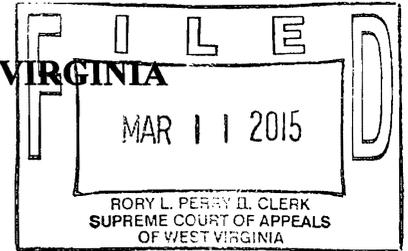


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-1113



**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.

On Appeal from the Circuit Court of Tyler County
Honorable David W. Hummel
Circuit Court Case No. 11-C-12

RESPONDENT'S BRIEF

Respectfully submitted by:

David A. Jividen, Esq. (W.Va. State Bar No. 1889)
Chad D. Haught, Esq. (W.Va. State Bar No. 10565)
JIVIDEN LAW OFFICES, PLLC
729 North Main Street
Wheeling, WV 26003
Telephone: (304) 232-8888
Facsimile: (304) 232-8555
djividen@jividenlaw.com
chaught@jividenlaw.com
Counsel for Thomas J. Wagner, Respondent

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STATEMENT OF THE CASE

“[T]he only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages.”

– *Hutchison v. City of Huntington*, 198 W.Va. 139, 148 (1996).

It is necessary for the respondent, Thomas J. Wagner, to provide this Court with the various interpretations and genuine issues of fact, which have been elicited throughout the discovery process, as the Petitioners have excluded from its Appeal Brief the inconsistent statements and deposition testimonies of petitioners, Deputy Joshua Maston and Trooper Shaun Curran, along with other material details that have created a dispute as to the facts in this case.

The inconsistencies and various versions of what transpired in this case are so voluminous that *Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment* (“*Response*”) filed with the Circuit Court of Tyler County was compromised of forty (40) pages and seventeen (17) exhibits, including thirteen (13) pages containing the various discrepancies, versions, and changes to the facts that have inundated this case. The Circuit Court carefully reviewed and considered the issues of fact existing in this case and concluded:

The crux of Defendants’ joint motion rests on the contention that the Court should apply qualified or statutory immunity to the ‘facts’ and determine that that Plaintiff’s claims must be dismissed. If only it were that easy. ...Before the Court is a record laden with genuine issues of material fact.

Appendix Pgs. 305-306, Circuit Court of Tyler County's September 25, 2014 Order.

As previously provided to the circuit court, the following factual disputes exist not only when comparing the recollections of respondent, Thomas J. Wagner; witnesses, Crystal Price and Lillian (Burch) Leeson; and petitioners, Deputy Joshua Maston and Trooper Shaun Curran; but the Petitioner officers’ written statements made immediately following the incident contain material factual differences when compared with the other. Also, during the course of their

depositions taken over three (3) years after the incident, the Petitioner officers have attempted to add, omit, and change the facts they themselves authored in their written statements.

At the time of the incident, the respondent, Thomas J. Wagner, was fifty (50) years old and lived at 120 Main Street, Middlebourne, West Virginia, located diagonally from the Tyler County Courthouse. *Appendix, Pg. 204 (Wagner Deposition, Pg. 8-11)*. Mr. Wagner owned the building where he resided, and the building also housed five (5) other apartment units that Mr. Wagner rented to tenants. *Id.* Thomas Wagner was employed as a boilermaker in the Boilermakers Local 667, serving as a welder and mechanic, and Mr. Wagner also owned the building where he operated the Tyler Feed Store that was located at 79 Middle Island Road in Middlebourne. Thomas Wagner and his family are well-known in the community, his sister, Mary Dotson, is employed as a Magistrate Assistant for the Tyler County Magistrate, and his brother, Sam Wagner, is the owner of a medical supply business in Middlebourne.

On Friday, April 10, 2009, the respondent, Thomas J. Wagner, spent most of the day unpacking his belongings having returned from an out of town job with the Boilermakers. *Appendix, Pg. 205 (Wagner Depo., Pg. 116-117)*. At approximately 10:00 p.m., Thomas Wagner walked up the sidewalk to Big C's Lounge, located at 212 Main Street, approximately seventy (70) yards from his residence. *Id.* While at Big C's Lounge, Mr. Wagner drank two (2) cans of beer and socialized with other patrons for two (2) to three (3) hours until he left Big C's Lounge to walk the short distance home. *Appendix, Pg. 206 (Wagner Depo., Pg. 120)*. The bartender working at Big C's Lounge, Crystal Price, provided that Thomas Wagner was present at Big C's Lounge for approximately three (3) hours, consumed two (2) to three (3) beers during this time, at no time appeared intoxicated, left Big C's Lounge by walking out the door, and that the weather outside was raining. *Appendix 218-219 (Affidavit of Crystal Price)*.

Upon leaving Big C's Lounge and walking down the Main Street sidewalk, Thomas Wagner observed a police cruiser stopped on Court Street facing Main Street and Dodd Street. *Appendix Pg. 207 (Wagner Depo., Pg. 124-126)*. Geographically, Court Street runs across Main Street and becomes Dodd Street. *Appendix Pg. 220-225 (Drawing of Streets by Thomas Wagner, Photographs of Area)*. Court Street is east of Main Street, and Dodd Street is west of Main Street. *Id.* Big C's Lounge, Thomas Wagner's residence, and the sidewalk Mr. Wagner was walking are all located on the Dodd Street side of Main Street. *Id.* The petitioners, Deputy Maston and Trooper Curran, could see both Big C's Lounge and Thomas Wagner's building from their location on Court Street. *Appendix Pg. 230 (Maston Depo., Pg. 36, lines 4-10)*.

Thomas Wagner continued walking down the sidewalk until he reached the intersection of Main Street and Dodd Street, where he stopped to look for traffic before crossing Dodd Street and continuing on the Main Street sidewalk. *Appendix Pg. 230 (Maston Depo., Pg. 38, lines 2-9)*. Thereafter, Thomas Wagner stopped on the sidewalk and turned to the police cruiser to inquire "[i]f everything was okay" or if something was wrong that he should be aware of for himself and his tenants. *Appendix Pg. 208 (Wagner Depo., Pg. 129-130)*. As stated by Thomas Wagner:

There's the cruiser with the engine running, [head] lights on. Hasn't budged an inch since the whole time I get down the street. I own this apartment building right here (indicating). My concern is for these people here. Is there something I should be aware of [?]

