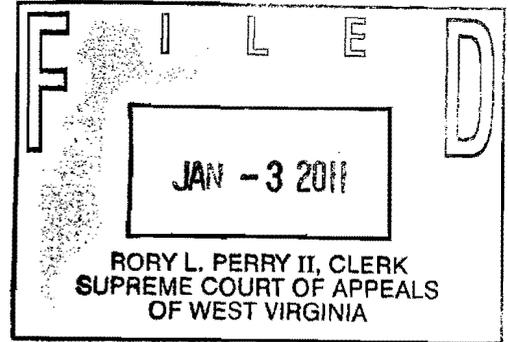


Case No. 101596

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

*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

**RESPONSE OF DAVID A. BOTKINS TO CITY OF SAINT ALBANS, a West Virginia
Municipal Corporation, B.L. TAGAYUN AND A.C. TRUIT'S PETITION FOR APPEAL**

MICHAEL T. CLIFFORD (#750)
723 Kanawha Blvd., East
Ste. 1200 Union Building
Charleston, WV 25301
(304)720-7660; fax (304)720-7753
Counsel for Respondent David A. Botkins

SUMMARY OF ARGUMENT

1. The Circuit Court did not err when it denied the Petitioner's Motion for Summary Judgment because qualified immunity does not apply to actions which are "clearly unlawful".
2. The Circuit Court did not err in denying summary judgment because he expressly ruled upon all arguments presented in the Petitioner's Motion for Summary Judgment.
3. The Defendants are not protected by West Virginia Code Section 29-12A-5(B) because their actions were done with malicious purpose and in bad faith.
4. The Defendant City of Saint Albans is liable in this case because of its negligent hiring and retention practices and is not insulated from suit by the Tort Reform Act.
5. The claim for intentional infliction of emotional distress should not be dismissed because the conduct underlying the complaint is outrageous in the extreme, and the Plaintiff has evidence to show that he has experienced severe emotional distress as a result.

ARGUMENTS

A. The Circuit Court did not err in denying the Motion for Summary Judgment because qualified immunity does not apply to wrongful acts.

In its ruling denying the Motion for Summary Judgment, the Circuit Court explained that whether or not qualified immunity was available to the Defendant officers hinged upon whether their actions constituted "wrongful acts" and stated that the Court *did not know* if the actions were wrong. At no time did he take it upon himself to make the determination that the actions were unlawful, and therefore he did not apply an incorrect standard. Since the Court could not determine from the facts if the actions were unlawful, or even if a reasonable officer would know they were unlawful, the Court could not grant summary judgment and the motion was properly

denied.

I. Qualified immunity does not apply to Defendant A.C. Truit because he was acting as a law enforcement officer on the night in question, and had a duty to intervene in the violation of the Plaintiff's civil rights by Defendant Tagayun.

Contrary to the Petitioner's brief, it is not "undisputed" that Defendant Truit had no duty to intervene. It is conceded that Truit did not physically assault the Respondent. However, the Plaintiff maintains that Truit was acting as an officer of the law that evening and had an absolute duty to intervene in the blatant violation of the civil rights of an unarmed man, who was being beaten with a gun by another officer for failing to get to onto the ground quickly enough.

Much argument surrounds whether or not Truit was acting as a police officer that night. However, the facts are that Truit was on patrol with and assisting Officer Tagayun as a reserve officer, and, according to his own statement, helped Tagayun physically restrain the Plaintiff. Furthermore, as part of St. Albans Police Department's General Investigative Report, Truit filed a report about the incident, signing his name on the signature line as the "preparing officer", along with an officer number that had apparently been assigned to Truit. See Attachment A. Clearly, his role that evening was one of law enforcement, despite the fact that he was not on the payroll as such.

