintiff below. As discussed below, the Petition for Appeal is an interlocutory appeal based upon, but not limited to, the lower Court's application of an incorrect standard in its' denial of qualified immunity to St. Albans' Defendants' A.C. Truitt's and Brandon Tagayun. In further support thereof, the Petitioners and Defendants below state and aver as follows:

**THE KIND OF PROCEEDINGS AND NATURE OF THE RULINGS
IN THE LOWER TRIBUNAL**

This is an interlocutory appeal from Judge John S. Hrko's¹ November 5, 2010 *Order* that DENIED Petitioners/Defendants City of St. Albans, B.L. Tagayun, and A.C. Truitt's *Motion for Summary Judgment* on the main issue of "qualified immunity."

STATEMENT OF FACTS

According to the *Complaint*, the Plaintiff alleges that on or about the 23rd day of November 2008, Defendant B.L. Tagayun "confronted the plaintiff in Saint Albans, Kanawha County, West Virginia, and struck the plaintiff, David A. Botkins with the butt of his service weapon several times, kicked and spat upon the plaintiff while he was convulsing on the ground. Defendant Truitt negligently failed to intervene, although having a duty to do so." See *Complaint*, ¶ 4, pp. 1-2.

¹ Civil Action No. 09-C-1432 was assigned to Judge James C. Stucky of the Kanawha County Circuit Court. Judge John S. Hrko was sitting by temporary assignment when he ruled upon the Petitioners' aforementioned *Motion for Summary Judgment*.

During his deposition, Plaintiff David Botkins stated that he was in the Taco Bell drive-thru, in St. Albans, West Virginia, ordering some food in his Jeep Cherokee with his two male friends, Casey Clark and Jimmy Moore. The Plaintiff states that there was a black Ford truck in front of them with three males inside. While at the drive-thru, Jimmy Moore got out of the Plaintiffs' vehicle and went to talk with someone he knew who was behind them at the Taco Bell drive-thru. *See Memorandum of Law in Support of Defendants' Motion for Summary Judgment*, attached Exhibit 2, pp. 43-44.

As they waited in line, Casey Clark yelled "scoot the f*ck up" at the black Ford truck and its occupants who were in front of the Plaintiff's vehicle in the drive-thru. Jimmy Moore then returned to the Plaintiff's vehicle and asked Casey Clark who he was yelling at. After Clark told Moore what he did, Jimmy Moore began yelling obscenities at the three males in the black Ford truck. All three males then get out of the black Ford truck and approached the Plaintiff's vehicle. *See Id.*, Exhibit 2, pp. 43-44; ¶¶ 16-19, p. 46.

In response, Casey Clark got out of the Plaintiff's vehicle with a large Mag-Light flashlight in his hands, Jimmy Moore got out and grabbed a wooden club, and the Plaintiff exited and got behind Casey Clark and Jimmy Moore allegedly because "I didn't want to get involved." *See Id.*, Exhibit 2, ¶¶ 13-21, p. 44; ¶¶ 5-6, p. 67; ¶¶ 4-24, p. 68. However, as the six males faced off, the Plaintiff stated that his friend, Casey Clark, recognized one of the three males in the black Ford truck as someone he knew. The situation therein apparently calmed down. *See Id.*, Exhibit 2, ¶¶ 11-24, p. 48; ¶¶ 1-6, p. 49.

At the exact same moment, St. Albans Police Officer Brandon Tagayun and Reserve Officer Aaron Truitt came upon the six suspects in the Taco Bell Drive-thru. The Plaintiff, in describing the situation, stated "about that time [they decide not to fight] here comes Brandon

with his gun out and Aaron was in behind him. I don't think he had a gun." See Id., Exhibit 2, ¶¶ 6-8, p. 49. Plaintiff David Botkins alleged that Defendant Tagayun ran up to him, threw Botkins' hands behind his back, and put his knee in Botkins' back, and then allegedly hits Botkins with the butt of his gun. The Plaintiff then alleged that Defendant Tagayun kicked him repeatedly and hit him two more times with his gun. Botkins also stated that he had blood running down his head and that he kept yelling "quit" and "that's police brutality" until Defendant Tagayun handcuffed him and shackled his legs. See Id., Exhibit 2, ¶¶ 9-23, p. 49; ¶¶ 1-16, p. 50.

After additional depositions were taken, a more complete story was revealed regarding the particulars of the incident that occurred in the Taco Bell Drive-Thru on November 22-23, 2008. Plaintiff David Botkins testified during his deposition that as tensions between the two vehicles and their six male occupants increased:

Q: Okay.

A: **So Casey [Clark] gets out, but' he's standing at my door, the door is open, the passenger door is open, he's hid behind it and he's got a flashlight. Jimmy [Moore] is at back door hid behind it with –**

Q: Why are you all getting behind the doors?

A: **I don't know why they done it.**

Q: Were they going to shoot?

A: **No, they didn't have no gun or nothing. He had a club, but he didn't have no gun.**

Q: When these three are approaching, do they have any kind of weapons?

A: **No, not that I could see.**

Q: So Casey [Clark] has got a flashlight and he steps out of the car, but stays behind the door?

A: **Yes, kind of halfway –**

Q: Which side is Jimmy [Moore] on, driver or passenger?

A: **Passenger, he's in behind Casey [Moore].**

Q: He gets out and stands behind the door also. Has he got anything on him?

A: **He had a club.**

Q: What do you do?

A: **I get nervous and jump out and I run like in behind Jimmy [Moore] because they're all arguing at that point.**

Q: Everybody is yelling?

A: **Yes, everybody is cussing each other. I didn't know what was going to happen, so I jump out and I just run in the back and come in behind all of them, Jimmy [Moore] and all of them, Jimmy [Moore] and Casey [Clark] is in front of me.**

Q: You're behind Jimmy [Moore] at the back passenger door?

A: **Yes ... Then all of a sudden one of the boys happened to know Casey [Clark]. That was Justin [Harvey] because Justin dated a girl which was best friends with Casey's girlfriend. So it all calms down –**

...