Id. (Wagner Depo., Pg. 129-130, lines 24, 1-5).

After not receiving a response to his initial inquiry, Thomas Wagner "[a]sked again, is everything all right[?]" *Id. (Wagner Depo., Pg. 131)*. Mr. Wagner then observed the police cruiser window come halfway down. *Id.* After hearing no response from the police cruiser, Mr. Wagner waived his hands to indicate never mind to the officers, pulled his sweatshirt hood back over his head as the rain had increased, and began hustling toward his residence that was fifteen (15) to twenty (20) yards from his location on the sidewalk. *Appendix Pgs. 208, 216*.

Upon reaching his building, Thomas J. Wagner began down the driveway to his apartment located in the back of the building. *Appendix Pgs. 216, 227-228 (Wagner Depo., Pg. 191; Photographs)*. Having just entered the driveway, Thomas Wagner was struck from behind in the back by a strong force causing his face to slam into the oak spindles of the porch attached to his building drawing blood and dazing Mr. Wagner. *Appendix Pgs. 209 (Wagner Depo., Pgs. 133-135)*. While being struck, the right arm of Thomas J. Wagner was grabbed and pulled behind his back causing his arm to explode into extreme pain. *Appendix Pgs. 210, 216 (Wagner Depo., Pgs. 137, 191)*. After clearing the cobwebs from his head striking the porch, Thomas Wagner saw that petitioner, Deputy Maston, was the force that had struck him from behind and injured his right arm. *Appendix Pgs. 210, 217 (Wagner Depo., Pgs. 137, 192)*.

Lillian (Burch) Leeson, a tenant in the building, woke up from the commotion and went out onto the porch to investigate. *Appendix Pg. 241 (Leeson Depo., Pg. 14)*. According to Mrs. Leeson, Thomas J. Wagner asked the Petitioner officers why they were hurting him and informed them that he lived at the building and was going home. *Id.* Mrs. Leeson testified that it was pouring down rain and that when she saw Thomas Wagner, he was pressed up tight to the porch by the officers unable to move, "He couldn't have moved if he wanted to." *Appendix Pg. 243 (Leeson Depo., Pg. 45, Lines 23-24)*. According to Mrs. Leeson, the officers asked Mr. Wagner on multiple occasions if he "had any drugs or anything on him. And he said no, he didn't have any drugs on him." *Appendix Pg. 241 (Leeson Depo., Pgs. 14-15)*. The officers asked Mr. Wagner "why he was running [,] and he said that he was trying to get in out of the rain." *Appendix Pg. 242 (Leeson Depo., Pg. 17, lines 18-24)*. Thomas Wagner informed the officers that he believed the officers had broken his arm and asked them to take him to the hospital. *Appendix Pg. 211 (Wagner Depo., Pg. 142)*. Mrs. Leeson added that the officers "kind

of pushed [Mr. Wagner] a little bit up through the driveway,” but that Tom never yelled at the officers during the arrest. *Appendix Pg. 243 (Leeson Depo., Pgs. 46-45)*.

Thereafter, Thomas J. Wagner was transported to Sistersville General Hospital where the blood was cleaned from his face, and he was provided an x-ray, injection of pain medication, and arm sling, before the Petitioner officers took him to the North Central Regional Jail in Doddridge County, where he was forced to spend the remainder of night until appearing before a Magistrate in the morning. *Appendix 213-214, 244 (Wagner Depo., Pgs. 149-153; Photograph of Thomas Wagner in the Emergency Room)*.

Subsequent medical treatment rendered, including MRI, revealed that in addition to the facial cuts and bruising, the unwarranted arrest and excessive force used by the Petitioners caused Thomas Wagner to suffer a complete tear of the common extensor tendon and radial collateral ligament in his right elbow necessitating reconstructive elbow surgery with an allograft cadaver Achilles tendon, along with subsequent casting and elbow brace. *Appendix Pgs. 248-250 (MRI and Operation Summary)*.

Conversely, the petitioners, Deputy Maston and Trooper Curran, provide a different version of the facts than stated by respondent, Thomas J. Wagner, and witnesses, Crystal Price and Lillian (Burch) Leeson. However, the differences are not limited to the facts provided by Mr. Wagner, Ms. Price, and Mrs. Leeson. The Petitioners' written statements made immediately following the incident contain material factual differences when compared to the other. Also, during their depositions taken over three (3) years after the incident, the Petitioners attempted to add, omit, and change the facts they themselves authored in their written statements.

According to the officers, on April 11, 2009 at 12:07 a.m. in the morning, the petitioners, Deputy Maston and Trooper Curran, were dispatched to 301 Main Street in Middlebourne for a

physical altercation in progress. *Appendix Pgs. 251-256 (Dispatch Log; Curran Written Statement)*. Trooper Curran was driving his West Virginia State Police cruiser, and Deputy Maston was riding in the passenger seat. *Appendix Pgs. 252-260 (Curran Statement; Maston Statement)*. Upon arriving at the address, the officers observed no parties or altercation. *Appendix Pgs. 252-256 (Curran Statement)*. By 12:19 a.m., the officers informed dispatch they had cleared the scene having found nothing. *Appendix Pg. 251 (911 Dispatch Log)*. However, the officers stayed in the area of Main Street and parked their police cruiser on Court Street to view individuals leaving Big C's Lounge. *Appendix Pgs. 257-260 (Maston Statement)*.