The Petitioner further argues that because Truit had no formal training as a law enforcement officer, he was unqualified to make a determination as to whether Tagayun's actions were a violation of constitutional rights. However, training at the police academy is not necessary in order for a person to know that pistol-whipping an unarmed man, especially one who is partially incapacitated with a casted arm, is unlawful. It is an action which "transgresses a bright line", as contemplated by Maciarelllo v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992). Because Truit

failed to intervene in the blatant violation of the Plaintiff's civil rights, he can be held liable for the resulting damages to the Plaintiff. Randall v. Prince George's County, 302 F. 3d 188 (Fed. 4th Cir., 2002).

II. Defendant Tagayun is not covered by qualified immunity because his actions were clearly wrong.

The actions of Defendant Tagayun on the night in question were not those of an officer simply performing his duties. While it is conceded that Tagayun and Truit came upon a group of six men, two of them armed with club-like items, who had been having a verbal altercation, it is also undisputed that the Plaintiff was not one of the armed men, (though the Petition describes the Plaintiff as having been "armed" by the cast he wore on his broken arm.) The armed men put their weapons down when instructed to do so. The sworn testimony of the Plaintiff at deposition, as quoted in the Petition for appeal, was that the Plaintiff was slow to get to the ground on his belly as ordered. In addition, the Plaintiff's broken arm made it more difficult for him to comply quickly with the Defendant's demands. This slow response did not justify Tagayun's actions in using the butt of his service weapon to beat the Plaintiff in the head. The injuries were so severe that the Plaintiff required staples to close his head wound. See Attachment B. Clearly, Tagayun's attack on the Plaintiff went well beyond necessary force and was in fact a malicious wounding. Many techniques and methods are available to an officer in such a situation, including pepper spray, or a less vicious physical means of subduing an individual perceived as "belligerent". The force used by Tagayun was clearly excessive and clearly unlawful, and therefore not protected by qualified immunity.

B. The Circuit Court did not err when it denied the Motion for Summary Judgment and did in fact rule that the motion was denied on all grounds stated within the motion.

Contrary to the statement in the Petition that the Court did not rule upon or address the other arguments in the Petition, quotes included within the petition and attributed to the Circuit Court judge contradict this assertion. Specifically, the Court stated that "...your motion for summary judgment will be denied on each of the grounds you have cited in your brief." It was not necessary for the Court to go into detail on the record of his reasons for denial on each ground.

I. Defendants Tagayun and Truit are not immune from suit pursuant to W.Va. Code Section 29-12A-5(b) because their actions were malicious, in bad faith, or in a wanton or reckless manor.

The provisions of W.Va. Code Section 29-12A-5(b) do not provide immunity to a municipal employee whose actions are done with malice. Tagayun's brutal attack on the Plaintiff was done maliciously, without provocation or justification. Again, the Plaintiff required staples to repair the gash in his head from the pistol-whipping by Tagayun, who cursed the Plaintiff throughout the assault. The statute was never meant to protect police officers who use their position and authority to brutalize unarmed citizens in this manner.

II. The City of Saint Albans is liable to the Plaintiff for his injuries because they acted negligently by hiring Defendant Tagayun

The claim against the City of Saint Albans is not based upon a theory of vicarious liability, and therefore the Tort Reform Act does not shield the city from suit. Brandon Tagayun's record as a police officer includes the death of a civilian as a result of his reckless behavior while on duty. Because the City of Saint Albans ignored or overlooked this fact and hired Tagayun into their police department, another citizen has been harmed.

Upon information and belief, the City of Saint Albans knew or should have known of the "unfitness, incompetence or dangerous attributes" of its employees, as required in *Di Cosala v.*

Kay, 91 N.J. 159 (N.J. 1982), the case cited by *State ex Rel. West Virginia State Police v. Taylor*, 201 W. Va. 554, 499 S.E.2d 283 (1997) in a footnote conceding that West Virginia has recognized a cause of action for negligent hiring practices.

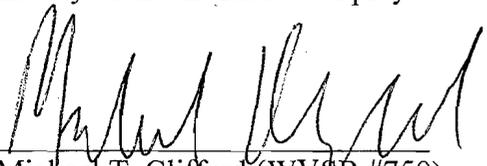
III. The Plaintiff has experienced severe emotional distress due to the actions of the Defendants.