Q: What happens?

A: **Justin realizes Casey [Clark], so then everything calms down, everybody is making up, just talking and I'm still standing back where I was. Casey meets Justin in front of my Jeep and they shake hands and about that time here comes Brandon [Tagayun] with his gun out and Aaron [Truitt] was in behind him. I don't think he had a gun.**

See Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment, attached Exhibit 1, Deposition of David Alan Botkins, ¶¶ 2-24, p. 47; ¶¶ 1-14, p. 48; ¶¶ 1-8, p. 49.

Importantly, Plaintiff David Botkins admitted that Defendant A.C. Truitt did nothing inappropriate to him:

Q: At any time did Aaron Truitt physically touch you?

A: **No, he never.**

Q: At any time did Aaron Truitt strike you?

A: **No.**

Q: At any time did Aaron Truitt grab you?

A: **No.**

Q: At any time did Aaron Truitt do anything inappropriate?
Mr. Clifford: Objection.
The Witness: No, he just stood there and watched. I don't know if he was in shock or what.

Q: But you said no, he didn't do anything inappropriate?

A: **No.**

See Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Exhibit 2, ¶¶ 17-24, p. 50; ¶¶ 1-9, p. 51. The Plaintiff's testimony was echoed by the testimony of Casey Clark, Plaintiff David Botkins' friend who was with him on the evening of November 22-23, 2008. During his deposition, Casey Clark testified:

Q: The other officer, Officer Truitt, did he do anything? Did he hit David Botkins?

A: **No, he did not.**

Q: Did he hit you?

A: **No, he did not.**

Q: Do you believe that he did anything wrong?

A: **No.**

See Id., Exhibit 3, ¶¶ 13-19, p. 57.

Its is further important to this appeal that at the exact moment that the six men realize that they do not have to fight, St. Albans Police Officer Brandon Tagayun and Reserve Officer Aaron Truitt appear contemporaneously. From the perspective of the officers, the Tagayun and Truitt came upon six unknown suspects confronting each other and shouting in the Taco Bell Drive-thru. They observed three men standing outside of a Jeep Grand Cherokee with what appeared to be weapons in their hands. Casey Clark had what appeared to be a 4 cell MagLight flashlight, Jimmy Moore had what appeared to be a homemade bat/club, and David Botkins had what appeared to be a plaster cast on his right hand. They were in a confrontational posture with Justin Harvey, Ryan Dillon, and Josh Mazzie who were standing outside of a Chevrolet 1500

pickup truck. Both groups were shouting back and forth at each other. Justin Harvey, Ryan Dillon, and Josh Mazzie did not have any weapons at all. *See Id.*, Exhibit 2, attached *Affidavit of Aaron Christopher Truitt*, ¶ 11, pp. 2-3.

When Defendants Tagayun and Truitt arrived at the Taco Bell Drive-Thru, they came upon what presented to be a clearly dangerous and volatile situation between six men facing off in public with weapons. Officer Tagayun immediately ordered all six (6) individuals to get down on the ground. Everyone complied with the order except for David Botkins, the driver of the Jeep. Defendant Truitt then turned his attention to Justin Harvey, Ryan Dillon, and Josh Mazzie, who had previously been confronting the Plaintiff and his friends, and made sure that they complied with Officer Tagayun's orders to get down on the ground. *See Id.*, Exhibit 2, ¶ 12, p. 3.

Plaintiff David Botkins testified that he did not immediately comply with the Defendant officers' orders:

Q: Is it your testimony you were fully compliant even when you wouldn't get on the ground?

A: **Well yes - - well, no, I might have been a little slow about getting my belly on the ground.**

Q: How were you a little slow?

A: **I was just hesitant about moving to the ground. Like I said before, I didn't want him to mess with my arm or my cast.**

See Id., Exhibit 1, ¶¶ 12-19, p. 98.

The Plaintiff's friend, Casey Clark, who was with the Plaintiff in his Jeep that night, testified that the events happened very fast:

Q: So from what you're testifying to, two minutes from the time Jimmy [Moore] starts jaw-jacking with the guys in front, until the officers come and take Mr. Botkins down, we're talking two minutes?

A: **Probably so, yes.**

Q: So it happened very fast?

A: **Very fast, yes.**

See Id., Exhibit 3, attached *Deposition of Casey Alan Clark*, ¶¶ 9-15, p. 64. Justin Harvey, one of the three men in the truck in front of the Plaintiff's vehicle that Casey Clark recognized, testified that:

Q: So you parked in the parking lot, ran back around, then what happened?

A: **As soon as I got up to Casey, I said, "Man, you don't want to do this. These are my friends. I know you, but these are my friends." As soon as that happened, the St. Albans police were there.**

Q: Are you saying it's pretty much instantaneous as soon as you got there?

A: **Yes.**

See Id., Exhibit 4, attached *Deposition of Justin Douglas Harvey*, ¶¶ 9-15, p. 64.

The two other participants in this incident, Josh Mazzie and Ryan Dillon, both testified to the limited amount of time between the incident and the Defendants arriving on scene. Josh Mazzie, driver of the black Ford truck, spoke about Justin Harvey trying to defuse the situation and stated:

Q: Where was Justin in all of this?

A: **He had already pulled around and he heard the shouting and come running back around the building and I guess he knew the Casey [Clark] boy from a previous girlfriend and he was talking to him.**

Q: Was he doing a good job defusing the situation?

A: **Pretty much, until the officers came around. It was that fast.**

Q: So there was pretty much – give me a time frame. From the time that you guys started shouting at each other for the first time, like move up, to when the officers showed up, how long? What are we talking about, a couple of minutes?

A: **A couple of minutes, yes.**

Q: Less than five?

A: **About five, less than five. It was going by fast.**

Q: When Justin [Harvey] came around to Casey [Clark] and they started talking like, "Hey, these are my buddies, let's not fight" –

A: **Then the officers comes [sic] around the building about that time.**

See Id., Exhibit 5, attached *Deposition of Joshua Edward Mazzie*, ¶¶ 17-24, p. 20; ¶¶ 1-15, p. 21.