After approximately five (5) minutes, the Petitioners observed a male, Thomas J. Wagner, leave Big C's Lounge and walk south on the Main Street sidewalk. *Appendix Pg. 262 (Curran Depo., Pg. 26, Lines 6-9)*. Trooper Curran provides in his statement that the male was "walking" south on the sidewalk,¹ while Deputy Maston provides the male was "walking and staggering" down the sidewalk. *Appendix Pgs. 252-260 (Curran and Maston Statements)*. When asked during his deposition to explain what he meant by "walking and staggering," Deputy Maston testified that Mr. Wagner was unsteady on his feet, but never fell and did not require anything to hold himself up. *Appendix Pg. 230 (Maston Depo., Pg. 36, Lines 11-22)*.

Upon the male exiting Big C's Lounge, Deputy Maston testified that he "had a pretty good idea [] from the physical features" the male was Thomas Wagner, and "[f]or sure I knew who it was when he got to the corner" of Dodd and Main Street. *Appendix Pg. 229 (Maston Depo., Pg. 25-26)*. Deputy Maston described Mr. Wagner's physical features as a "heavysset-ness [] body build" with "not much" hair. *Id.* Trooper Curran testified that Deputy Maston informed him, "I believe that's Mr. Wagner." *Appendix. Pg. 262 (Curran Depo., Pg. 21)*.

¹ In his deposition, Trooper Curran changed his perception of events stated on his written statement from Mr. Wagner was "walking," to that now Mr. Wagner "appeared to be intoxicated based solely on the observation that he was staggering." *Appendix Pg. 262 (Curran Depo., Pg. 36, Lines 10-15)*.

Deputy Maston testified that he knew Thomas J. Wagner generally from around town and also from Mr. Wagner's sister, Mary Dotson, who worked at the Magistrate Office, as Mr. Wagner would come in and out of the Magistrate's Office to talk with her. *Appendix Pg. 229 (Maston Depo., Pg. 26-27, lines 13, 2-8)*. In his interactions with Thomas J. Wagner, Deputy Maston testified that Mr. Wagner would exchange pleasantries, never disrespected him, and never caused any problems to Deputy Maston. *Appendix Pg. 230 (Maston Depo., Pg. 29, lines 5-14)*. Deputy Maston stated that Mr. Wagner was not known to him to be violent or a danger to others. *Appendix Pg. 232 (Maston Depo., Pg. 56-57, lines 18-24, 1-3)*. Trooper Curran testified that he also talked to Thomas Wagner in passing at the magistrate court but was not as familiar with him as Deputy Maston. *Appendix Pg. 262 (Curran Depo., Pg. 21, Lines 14-20)*.

After Thomas Wagner walked down the sidewalk, the Petitioners provide that Mr. Wagner stopped at the intersection of Main Street and Dodd Street to look for traffic and at them, and then walked across Dodd Street to the connecting Main Street sidewalk. *Appendix Pgs. 252-260 (Curran and Maston Statements)*. At this point, the officers testified they had no intention of stopping or arresting Thomas Wagner. *Appendix Pg. 263 (Curran Depo., Pg. 38, lines 7-9)*; *Appendix Pgs. 230-231 (Maston Depo., Pg. 47-48, Lines 1-13, 5-9)*. What occurred next depends upon which officer's written statement or subsequent deposition testimony is read.

Both Petitioners agree that Thomas Wagner, while on the Main Street sidewalk, turned toward the police cruiser that was sitting on Court Street, and said something the officers could not hear. *Appendix Pg. 231 (Maston Depo., Pg. 48, lines 16-20)*, *Appendix Pg. 263 (Curran Depo., Pg. 37, line 24)*. The officers testified they heard sound but could not hear what Thomas Wagner was saying because their windows were up. *Id.* In response, Trooper Curran rolled down his window to communicate with Mr. Wagner. *Id. (Curran Depo., Pg. 38, Lines 2-5)*.

Deputy Maston wrote that Thomas Wagner “yelled if we need[ed] anything,” which is similar to the testimony provided by Mr. Wagner.² *Appendix Pg. 257 (Maston Statement)*. Conversely, Trooper Curran wrote that he heard Mr. Wagner “shouting profanities and acting in a manner as to provoke an altercation.”³ *Appendix Pg. 252-253 (Curran Statement)*.

Both Petitioners testified that Trooper Curran had to yell or project his voice in an attempt for Thomas Wagner to hear him from across the street. *Appendix Pg. 232 (Maston Depo., 56, lines 4-7), Appendix Pg. 264 (Curran Depo., Pg. 41, Line 10-18)*.

Next, Deputy Maston wrote that “Trooper Curran advised [Mr. Wagner] nothing was needed and to go home.” *Appendix Pg. 257 (Maston Statement)*. At which point, Mr. Wagner “threw his arms up in the air and yelled something else.” *Id.* Trooper Curran again advised Mr. Wagner to go home, but he did not, so Trooper Curran drove toward Mr. Wagner.⁴ *Id.*

Conversely, Trooper Curran testified that he “told [Mr. Wagner] to go to his residence or [] get off the street[,]” but when Mr. Wagner did not move, Trooper Curran states he then “advised [the] subject to remain at his location,” not to go home as Deputy Maston had indicated in his written statement. *Appendix Pg. 263 (Curran Depo., Pg. 40, lines 16-24)*. Trooper Curran states it was only after his instruction to remain at the location did the officers began driving

² Contrary to his written statement, Deputy Maston testified at his deposition that he heard Mr. Wagner yell profanities even though he did not state that fact in his written statement, which was completed immediately following the incident on August 11, 2009. *Appendix Pg. 231 (Maston Deposition, Pgs. 52-54)*. The alleged profanities would have been an element for the charge of disorderly conduct, so it is difficult to believe that Deputy Maston would have left this material fact out of his report. *Id.* However, the credibility of Deputy Maston is for jury determination.