It is self-evident that the actions of Defendants Tagayun and Truit were outrageous in the extreme. It cannot be stated enough: this case involves the pistol-whipping by a police officer of an unarmed citizen, who posed no threat to the officer and whose transgression was not moving quickly enough to comply with the officer's demands. It is likely that a jury would find this incident to be one which "shocks the conscious" and one which is "utterly intolerable in a civilized community". Therefore, the Plaintiff may claim severe emotional distress. The Plaintiff's own testimony is competent evidence of his mental and emotional injuries.

PRAYER

Accordingly, respondent David Botkins prays that the Court deny the Petition for Appeal, and that he be granted all such other and further relief as the nature of his case may require and as in duty bound he shall ever pray.

DAVID A. BOTKINS,
By counsel



Michael T. Clifford (WV SB #750)
723 Kanawha Blvd. East
Union Bldg., Suite 1200
Charleston, WV 25301
304-720-7660
304-720-7753 fax



ST. ALBANS POLICE DEPARTMENT
GENERAL INVESTIGATIVE REPORT

SAFD 102

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Victim:	Report Date: 23 Nov.2008	Time: 0300	Incident Number: 08CI-742
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On this date I was out with Officer B.L. Tagayun (571) on foot patrol near the C&O Motors Nissan lot. I heard some shouting and yelling coming from the direction of Taco Bell. I asked Officer Tagayun if he heard the yelling. At that time we observed a white male wearing a yellow t-shirt and blue jeans running from the parking lot facing 3rd St. to the drive-thru at Taco Bell. We immediately ran to the drive thru. When we arrived there we noticed a gold Jeep Grand Cherokee with 3 people standing out side and 2 of the males were holding long baton like objects. They were shouting at some males standing outside of a black Chevrolet 1500 truck. We immediately ordered everyone to the ground. Everyone complied except for the driver of the Jeep. The driver came toward Officer Tagayun refusing to listen to multiple orders to get down on his stomach. Officer Tagayun was forced to wrestle with the male in order to get him to the ground. I came over to assist Officer Tagayun in order to get the male on the ground. The male was cussing and fighting while we were trying to restrain him the suspect also had a strong presence of alcohol on his breath. After we placed the male in handcuffs, we noticed that he was bleeding from his head. Kanawha County Emergency Medical Services were contacted; they arrived on the scene and transported the male to Thomas Memorial Hospital. While on scene at the hospital, I heard the suspect state that he had been drinking alcohol earlier in the day. The nurse that was with the suspect asked Officer Tagayun and myself if he was on any type of "pills" and or alcohol.

Aaron C. Leutt 573
SIGNATURE OF PREPARING OFFICER

SIGNATURE OF APPROVING SUPERVISOR

Aaron C. Leutt 592
PREPARED BY

Attachment A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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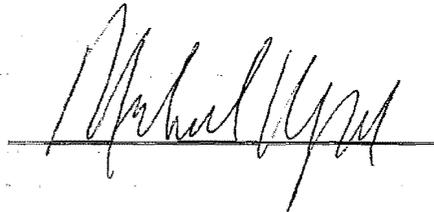
DAVID A. BOTKINS

Respondent and
Plaintiff below..

CERTIFICATE OF SERVICE

I, Michael T. Clifford, do hereby certify that I served a true copy of the foregoing
**RESPONSE OF DAVID A. BOTKINS TO CITY OF SAINT ALBANS, a West Virginia
Municipal Corporation, B.L. TAGAYUN AND A.C. TRUIT'S PETITION FOR APPEAL**
upon opposing counsel by facsimile transmission and/or by depositing the same in the regular United
States Mail, postage prepaid and properly addressed, this 3rd day of January, 2011:

Duane J. Ruggier, II
David A. Holtzapfel
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301

A handwritten signature in black ink, appearing to read "Michael T. Clifford", is written over a horizontal line.