Additionally, Ryan Dillon, who was in the vehicle with Josh Mazzie, stated:

Q: From the time that Justin came running up to you guys, how long between him entering the situation and the police officers coming? Give me an idea of the time.

A: **Maybe a minute, two.**

Q: Tops?

A: **He told one of them boys not to do this or something and then I turned around and I heard, "Freeze, get on the ground."**

See Id., Exhibit 6, attached *Deposition of Ryan Patrick Dillon*, ¶¶ 13-20, p. 18.

Through all the testimony of Plaintiff David Botkins, Defendants Tagayun and Truitt, and all of the eye-witnesses, it is undisputed that the time between any peaceful end to the hostilities between the six men **AND** the arrival of the Defendant officers happened almost instantaneously. Therefore, **contemporaneous** with the dispute being seemingly resolved, the Defendants came upon six men, with three of them appearing to have weapons and all of them appearing ready to fight in the Taco Bell drive thru. The Plaintiff incorrectly states that the incident had already resolved and that a discernable amount of time passed before the Defendants arrived on scene.

The Petitioners and Defendants below initially filed a *Motion for Summary Judgment* pursuant to West Virginia Rules of Civil Procedure Rule 56 on or about August 11, 2010. The *Motion and Memorandum of Law in Support* advanced five (5) arguments:

- (1) Defendants B.L. Tagayun and A.C. Truitt are entitled to Qualified Immunity because their individual actions were NOT "clearly unlawful;"
- (2) Defendant A.C. Truitt should be DISMISSED from this action (a) because he did not cause any injury to the Plaintiff, and (b) because he had no duty to intervene;
- (3) The state common law claims against individual Defendants Tagayun and Truitt should be DISMISSED as employees are immune from suit pursuant to W.Va. Code Section 29-12A-5(B);

- (4) Pursuant to the Tort Reform Act, political subdivisions are NOT liable for the intentional acts of their employees;
- (5) The facts do NOT show that the Plaintiff has experienced severe emotional distress as a result of his experience during the incident.

The circuit court (*with Judge John S. Hrko sitting by temporary assignment*) only addressed the “qualified immunity” argument and a “duty to intervene argument involving Defendant Truitt” during the November 4, 2010 motion hearing. The Court turned aside the Defendants’ arguments and held:

The Court: But, however, Mr. Ruggier, you know that there are - - there is case law that an officer who stands by while a wrong is being committed is held responsible for just standing by while the wrong is being committed.

Now, that opens the door to, “Is it wrong? Was a wrong being committed? Did it – Was it – Should he have his head whacked with a pistol?” Probably not.

Was it wrong to do it? I don’t know. Was Mr. Truitt an officer, or a policeman, or an individual with responsibility, being there, riding there, dressed in uniform, although it was different? I don’t know.

Is there qualified immunity? Well, then I have to decide whether or not I believe that the act was a wrongful act, and I don’t know.

I appreciate your arguments, and I appreciate the brief that you wrote, and I appreciate everyone’s situation in this, and I believe that reasonable minds could come to different conclusions about each and every issue that you have raised in this case.

I believe that this is one of those cases that should better be decided on a motion for a directed verdict, as opposed to a motion for summary judgment, and, accordingly, your motion for summary judgment will be denied on each of the grounds that you have cited in your brief. I can go back through those.

Mr. Ruggier: Judge, may I speak? As far as – I understand the Court’s ruling. I would like to talk a little bit – Aaron Truitt, as far as his actions, as far as what he did, and you said that it was a question of whether –

whether his – whether – you know, whether it was wrong for Brandon Tagayun to do what he did during the arrest.

Would Aaron Truitt – If Aaron Truitt had qualified immunity, which he would, as a reserve officer, in order to defeat his qualified immunity, his actions would have had to be clearly unlawful, and so is the Court saying that it would be – that it was clearly unlawful that Aaron Truitt – if Brandon Tagayun does what the plaintiff’s are alleging, was Aaron Truitt’s actions – would it have been clearly unlawful for Aaron Truitt, as a Building Department employee, reserve officer, to not – to fail to intervene?

The Court: What I’m saying is that on a motion for a directed verdict would be the best time to make that decision.

Mr. Ruggier: Even on qualified immunity –

The Court: (Interposing). That’s what I’m saying.

See Transcript for Hearing for Motion for Summary Judgment Thursday, November 4, 2010, ¶¶ 1-24, p. 25; ¶¶ 1-23, p. 26 (emphasis added).

ASSIGNMENTS OF ERROR

1. **The Circuit Court of Kanawha County erred when it denied the City of St. Albans, B.L. Tagayun, and A.C. Truitt’s *Motion for Summary Judgment* because Defendants B.L. Tagayun and A.C. Truitt are both entitled to qualified immunity as a matter of law because the wrong standard was applied by the Circuit Court.**
2. **The Circuit Court of Kanawha County erred when it denied the City of St. Albans, B.L. Tagayun, and A.C. Truitt’s *Motion for Summary Judgment* because the Court did not, in fact, rule upon the other arguments proffered within the Defendants’ *Motion for Summary Judgment*.**

STANDARD OF REVIEW

In Syllabus Point 2 of Robinson v. Pack, 679 S.E.2d 660 (W.Va. 2009), this Court held 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.” The “collateral order” doctrine, as explained in Robinson:

was set forth by the United States Supreme Court in *Cohen* [*v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)].... In *Durm* [*v. Heck's, Inc.*], 184 W.Va. at 566 n. 2, 401 S.E.2d at 912 n. 2, we noted the doctrine as an exception to the federal interpretation of Rule 54(b), and we said that under *Cohen*, “[a]n interlocutory order would be subject to appeal under this doctrine if it ‘(1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the actions, and (3) is effectively unreviewable on appeal from a final judgment.’