³ In his deposition, Trooper Curran informed the “profanities” were Thomas Wagner allegedly asking the officers, “what the fuck are you doing[?]” *Appendix Pg. 263 (Curran Depo., Pg. 39, lines 6-7)*. The “acting in a manner as to provoke an altercation” was Thomas Wagner allegedly “rais[ing] his hands in the air [], about head height, and shook them back and forth.” *Id. (lines 16-19)*.

⁴ In another change from his written report, Deputy Maston testified in his deposition that “Trooper Curran had told [Mr. Wagner] to wait right there” but then admitted he did not state that fact in his written statement, said statement allegedly being the best of his recollection following the encounter. *Appendix Pg. 234 (Maston Depo., Pg. 65-66, lines 23-24, 1-14)*.

towards Mr. Wagner and he began to run home. *Id.*

Although omitted from his written report, Deputy Maston testified that Trooper Curran had turned to him while in the police cruiser and stated that Mr. Wagner was saying, “This is fuckin’ bullshit,’ along those lines;” however, Deputy Maston did not hear Mr. Wagner saying those things. *Appendix Pg. 233 (Maston Depo., Pg. 59, lines 1-8)*. It is for a jury to determine the volume and manner of the conversation, when Deputy Maston, who was sitting right next to Trooper Curran, could not hear the words Trooper Curran was alleging Mr. Wagner was saying.⁵

The conversation between Thomas Wagner and Trooper Curran lasted “No longer than thirty (30) seconds.” *Appendix Pg. 264 (Curran Depo., Pg. 41, lines 19-22)*. Deputy Maston admitted there were no people around to hear the conversation and only the officers would have heard the alleged curse words. *Appendix Pg. 233 (Maston Depo, Pg. 62, lines 1-5)*. Trooper Curran testified there was no one else in the area to hear the conversation except for the officers and Thomas Wagner, and that no public citizen called or made a complaint about Mr. Wagner. *Appendix Pg. 265, 268 (Curran Depo., Pg. 55, lines 14-20; Pgs. 87-88, lines 16-24, 1-5)*.

Deputy Maston testified that Thomas Wagner was not under arrest for using profanities, and the officers instructed Mr. Wagner “to go home.” *Appendix Pg. 232-234 (Maston Depo., Pg. 55, Lines 12-15; Pg. 62-63, lines 19-24, 1-9)*. Trooper Curran testified that Thomas Wagner was not under arrest after the conversation, nor when the officers began driving towards Mr. Wagner. *Appendix Pg. 264 (Curran Depo., Pg. 42, lines 17-24)*.

In regards to any threat the officers felt from Thomas Wagner, both officers testified Mr. Wagner had no weapon, was alone, did not have anything in his hands, and that both officers were not in fear of any danger for themselves or the other officer. *Appendix Pg. 262-263*

⁵ Q. Do you know why you could hear [] that, but you couldn’t hear [what Trooper Curran heard]?”

A. I can’t – no, I don’t know for sure. I mean....
Appendix Pg. 233, Maston Depo., Pg. 59, lines 13-24.

(*Curran Depo.*, Pg. 35, Lines 20-24, Pg. 40, lines 3-4); *Appendix Pg. 232 (Maston Depo.*, Pg. 57). Deputy Maston stated that he merely perceived the situation as an individual who was walking down the sidewalk after leaving a bar. *Appendix Pg. 232 (Maston Depo.*, Pg. 57).

As the officers drove towards Thomas Wagner, neither officer turned on the police cruiser lights or sirens. *Appendix Pg. 234 (Maston Depo.*, Pg. 64, lines 13-17); *Appendix Pg. 266 (Curran Depo.*, Pg. 61, lines 13-17). Not only would police lights or sirens indicate a desire of the police for an individual to stop, but the lights also activate the in-car police camera with audio. *Appendix Pg. 273-274 (WV State Police Policy 17 In-Car Audiovisual Recording Equipment)*. The in-car police camera with audio can also be activated manually by the officers, and pursuant to Policy 17 “shall remain activated from the time that a member initiates contact with a traffic violator or other offender/suspect.” *Id. (WV State Police Policy 17, Pg. 4)*. There is no in-car police video or audio for the interactions with Thomas J. Wagner, as the officers never activated the police lights or sirens, nor manually turned on the camera or audio.^{6, 7} *Appendix Pg. 271-272 (Curran Depo.*, Pg. 148, lines 10-21, Pg. 166, lines 15-18).

According to the Petitioners, as they drove towards Thomas Wagner, he began running or jogging away from them towards his residence.⁸ *Maston Depo.*, Pg. 73, lines 8-10. The officers testified that once Thomas Wagner started running/jogging, then Mr. Wagner was under arrest. *Appendix Pg. 236 (Maston Depo.*, Pg. 81, lines 20-22); *Appendix Pg. 266 (Curran Depo.*,

⁶ Trooper Curran testified that he was unsure if the camera was functioning properly the night of the incident. However, if the camera was non-operational or malfunctioning, Trooper Curran testified that it had to be reported, and no documents have been provided by the Petitioners in discovery indicating the camera was non-operational. *Appendix Pg. 271 (Curran Depo.*, Pgs. 154-155, lines 22-24, 1-24).

⁷ Trooper Curran agreed that one purpose of the video system is to document interactions between officers and citizens, and recording the incident would have recorded the conversation and what occurred between the Petitioners and Thomas J. Wagner. *Appendix Pg. 272 (Curran Depo.*, Pg. 167, Lines 1-10).

⁸ It is noteworthy the officers allege Thomas Wagner ran, when earlier Deputy Maston provides Mr. Wagner was staggering just walking.

Pg. 64, lines 12-14). Deputy Maston testified that whenever somebody starts running home “then something’s not right” and at that point we want to “detain him and find out what’s going on.” *Appendix Pg. 235 (Maston Depo., Pg. 74, lines 4-14)*. In the view of Trooper Curran, the officers were going to arrest Thomas Wagner because, “Innocent people don’t run.” *Appendix Pg. 264 (Curran Depo., Pg. 48, line 20)*. When asked if he knew why Thomas Wagner was running, Trooper Curran responded, “I do not. ...I was actually [] dumbfounded why he ran.” *Appendix Pg. 268-269 (Curran Depo., Pg. 88, lines 23-24; Pg. 91, lines 21-22)*.

Thereafter, the officers made a left onto Main Street stopping at the driveway of Thomas Wagner’s residence. *Appendix Pg. 252 (Curran Statement)*. Trooper Curran wrote that “both officers engaged in a foot pursuit [of] approximately fifty (50) yards”; however, in his deposition, Trooper Curran states that Mr. Wagner ran fifty (50) yards while Deputy Maston ran only ten (10) yards. *Appendix Pg. 252, 264 (Curran Statement; Depo. Pg. 48, Lines 2-10)*.

Deputy Maston admits that at the driveway he put his hands on Mr. Wagner’s back, grabbing his clothing, and pinning his body against the porch while getting control of his right arm with a wristlock. *Appendix Pg. 235, 257 (Maston Depo., Page 79-80, lines 14-16, 1-22; Maston Statement)*. Then, Trooper Curran arrived, and gained control of Mr. Wagner’s left arm.⁹ *Appendix Pg. 236-237 (Maston Depo., Pgs. 81-86)*. Thereafter, Mr. Wagner was handcuffed at the bannister, instructed he was under arrest, and led to the police cruiser where he was read his Miranda rights. *Appendix Pg. 237 (Maston Depo., Pg. 86, line 22, Pg. 90, lines 1-3); Appendix Pg. 264 (Curran Depo., Pg. 54, lines 3-5)*.

⁹ Pursuant to the testimony of Lillian (Burch) Leeson, the tenant who was awoken by the arrest, Thomas Wagner was not moving or wiggling around during the arrest, “Oh, absolutely not. He couldn’t have moved if he wanted to. ...Because he was pressed up tight. The trooper had him – he wasn’t pressing against him, but he was up so tight against him he couldn’t move.” *Leeson Depo., Pg. 45, lines 13-24; Pg. 46, lines 1-6*.

It was only after arresting and injuring Thomas J. Wagner did the officers note the alleged smell of alcohol, red and glassy eyes, and slurred speech.¹⁰ *Appendix Pg. 252-253, 265-266 (Curran Statement; Curran Depo., Pg. 59-61); Appendix Pg. 257, 237 (Maston Statement; Maston Depo., Pg. 94, lines 11-24)*. These alleged symptoms of alcohol consumption had no bearing on the Petitioner officers' arrest and were noted only after the arrest and injury. *Id.*

Trooper Curran writes that Thomas J. Wagner "question[ed] both officers' reasoning for attempting to stop him." *Appendix Pg. 252-253 (Curran Statement)*. Trooper Curran testified that he told Thomas Wagner he was stopped "Because he ran on foot." *Appendix Pg. 265 (Curran Depo., Pg. 58, Lines 2-5)*. Thereafter, Thomas Wagner requested medical attention and was transported to Sistersville General Hospital. *Appendix Pg. 257 (Maston Statement)*.

It is undisputed that Thomas J. Wagner never attempted to injure or touch the officers in any way, neither officer sustained any injury, and neither officer ever felt threatened. *Appendix Pgs. 238, 267-268 (Maston Depo., Pgs. 104-105; Curran Depo., Pg. 73-76)*.

Following the arrest, Trooper Curran informed Thomas Wagner that he was "going to be charged with disorderly conduct and fleeing on foot initially." *Appendix Pg. 266 (Curran Depo., Pg. 65, lines 14-18)*. Then, Trooper Curran provided in his written report that Thomas Wagner was "arrested and charged with Public Intoxication, Disturbing the peace, fleeing on foot, and refusal of a PBT." *Appendix Pg. 252-253 (Curran Statement)*. However, subsequent to filing criminal complaints with the Magistrate Court of Tyler County, Trooper Curran dropped the charge of Refusal of a PBT, and subsequently added the charge of Obstructing and Resisting an Officer. *Appendix Pgs. 266, 275-279 (Curran Depo., Pgs. 64-66, Magistrate Complaints)*. Trooper Curran testified the charge for Resisting an Officer pertained to Thomas Wagner's

¹⁰ It should be noted there is no reference to slurred speech prior to the arrest while Mr. Wagner was speaking and allegedly cursing at the officers. *See officers' statements and deposition testimonies.*

refusal to give his hands to the officers during the arrest and was added before Mr. Wagner was taken to the North Central Regional Jail, or following Sistersville General Hospital that was attended by Trooper Curran's supervisor. *Appendix Pgs. 267 (Curran Depo., Pg. 69, lines 10-17)*. When asked why the charge of Resisting an Officer was not included with the initial charges, Trooper Curran responded, "I do not know." *Id. (Curran Depo., Pgs. 69-70, lines 23-1)*.

Thereafter, the charges were assigned to special prosecutor, Judith McCullough, as the Tyler County Prosecutor had a conflict of interest as he was renting a building from Thomas J. Wagner. The special prosecutor did not pursue, nor prosecute the charges filed by the Petitioners. On September 22, 2010, the Circuit Court of Tyler County, West Virginia, dismissed with prejudice the charges filed against Thomas Wagner following the special prosecutor declining to answer a rule to show cause why the charges should not be dismissed. *Appendix Pgs. 280-283*

SUMMARY OF ARGUMENT

This case involves the respondent, Thomas J. Wagner, a citizen of Middlebourne, West Virginia, who was significantly injured by petitioners, Deputy Joshua Maston and Trooper Shaun Curran, as he was walking home on a sidewalk. The Petitioners knew Thomas J. Wagner and knew his family. The Petitioners admitted that Mr. Wagner was no threat to them, the public, or himself. The Petitioners testified that Thomas J. Wagner was not going to be stopped, nor under arrest, as he walked towards his home in the rain and turned to ask the officers if everything was okay. The officers never turned on their police cruiser lights nor activated the video camera and audio, even though officers are instructed to perform these functions upon having contact with an offender/suspect. The Petitioners heard differing statements made by Thomas Wagner and each other. Deputy Maston stated in his written report that Trooper Curran told Mr. Wagner to go home, while Trooper Curran stated in his written report that he told Mr. Wagner to remain at his

location. Thomas Wagner testified that he did not hear the officers respond to his inquiry, so he waived back to them indicating never mind, and he started back home as the rain had increased.