Id. at 664. “The three-factor Cohen test governs our determination of whether a qualified immunity ruling falls within the ‘collateral order’ doctrine and is therefore subject to immediate appeal.” Id.

This Court further discussed in Robinson why the collateral order doctrine applies to cases involving claims of qualified immunity:

With regard to the first factor of Cohen ... [b]ecause a ruling denying the availability of immunity fully resolves the issue of a litigant's obligation to participate in the litigation, the first factor of Cohen is easily met. As to the second factor which focuses on whether the immunity ruling resolves significant issues separate from the merits, there is little question that the claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his or her rights have been violated....

The final factor of the Cohen test requires us to consider whether a qualified immunity ruling is effectively unreviewable at the appeal stage. Postponing review of a ruling denying immunity to the post-trial stage is fruitless ... because the underlying objective in any immunity determination (absolute or qualified) is immunity from suit. Traditional appellate review of a qualified immunity ruling cannot achieve the intended goal of an immunity ruling: the right not to be subject to the burden of trial. As a result, the third factor of Cohen is easily met.

Jarvis v. West Virginia State Police, 2010 WL 4730972 (W.Va. 2010)(citing Robinson v. Pack, 679 S.E.2d at 664-665 (internal quotations, brackets, and citations omitted).

As the instant order denying a motion for summary judgment is an order that is predicated in part on qualified immunity, the order is subject to immediate appeal under this Court's holding in Robinson. A circuit court's entry of summary judgment is reviewed *de novo*. Syl. pt. 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). The test for determining the propriety

of summary judgment is set forth in Syllabus Point 3 of Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 133 S.E.2d 770 (W.Va. 1963), where the Court held, “[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.” The decision in Painter v. Peavy, marked a significant shift in the attitude of the Court toward summary judgment. This shift in judicial attitude was reflected in the following statement:

Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. *It is “designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,” if in essence there is no real dispute as to salient facts or if only a question of law is involved...* Indeed, it is one of the few safeguards in existence that prevents frivolous lawsuits that have survived a motion to dismiss from being tried. Its principal purpose is to isolate and dispose of meritless litigation...To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. *When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists.* Otherwise, Rule 56 empowers the trial court to grant the motion.

451 S.E.2d at 758 (emphasis added).

In order to defeat a motion for summary judgment, the Petitioner must either: (1) rehabilitate the evidence attacked by the Respondent, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). If the Petitioner fails to meet this burden, then as a matter of law, Respondent’s motion for summary judgment must be granted. Syl. pt. 5, Gardner v. CSX Transp., Inc., 498 S.E.2d 473 (W.Va. 1997); Syl. pt. 4, Payne’s Hardware & Building Supply, Inc. v. Apple Valley Trading Co. of West Virginia, 490 S.E.2d 770 (W.Va. 1997); Syl. pt. 3, McGraw v. St. Joseph’s Hospital, 488 S.E.2d 389 (W.Va. 1997); Syl. pt. 3, Farm Family Mut. Ins. Co. v. Bobo, 486 S.E.2d 582 (W.Va. 1997); Syl. pt. 4, Evans v. Mutual Mining, 485 S.E.2d 695 (W.Va. 1997);

Syl. pt. 3, Miller v. City Hospital, Inc., 475 S.E.2d 495 (W.Va. 1996); Syl. pt. 3, McKenzie v. Cherry River Coal & Coke Co., 466 S.E.2d 810 (W.Va. 1995); Syl. pt. 6, Gooch v. West Virginia Dept. of Public Safety, 465 S.E.2d 628 (W.Va. 1995); Syl. pt. 3, Cavendar v. Fouty, 464 S.E.2d 736 (W.Va. 1995); Syl. pt. 3, Jividen v. Law, 461 S.E.2d 451 (W.Va. 1995); Syl. pt. 3, Cox v. State, 460 S.E.2d 25 (W.Va. 1995).

Moreover, in Syllabus Point 1 of Jividen v. Law, the Court further articulated that the existence of “factual issues” does not necessarily preclude the award of summary judgment, stating that:

The mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under West Virginia Rule of Civil Procedure 56(c) by demonstrating that a legitimate jury question, i.e., a genuine issue of material fact, is present.

461 S.E.2d 451 (W.Va. 1995)(emphasis added).

Likewise, in Powderidge Unit Owners Ass’n. v. Highland Properties, Ltd., the Court stated:

Summary judgment is not a remedy to be exercised at the circuit court’s option; it must be granted when there is no genuine disputed issue of a material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986); Williams, 194 W. Va. at 59 n. 7, 459 S.E.2d at 335-36 n. 7 (“[i]f the nonmoving party does not controvert the proof offered in support of the motion, and the moving party’s affidavit shows that it supports a judgment as a matter of law, Rule 56(c) mandates summary judgment be granted”). *Genuineness and materiality are not infinitely elastic euphemisms that may be stretched to fit whatever preferences catch a litigant’s fancy. A “dispute about a material fact is ‘genuine’ . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”* Anderson, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211. *However, “only materials which were included in the pretrial record and that would have been admissible evidence may be considered.”* Stults v. Conoco, Inc., 76 F.3d 651, 654 (5th Cir. 1996). (Citation omitted).

474 S.E.2d 872, 878 (W. Va. 1996) (emphasis added and footnotes omitted).

ARGUMENTS

- A. The Circuit Court of Kanawha County erred when it denied the City of St. Albans, B.L. Tagayun, and A.C. Truitt's *Motion for Summary Judgment* because Defendants B.L. Tagayun and A.C. Truitt are both entitled to qualified immunity as a matter of law because the wrong standard was applied by the Circuit Court.**

The Circuit Court of Kanawha County erred when it DENIED the City of St. Albans, B.L. Tagayun, and A.C. Truitt's *Motion for Summary Judgment* because both Defendant Tagayun and Truitt are, as a matter of law, entitled to dismissal pursuant to the common law doctrine of "qualified immunity." In particular, the Court applied an incorrect standard in denying the qualified immunity of the officers.

Civil rights violations under 42 U.S.C. § 1983, as alleged in the Plaintiff's *Complaint*, are grounded in common law. They are violations of one's Constitutional rights, whether it is the United States Constitution or the West Virginia Constitution. The Defendants are entitled to qualified immunity for the discretionary functions and acts made within the scope of their employment, as well as any and all alleged violations of Plaintiff's constitutional rights.

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 mulcted² 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

² Mulct: A fine or penalty. See Black's Law Dictionary, Abridged 7th Ed. (2000).

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 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).

In his *Complaint*, the Plaintiff states that “the actions of Defendant Tagayun and Truitt were done in bad faith, were done maliciously, and *were in violation of clearly established law*, or in a wanton or reckless manner.” *See Complaint*, ¶ 9, p. 2 (emphasis added). “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202. Therefore, the seminal question in regard to Brandon Tagayun’s qualified immunity in this action is whether the law put Brandon Tagayun on notice that it was “clearly unlawful” to take down Plaintiff David Botkins when he was acting belligerent towards the Defendants and refused to get down on the ground after commanded to do so. The seminal question in regard to Aaron Truitt’s qualified immunity in this action is whether the law put *reserve officer* Aaron Truitt on notice that it was “clearly unlawful” to *not* intervene in Tagayun’s arrest of David Botkins. The “qualified immunity” defense permits for an officer’s mistaken belief that his actions are legal. In the instant case, a reasonable officer (Tagayun) and a reasonable reserve officer (Truitt) would not be on notice that their respective actions were clearly unlawful because they were, in fact, lawful actions.

(i) A.C. Truitt is entitled to Qualified Immunity

The Plaintiff alleges that Defendant Truitt “negligently failed to intervene, although having a duty to do so.” *See Complaint*, ¶ 4, p. 2. Because Truitt is not a police officer and does not have the same duties and obligations that a police officer has, he cannot intervene against a police officer. Defendant Truitt is a city employee for the city of St. Albans. Since May of 2004, Defendant Truitt has been working for the City of St. Albans Parks and Recreation Department as a helper/laborer; the City of St. Albans Public Works Department as a trash collector, laborer, and equipment operator; and the City of St. Albans Building Department. He

is still presently employed by the City of St. Albans Building Department. *See Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment*, Exhibit 2, ¶¶ 1-5, pp. 1-2.

On or around May 2006, Defendant Truitt applied for a "Reserve Officer" position with the City of St. Albans Police Department. This was strictly a *volunteer* position. He never received a salary or any other compensation in his position as a "Reserve Officer." According to Defendant Truitt, in order to become a "Reserve Officer" for the City of St. Albans Police Department, a person fills out a City of St. Albans general application, gets fingerprinted, and has a background check performed on them. Any citizen can become a "Reserve Officer" if he or she performs these same steps. *See Id.*, Exhibit 2, ¶¶ 6-7, p. 2.

On or about November 22-23, 2008, Defendant Truitt was a "Reserve Officer" for the St. Albans' Police Department. He did not have the duties and/or responsibilities of an actual police officer and was merely assisting Defendant Tagayun, a full-time officer with the St. Albans Police Department, on the night of the incident. The Plaintiff argued that "[o]n the night in question, Truitt was a 'reserve officer' assisting Tagayun in his law enforcement duties, and not simply a civilian." *See Plaintiff's Response to Defendants' Motion for Summary Judgment*, ¶ 2, p. 3.

However, the Plaintiff offered no evidence or proof that Defendant Truitt was, in fact, acting as a proper law enforcement officer at the time of the incident. The Plaintiff also offered no West Virginia case law or statute that states the duties and responsibilities of a "Reserve" or "Auxiliary" Officer. Additionally, it is without dispute that Defendant Truitt did not physically harm Plaintiff David Botkins. The only argument that the Plaintiff proffered, was that in the criminal complaint against the Plaintiff, Defendant Tagayun wrote that he and Truitt "identified themselves as police." *Id.* However, once again, Defendant Truitt is **NOT** a police officer.

Defendant Truitt *never* attended training at the West Virginia State Police Academy. He was only trained to utilize OC Spray (Oleoresin Capsicum or “pepper” spray); the ASP Baton (Armament Systems and Procedures, Inc. Baton); and the TASER electroshock gun. Defendant Truitt was never issued a service weapon by the City of St. Albans Police Department. *See Exhibit 2, ¶ 8, p. 2.* The mere fact that the Plaintiff alleged that Defendant Tagayun struck David Botkins with his service weapon, does not prove that Defendant Truitt actually even witnessed that very act. The Plaintiff has not met his burden of producing even a scintilla of evidence that Defendant Truitt witnessed or even recognized a “constitutional violation” that he is accused of “standing idly by” while it was happening.

In his November 12, 2009 deposition, Plaintiff David Botkins admitted that Defendant A.C. Truitt did nothing inappropriate to him. The Plaintiff testified that:

Q: At any time did Aaron Truitt physically touch you?

A: **No, he never.**

Q: At any time did Aaron Truitt strike you?

A: **No.**

Q: At any time did Aaron Truitt grab you?

A: **No.**

Q: At any time did Aaron Truitt do anything inappropriate?

Mr. Clifford: Objection.

The Witness: No, he just stood there and watched. I don't know if he was in shock or what.

Q: But you said no, he didn't do anything inappropriate?

A: **No.**

See Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Exhibit 2, ¶¶ 17-24, p. 50; ¶¶ 1-9, p. 51. The Plaintiff's testimony was echoed by the testimony of Casey Clark, Plaintiff David Botkins' friend who was with him on the evening of November 22-23, 2008. During his deposition, Casey Clark testified:

Q: The other officer, Officer Truitt, did he do anything? Did he hit David Botkins?

A: **No, he did not.**

Q: Did he hit you?

A: **No, he did not.**

Q: Do you believe that he did anything wrong?

A: **No.**

See Id., Exhibit 3, ¶¶ 13-19, p. 57.