Only when Thomas J. Wagner began heading to his home in the rain did the Petitioner officers state they assumed something was wrong. There was no intention to stop or arrest Mr. Wagner prior to this because the officers had no facts to support a violation of law. The officers admit they arrested Mr. Wagner only because he started back to his home in the rain. The officers drove a short distance to stop at Mr. Wagner's driveway, and Deputy Maston grabbed Thomas Wagner's right arm from behind while slamming Mr. Wagner against the oak spindles of Mr. Wagner's porch with such force that it cut and bruised Mr. Wagner's face and tore the ligaments and tendons in his right elbow that necessitated reconstructive surgery.

Realizing they had significantly injured a citizen for no lawful reason, the Petitioners attempted to assemble a hodgepodge of criminal charges, which they changed on three (3) different occasions to attempt and justify their use of force. The first charges were disorderly conduct and fleeing even though the officers admit that no one from the public heard their conversation with Mr. Wagner and that he was not under arrest prior to him leaving for his home. Then, Trooper Curran wrote in his report that charges of public intoxication, disturbing the peace, fleeing, and refusal to take a PBT were to be filed even though the officers' written statements conflict as to the facts giving rise to the public intoxication and said charge would not justify the use of force exhibited. Finally, the charge of refusal to take a PBT was dropped and the charge of Resisting an Officer was added. All criminal charges were dismissed.

The Petitioners, through their unwarranted and unlawful use of excessive force, violated the respondent, Thomas J. Wagner's clearly established right to be free from unlawful arrest, seizure, and injury. W.Va. Const. Art. 3, §1; §3; §6; §7, and §10. The West Virginia Supreme

Court has recognized the vital role of the court system, which cannot be overstated, in protecting the rights of citizens that have been damaged through the violation of their constitutional rights.

[Q]ualified immunity, as opposed to absolute statutory immunity, is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages. *Hutchison v. City of Huntington*, 198 W.Va. 139, 148-149, 479 S.E.2d 649, 658 - 659 (1996) (citing Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L.Rev. 261 (1995)).

The law provides the right to a trial by jury so that aggrieved citizens have a lawful outlet to enforce their rights. The procedures are in place to prevent constitutional rights from being trampled and to prevent citizens from feeling their only recourse is to take matters into their own hands. Here, the importance of the court is to protect our citizens when they are wrongfully aggrieved by our governmental agencies, which exist to protect and serve, not to cause unwarranted harm to our citizens.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The respondent, Thomas J. Wagner, has adequately presented the disputed facts and legal arguments at issue in this matter. The Petitioners have asked this court to make legal determinations when genuine issues of material fact exist. The facts and legal issues have been presented in the record on appeal. W.Va. Rules of App. Proc., Rules 18. If the court determines oral argument will aid in its decision, Rule 19 would govern argument in this matter as the Petitioners have alleged an assignment of error in the application of settled law, and the Respondent requests permission to further state his position during oral argument. W.Va. Rules of App. Proc., Rules 19.

ARGUMENT

A. Standard of Review

The West Virginia Supreme Court of Appeals “reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.” Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). “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). This review, however, is guided by the following principle regarding immunity:

The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

W.Va. Regional Jail and Correctional Facility Authority v. A.B., 766 S.E.2d 751, 759 (W.Va. 2014)(citing Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996)(*emphasis added*)).

In this connection, it is the jury, not the judge, who must decide the disputed ‘foundational’ or ‘historical’ facts that underlie the immunity determination, but it is solely the prerogative of the court to make the ultimate legal conclusion.

Hutchison v. City of Huntington, 198 W.Va. at 149, 479 S.E.2d at 659.

“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. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Summary judgment shall only be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” W.Va. R. Civ. P., Rule 56(c).

In considering a motion for summary judgment, “the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party[.]” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337 (1995). Likewise, “A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact.” Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 133 S.E.2d 770 (W.Va. 1963). “Roughly stated, a ‘genuine issue’ for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed ‘material’ facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.” Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

“Even if the trial judge is of the opinion to direct a verdict, he should nevertheless ordinarily hear evidence and, upon a trial, direct a verdict rather than try the case in advance on a motion for summary judgment.” Syl. Pt. 1, *Masinter v. WEBCO Co.*, 164 W.Va. 241, 262 S.E.2d 433 (1980)). “The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

B. The decision of the Circuit Court of Tyler County to deny Petitioners' Motion for Summary Judgment must be affirmed as the Petitioner officers' unlawful arrest, seizure, and use of excessive force that caused respondent, Thomas J. Wagner, severe injuries are not hidden nor shielded by the doctrine of qualified immunity, which (1.) is not ripe for disposition as bona fide disputes exist as to the material facts that underlie the immunity determination, and which (2.) do not protect against the violations of Respondent's clearly established constitutional rights which a reasonable officer would have known.

The law does not provide immunity¹¹ to an unlawful acting government official who has unreasonably caused damage to a citizen. “[Q]ualified immunity, as opposed to absolute statutory immunity, is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages.” *Hutchison v. City of Huntington*, 198 W.Va. 139, 148-149, 479 S.E.2d 649, 658 - 659 (1996). “Unless barred by one of the recognized statutory, constitutional or common law immunities, a private cause of action exists where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution.” Syl. Pt. 2, *Hutchison v. City of Huntington, supra*.