It is *undisputed* that Defendant Truitt had no physical contact with Plaintiff David Botkins, or anyone else, and did not injure the Plaintiff in any way, shape, or form. There was no genuine issue of a material fact that Defendant Aaron Truitt had a duty to intervene on behalf of Plaintiff David Botkins. It is unreasonable to think that a city building department employee who moonlights as a reserve police officer should know to intervene or interfere with a city police officer during an arrest. Additionally, the Plaintiff has already conceded that Defendant Truitt did not have any physical contact with the Plaintiff which caused any injury. See *Plaintiff's Response to Defendants' Motion for Summary Judgment*, ¶ 2, p. 2 and ¶ 1, p. 3.

Regardless of the arguments proffered above, the seminal fact remains that the Circuit Court applied the wrong standard in its denial of “qualified immunity” for Defendant Truitt. During the hearing on the *Defendants' Motion for Summary Judgment*, the following exchange occurred between the Court and defense counsel Duane Ruggier:

The Court: But, however, Mr. Ruggier, you know that there are - - there is case law that an officer who stands by while a wrong is being committed is held responsible for just standing by while the wrong is being committed.

Now, that opens the door to, “Is it wrong? Was a wrong being committed? Did it – Was it – Should he have his head whacked with a pistol?” Probably not.

Was it wrong to do it? I don't know. Was Mr. Truitt an officer, or a policeman, or an individual with responsibility, being there, riding there, dressed in uniform, although it was different? I don't know.

Is there qualified immunity? Well, then I have to decide whether or not I believe that the act was a wrongful act, and I don't know.

I appreciate your arguments, and I appreciate the brief that you wrote, and I appreciate everyone's situation in this, and I believe that reasonable minds could come to different conclusions about each and every issue that you have raised in this case.

I believe that this is one of those cases that should better be decided on a motion for a directed verdict, as opposed to a motion for summary judgment, and, accordingly, your motion for summary judgment will be denied on each of the grounds that you have cited in your brief. I can go back through those.

Mr. Ruggier: Judge, may I speak? As far as – I understand the Court's ruling. I would like to talk a little bit – Aaron Truitt, as far as his actions, as far as what he did, and you said that it was a question of whether – whether his – whether – you know, whether it was wrong for Brandon Tagayun to do what he did during the arrest.

Would Aaron Truitt – If Aaron Truitt had qualified immunity, which he would, as a reserve officer, in order to defeat his qualified immunity, his actions would have had to been clearly unlawful, and so is the Court saying that it would be – that it was clearly unlawful that Aaron Truitt – if Brandon Tagayun does what the plaintiff's are alleging, was Aaron Truitt's actions – would it have been clearly unlawful for Aaron Truitt, as a Building Department employee, reserve officer, to not – to fail to intervene?

The Court: What I'm saying is that on a motion for a directed verdict would be the best time to make that decision.

Mr. Ruggier: Even on qualified immunity –

The Court: (Interposing). That's what I'm saying.

See Transcript for Hearing for Motion for Summary Judgment Thursday, November 4, 2010, ¶¶ 21-24, p. 25; ¶¶ 1-23, p. 26.

The qualified immunity defense permits for an (reserve) officer's mistaken belief that his actions are legal. The Plaintiff did not proffer any testimony or evidence that Defendant Truitt's actions (or inactions) were "clearly unlawful" in order to defeat the defense of "qualified immunity." Moreover and importantly, the Circuit Court applied an incorrect standard when it denied the *Defendants' Motion for Summary Judgment* on the issue of qualified immunity. **When deciding whether an officer is entitled to qualified immunity the standard is not whether the Court believes "that the act was a wrongful act" but rather "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."** *Saucier*, 533 U.S. at 202(emphasis added). Additionally, as shown above, Defendant A.C. Truitt should have been dismissed from this action (a) as it is agreed by all parties that he did not act inappropriately or that he caused injury to the Plaintiff, and (b) because he had no duty to intervene.

(ii) B.L. Tagayun is entitled to Qualified Immunity

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Therefore, the seminal question in this matter is whether the law put the Defendants on notice that it was "clearly unlawful" to take down Plaintiff David Botkins when he was acting belligerent towards the Defendants and refused to get down on the ground after the Defendants commanded him to do so. The qualified immunity defense permits for an officer's mistaken belief that his actions are legal. In the instant case, a reasonable officer would not be on notice that his actions were clearly unlawful because they were, in fact, lawful actions.

As with Truitt, the seminal issue remains that the Circuit Court applied the wrong standard in its denial of "qualified immunity" for Defendant Tagayun. Defendant Tagayun did

not violate any of Plaintiff David Botkins' constitutional or statutory rights and his actions were entirely appropriate given David Botkins' aggravated and hostile situation. *Qualified immunity exists because the seminal question in this matter because the law did not put Tagayun on notice that it was "clearly unlawful" to engage in the above listed actions.*

As shown above, *contemporaneous* with the face-off resolving amicably, Defendant Tagayun came upon six men, with three of them appearing to have weapons and all of them appearing ready to fight, in the Taco Bell drive thru. He also had the responsibility of protecting the public as well as Defendant Truitt, who was not a law enforcement officer. Upon arriving on scene, Defendant Truitt stated that Defendant Tagayun immediately ordered all six (6) individuals to get down on the ground. Everyone complied with the order except for David Botkins, the driver of the Jeep. *See Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit 2, ¶ 12, p. 3.*

Testimony from each and every participant indicates that all of the six men involved in the incident got down on the ground, save for Plaintiff David Botkins. In fact, Plaintiff David Botkins admits that he did not immediately get down on the ground:

Q: Why did you not get on the ground when he [Defendant Tagayun] told you to?

A: **On my belly?**

Q: Yes.

A: **I wanted to make sure he knew I had a cast on, so I put my arms in the air.**

...

Q: Officer Tagayun told you to get on the ground, but you didn't get on the ground?

A: **I didn't get on my belly; I got on my knees.**

...

Q: I'm still not sure why you didn't get on the ground. Why didn't you get on your stomach?

A: Just – I don't know. I just figured if I had my arms in the air, he knew I was unarmed.

...

Q: Is it your testimony you were fully compliant even when you wouldn't get on the ground?

A: Well yes - - well, no, I might have been a little slow about getting my belly on the ground.

Q: How were you a little slow?

A: I was just hesitant about moving to the ground. Like I said before, I didn't want him to mess with my arm or my cast.

See Id., Exhibit 1, ¶¶ 10-15, ¶¶ 19-21, p. 55; ¶¶ 7-10, p. 56; ¶¶ 12-19, p. 98.

David Botkins testified that he did not specifically comply with the Defendant Tagayun's commands and actually admits that he did not get on the ground and that he "might have been a little slow about getting my belly on the ground." It is a routine practice for police officers who come upon potentially dangerous and volatile situations to instruct all individuals to get down on the ground for both the public's and the officer's safety.

However, it is undisputed that Plaintiff David Botkins **did not** comply with Defendant Tagayun's commands. In fact, Plaintiff Botkins was belligerent and continued to shout obscenities at Defendant Tagayun. Additionally, the situation was heightened because three of the six male individuals in the Taco Bell Drive-Thru were holding weapons, including the cast that was on Plaintiff Botkins' hand/arm. Plaintiff David Botkins testified that:

Q: So when Brandon Tagayun arrives on the scene and he has his gun out, there are six of you outside of the cars, right?

A: Correct.

Q: There's Ryan [Dillon], Josh [Mazzie], Justin [Harvey], Casey [Clark], Jimmy [Moore], David [Botkins]?

A: Correct.

Q: When Tagayun arrives, who has got weapons on them?

A: Casey.

Q: Casey has got what, the flashlight?

A: **Yes.**

Q: Who else?

A: **Jimmy Moore.**

Q: Jimmy Moore has?

A: **It's a wooden club.**

See Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Exhibit 2,

¶¶ 7-22, p. 53.

During this incident, there was shouting and arguing between two groups of six men, some of whom had weapons in their hands, in a dimly lit Taco Bell Drive-Thru. Defendant Tagayun acted reasonably under the dangerous circumstances. The qualified immunity defense permits for an officer's mistaken belief that his actions are legal. The Plaintiff did not proffer any testimony or evidence that Defendant Tagayun's actions were "clearly unlawful" in order to defeat the defense of "qualified immunity." It is clear that the Circuit Court applied the wrong standard when it denied the *Defendants' Motion for Summary Judgment* on the issue of "qualified immunity." Moreover and importantly, the Circuit Court applied an incorrect standard when it denied the *Defendants' Motion for Summary Judgment* on the issue of qualified immunity. **When deciding whether an officer is entitled to qualified immunity the standard is not whether the Court believes "that the act was a wrongful act" but rather "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."** *Saucier*, 533 U.S. at 202(emphasis added). Additionally, as shown above, Defendant Brandon Tagayun should have been entitled to qualified immunity and dismissed from this action as there is no disputed that (a) Tagayun was faced with 6 individuals males after 2 a.m. with 2 individuals possessing weapons about to get into an altercation and (b) the Plaintiff admits that he did not get on the ground despite being ordered to do so..

B. The Circuit Court of Kanawha County erred when it denied the City of St. Albans, B.L. Tagayun, and A.C. Truitt's *Motion for Summary Judgment* because the Court did not, in fact, rule upon the other arguments proffered within the Defendants' *Motion for Summary Judgment*.

The Kanawha County Circuit Court also did not rule upon, let alone address, the other arguments proffered within the *Defendant's Motion for Summary Judgment*, which include the following:

(i) The state common law claims against individual Defendants Tagayun and Truitt should be DISMISSED as employees are immune from suit pursuant to W.Va. Code Section 29-12A-5(b).

In addition to the reasons set forth above, Plaintiff's claims of unconstitutional search and seizure against the individual officers 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.

W.Va. Code § 29-12A-5(b)(1-3)(1986).

In essence, a police officer 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 which provides:

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 of political subdivision acting within the scope of his employment be***

named as a defendant.

W.Va. Code § 29-12A-13(b)(1986)(emphasis added).

The Plaintiff's claims are based upon the Defendants' exercise of authority as police officers. Therefore, there is no legal basis to deny immunity under the first exception that these actions were "manifestly outside the scope of employment or official responsibilities." See West Virginia Code § 29-12A-5(b)(1)(1986). As Defendant Tagayun came upon the Taco Bell drive-thru, the Plaintiff (David Botkins), who had a cast on his arm, and his two weapon carrying friends (Casey Clark and Jimmy Moore), presented a clearly dangerous and volatile situation involving a heated argument with three other men (Justin Harvey, Ryan Dillon, and Josh Mazzie) that appeared to be escalating into a fight. Therefore, there is no legal basis to deny immunity under West Virginia Code § 29-12A-5(b)(2)(1986) as Defendant Tagayun's actions were not "malicious, in bad faith, or in a wanton or reckless manner." Finally, there is no claim that liability is expressly imposed upon these Defendants by any West Virginia statute, so the last exception to the statutory immunity under from liability does not apply under West Virginia Code § 29-12A-5(b)(3)(1986). As such, the Defendants are immune from this suit pursuant to W.Va. Code §§ 29-12A-5(b) and 29-12A-13(b).

The Plaintiff states that "as evident by the force of the blows and the extent of the Plaintiff's injuries as well as the verbal profanity used by Tagayun during his assault on the Plaintiff, the officer's actions were malicious and/or wanton." See *Plaintiff's Response to Defendants' Motion for Summary Judgment*, ¶ 3, p. 4; ¶ 1, p. 5. The Plaintiff has clearly **NOT** met his burden of proof by offering these self serving arguments. Therefore, the state common law claims against the individual Defendants should have been dismissed as employees are immune from suit pursuant to W.Va. Code § 29-12A-5(b).

(ii) Pursuant to the Tort Reform Act, political subdivisions are NOT liable for the intentional acts of their employees.