“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.” Syl. Pt. 1, in relevant

¹¹As an employee of a political subdivision, Deputy Maston is governed by the statutory immunity language of W.Va. Code, 29-12A-5(b)(1)-(3)(1986), which is discussed in Sections C(1) and D of this Brief. Nevertheless, in analyzing statutory immunity for employees of political subdivisions, the W.Va. Supreme Court of Appeals appears to use the similarly worded standard for qualified immunity set forth in federal law, apparently so that a uniform standard is applied when public officers are sued in state court for violations of federal civil rights. *City of Saint Albans v. Botkins*, 228 W.Va. 393, 398, 719 S.E.2d 863, 868 (2011). As a result, even though only State Constitutional violations have been alleged in this matter, the Respondent in Section B analyzes jointly the unlawful conduct of Deputy Maston and Trooper Curran pursuant to standards set forth governing the doctrine of qualified immunity.

part, *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987).

“[W]hether qualified immunity bars recovery in a civil action turns on the objective legal reasonableness of the action assessed, in light of the legal rules that were clearly established at the time it was taken.” *Hutchison v. City of Huntington*, 198 W.Va. at 148-149, 479 S.E.2d at 658-659 (1996)(citing *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992) and *Bennett v. Coffman*, *supra*).

“There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.” *State v. Chase Securities, Inc.*, 188 W.Va. at 365, 424 S.E.2d at 600. “[I]n the absence of any willful or intentional wrongdoing, to establish whether public officials are entitled to qualified immunity, we ask whether an objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate the plaintiff’s constitutional rights, in light of clearly established law and the information possessed by the defendant at the time of the allegedly wrongful conduct[.]” *Hutchison v. City of Huntington*, 198 W.Va. at 149, 479 S.E.2d at 659. “When broken down, it can be said that we follow a two-part test: (1) does the alleged conduct set out a constitutional or statutory violation, and (2) were the constitutional standards clearly established at the time in question?”¹² *Id.* “Whenever the public

¹² Similarly, the U.S. Supreme Court in case of *Saucier v. Katz*, 533 U.S. 194, 201-202 (2001), overruled on other grounds, “fashioned the following two-prong test that a court required to rule on the qualified immunity issue must consider:

- (1) Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?
- (2) If a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established[, that is] it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”

¹² In *Pearson v. Callahan*, 555 U.S. 223, 224 (2009), U.S. Supreme Court held that because the two-step *Saucier* procedure is often advantageous but that judges are in the best position to determine the order of decision making that will best facilitate the fair and efficient disposition of each case, the mandatory rigid application of the *Saucier* procedure is no longer mandatory.

officer's conduct appears to infringe on constitutional protections, the lower court must consider both whether the officer's conduct violated a constitutional right as well as whether the officer's conduct was unlawful." *Id.*

- 1. The determination of whether qualified or statutory immunity bars this civil action cannot be decided when there are disputes as to the material facts that underlie the immunity determination especially when the facts viewed in the light most favorable to the Respondent show violations to the constitutional rights of the respondent, Thomas J. Wagner, that a reasonable officer would know unlawful.**

As the above fact pattern reveals, there is a genuine dispute as to the facts that occurred on the night Petitioners caused injuries to the Respondent. There are not only factual disputes between evidence provided by the respondent, Thomas Wagner; witnesses, Crystal Price and Lillian (Burch) Leeson; and the petitioners, Deputy Maston and Trooper Curran; but factual disputes exist between Deputy Maston and Trooper Curran, and between the Petitioner officers' own written statements and subsequent deposition testimonies.

The different versions of facts provided by Deputy Maston and Trooper Curran, which include material omissions in their written statements and subsequent inconsistent testimonies, become all the more condemning when it is realized the officers omitted and were inconsistent on facts that are elements of the criminal charges they filed. In addressing the officers' omissions and inconsistencies, Respondent's expert, R. Paul McCauley, Ph.D., stated:

When it comes to police reports if you exclude a significant fact like that it's considered a lie on the part of the officer. The same as saying, bold face lie. Just flat misrepresenting it. So police reports are so important especially when you're talking about facts that contribute to the elements of offense. So when you're talking about swearing, profanity, that should be in a police report. They testified later I think that there was swearing, but the statement didn't include it. Did he swear? I really don't know. Mr. Wagner said he didn't. The trooper said at the time that he did and the deputy said he didn't hear it --- or didn't report it in his report. So we have significant issues of fact and problems with what really happened and what were the facts. At least I do.

Appendix Pg. 286 (McCauley Depo., Pg. 47, lines 5-22).

It is patently unfair for the Petitioners to have asked the Circuit Court of Tyler County, and now this Court, to wade through the vastly different interpretations of the facts and make a determination on the factual issues that underlie the immunity determination. The law does not place such an impossible task upon its judiciary, which is why this Court held, in *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996), that:

The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996)(emphasis added).

In this connection, it is the jury, not the judge, who must decide the disputed ‘foundational’ or ‘historical’ facts that underlie the immunity determination, but it is solely the prerogative of the court to make the ultimate legal conclusion.”

Id., 198 W.Va. at 149, 479 S.E.2d at 659.

It is disingenuous for either party to argue that concrete facts exist that would permit the court to make a determination upon those facts. The Respondent has presented facts that show the Petitioners violated the clearly established statutory and constitutional rights of Respondent. The Petitioners want this court to adopt certain facts, while ignoring other facts, in their argument that an immunity determination can be made.

In this case, numerous “material facts” exist and require jury determination. The West Virginia Supreme Court of Appeals have found that a “conflict in testimony creates a genuine issue of material fact for the trier of fact to resolve... [and] the resolution of this issue at trial may rest upon whether the jury find the officer’s testimony credible. ‘In assessing the factual record, we must grant the nonmoving party the benefit of inference, as ‘[c]redibility determinations...are jury functions, not those of a judge[.]’ ” *Pruitt v. West Virginia Dept. of*

Public Safety, 222 W.Va. 290, 297, 664 S.E.2d 175, 182 (2008)(citing *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202, 216 (1986)).