Although the Governmental Tort Claims and Insurance Reform Act (hereinafter “Tort Reform Act”), codified at West Virginia Code § 29-12A-1 *et. seq.*, creates political subdivision liability for the negligent acts of its employees, no provision provides liability for the intentional acts of political subdivision employees. The Tort Reform Act provides general immunity for political subdivisions. However, West Virginia Code § 29-12A-4(c)(2) states:

[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.

W. Va. Code § 29-12A-4(c)(2)(1986) (emphasis added). In addressing above referenced statute, the West Virginia Supreme Court of Appeals in Mallamo v. Town of Rivesville, found that a “plain reading” of this section did not impose liability on the political subdivision for the intentional acts of its employees. 477 S.E.2d 525, 533-534 (W.Va. 1996)(emphasis added).

The Plaintiff alleges that the acts of the “individual Defendants Tagayun and Truitt as aforesaid were outrageous, constitute the intentional infliction of mental, physical and emotional distress, were reprehensible, fraudulent, willful and wanton, malicious, and in blatant and intentional disregard of Plaintiff’s rights.” *See* Complaint, ¶ 18, p. 4. Being that political subdivisions cannot be liable for any intentional act of its employees, Defendant City of St. Albans is immune from any liability resulting from what may be determined to be an intentional act of either of the individual Defendants.

(iii) The facts do NOT show that the Plaintiff has experienced severe emotional distress as a result of his experience during the incident.

The Plaintiff also alleges a state-based claim for the tort of “outrageous conduct,” which is essentially the functional equivalent of a claim for intentional infliction of emotional distress.

Outrageous conduct is considered “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” Harless v. First National Bank in Fairmont, 289 S.E.2d 692, 693 (W.Va. 1982). The court adopted the standard found in the Restatement (Second) of Torts § 46 (1965), which states: “Liability has been found only where the conduct has been so 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 community*.” Id. (emphasis added).

As shown above, *contemporaneous* with the dispute being allegedly resolved amicably, the Defendants came upon six men, with two or three of them appearing to have weapons and all of them appearing ready to fight, in the Taco Bell drive thru. Upon arriving on scene, Defendant Tagayun immediately ordered all six (6) individuals to get down on the ground. Everyone complied with the order except for David Botkins, the driver of the Jeep.

The Plaintiff did not comply with Defendant Tagayun’s order to get down on the ground and when the Plaintiff appeared to be lunging for Defendant Tagayun, Defendant Tagayun took him down and Plaintiff David Botkins was injured. The Plaintiff admits that he did not specifically comply with the Defendant officers’ commands and actually “might have been a little slow about getting my belly on the ground.” It is a routine practice for police officers who come upon potentially dangerous and volatile situations to instruct all individuals to get down on the ground for both the public’s and the officer’s safety. This surely does not constitute outrageous conduct.

The Plaintiff has clearly **NOT** met his burden of proof to offer testimony or evidence that he has suffered any type of emotional distress in order to refute the Defendants’ properly

submitted *Motion for Summary Judgment*. Save for the Plaintiff's self-serving statements, the Plaintiff has not produced any records from any mental health provider stating that he is suffering from any type of emotional distress. Therefore, the Plaintiff's cause of action for "severe emotional distress" should be denied and dismissed from the case.

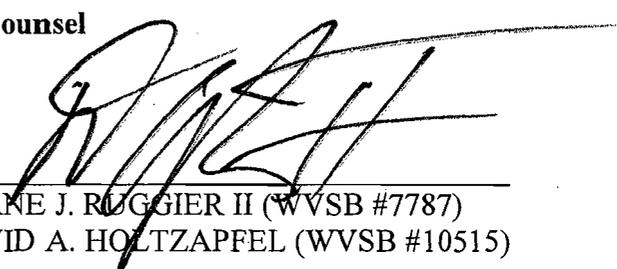
CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing, the Petitioners and Defendants below, City of St. Albans, B.L. Tagayun, and A.C. Truitt, respectfully request that the Court **GRANT** the *Petitioners and Defendants below Petition for Appeal* and **REMAND** this case back to the Kanawha County Circuit Court for dismissal with prejudice.

Respectfully submitted,

**CITY OF SAINT ALBANS, B.L. TAGAYUN,
and A.C. TRUITT**

By Counsel


DUANE J. RUGGIER II (WVSB #7787)
DAVID A. HOLTZAPFEL (WVSB #10515)

Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
304-344-0100

**CITY OF SAINT ALBANS, B.L. TAGAYUN,
and A.C. TRUITT**

By Counsel



DUANE J. RUGGIERI II (WVSB #7787)
DAVID A. HOLTZAPFEL (WVSB #10515)

Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
304-344-0100

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DAVID A. BOTKINS,

Plaintiff,

v.

Civil Action No. 09-C-1432
Judge James C. Stucky

CITY OF SAINT ALBANS,
a West Virginia municipal corporation,
B.L. TAGAYUN and A.C. TRUIT,

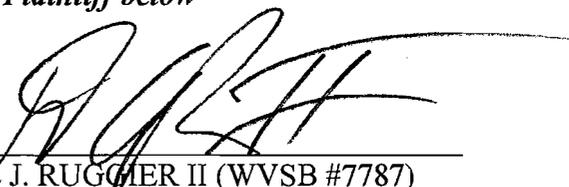
Defendants.

FILED
2010 DEC 23 PM 4:15
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioners and Defendants below, does hereby certify that a true copy of the foregoing ***"PETITIONERS CITY OF ST. ALBANS, B.L. TAGAYUN, AND A.C. TRUITT'S BRIEF IN SUPPORT OF ITS APPEAL OF THE CIRCUIT COURT'S ORDER DENYING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT"*** 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 23rd day of December, 2010.

Michael T. Clifford, Esquire
723 Kanawha Boulevard East
Union Building, Suite 1200
Charleston, WV 25301
Counsel for Respondent/Plaintiff below


DUANE J. RUGGIER II (WVSB #7787)
DAVID A. HOLTZAPFEL (WVSB #10515)

Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301