Here, as the Petitioners have raised the motion for summary judgment, the facts in this case are construed “in the light most favorable” to the Respondent. *Kelley v. City of Williamson, W.Va.*, 221 W.Va. 506, 510, 655 S.E.2d 528, 532 (2007).

The Circuit Court specifically addressed and noted the various discrepancies in facts by acknowledging, “Before the Court is a record laden with genuine issues of material fact.” The Circuit Court has determined that it cannot make an immunity determination given the material discrepancies in the record, and the West Virginia Supreme Court has instructed a determination should not be made when “there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination.” Syl. Pt. 1, *Hutchison v. City of Huntington, supra*.

2. The doctrine of qualified immunity does not protect the defendant officers’ unwarranted and unlawful arrest, seizure, and use of excessive force that violated the Respondent’s clearly known and established constitutional rights found in W.Va. Const. Art. 3, §1; §3; §6; §7, & §10.

Once the numerous disputed material facts have been determined by a jury, the issue becomes whether an objectively reasonable officer would have known that it was unlawful and a violation of the West Virginia Constitution to arrest the respondent, Thomas Wagner, without facts to support the criminal charges alleged. *Hutchison v. City of Huntington, supra*.

“Probable cause to make an arrest without a warrant exists when the facts and the circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed.” Syl. Pt. 1, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971).

Following the arrest, the Petitioner officers informed Thomas J. Wagner that he was being charged with Disorderly Conduct and Fleeing on Foot. *Appendix Pg. 266 (Curran Depo., 65, lines 14-18)*. Then, Trooper Curran added the charges of Public Intoxication and Refusal of a PBT. *Appendix Pg. 252-253 (Curran Statement)*. Then, after Thomas Wagner received medical treatment on his injured face and elbow, Trooper Curran changed the charge of Refusal of a PBT to the charge of Obstructing and Resisting an Officer.¹³ *Appendix Pg. 267 (Curran Depo., Pg. 69, 10-17)*. The facts show that all of the criminal charges were dismissed with prejudice. *Appendix Pg. 280-283 (September 22, 2010 Order)*. It is necessary to examine the four criminal charges ultimately alleged to show that no probable cause existed to arrest respondent, Thomas Wagner, and the criminal charges alleged were a pretext for the officers injuring Mr. Wagner.

i. Public Intoxication, W.Va. Code, § 60-6-9.

The petitioners, Deputy Maston and Trooper Curran, had no probable cause to arrest the respondent, Thomas Wagner, for public intoxication,¹⁴ as shown by the officers' admissions in their testimonies that they had no intention to stop, nor arrest Mr. Wagner for walking down the sidewalk and asking the officers if everything was okay. *Appendix Pg. 263 (Curran Depo., Pg. 38, lines 7-9); Appendix Pgs. 230-231 (Maston Depo., Pg. 47-48, Lines 1-13, 5-9)*.

As testified by Respondent's expert, R. Paul McCauley, Ph.D., FACFE, there were not sufficient facts for the officers to stop Thomas J. Wagner, or the officers would have done so:

That the trooper and the deputy saw Mr. Wagner walking down the sidewalk, whatever he was doing, was okay apparently because they said go home. So they had no reasonable suspicion to believe that he did anything wrong or intoxicated. So they said go home and he did.

¹³ When asked why the charge of Resisting an Officer was not included with the initial charges, Trooper Curran responded, "I do not know." *Curran Depo., Pg. 69-70, lines 23-24, 1.*

¹⁴ Pursuant to W.Va. Code, § 60-6-9(a)(1), "A person shall not: [a]ppear in a public place in an intoxicated condition[.]"

...Well, from the time --- up until the time the trooper said go home, they didn't have reasonable suspicion to stop [Mr. Wagner] or they would have. After that the issue becomes, according to --- I think the deputy, said that Mr. Wagner began to run and at that point they wanted to detain him. And as I said before, I know of no place where running is against the law.

Appendix 286 (McCauley Deposition, Pg. 40-41).

Another important fact is the Petitioner officers did not inform Thomas J. Wagner immediately following his arrest that he was being charged with Public Intoxication. *Appendix Pg. 266 (Curran Depo., 65, lines 14-18).*

In fact, the only reference to a claim supporting public intoxication on the day of the incident is contained within the written statement of Deputy Maston, which conflicts with the written statement of Trooper Curran. *Appendix Pg. 257 (Maston Statement), Appendix Pgs. 252-253 (Curran Statement).* Trooper Curran wrote Thomas J. Wagner was "walking" down the sidewalk, and Deputy Maston wrote Mr. Wagner was "walking and staggering."¹⁵ *Id.*

Although what the officers saw according to their written statements may be conflicting, both officers agree that Thomas J. Wagner stopped at the intersection to look for traffic before crossing the street, spoke to the officers without slurring his words, and was able to jog or run,¹⁶ all of which is conduct contrary to intoxication. When combined with the officers' admissions that Thomas Wagner was not under arrest until he hustled to his home, the facts show the charge of public intoxication was brought merely in an attempt to justify the unlawful arrest after it was discovered Mr. Wagner was seriously injured.

All other alleged signs of intoxication the officers have now claimed to bolster their

¹⁵ As stated, during his deposition, Trooper Curran changed his perception of the events stated in his written statement from Mr. Wagner "walking" to now Mr. Wagner "appeared to be intoxicated based solely on the observation that he was staggering." *Appendix Pg. 262 (Curran Depo., Pg. 36, Lines 10-15).*

¹⁶ "And the scurrying or the running home is not an element or a factor in determining intoxication. You would think that a person who is intoxicated, publicly drunk, would not be able to run or not scurry home like that." *Appendix Pg. 287 (McCauley Depo., Pg. 69, lines 20-24).*

unsupported charge were noticed after the arrest, and henceforth have absolutely zero relevance to the arrest, and the condition of Mr. Wagner is disputed between various witnesses.¹⁷

ii. Disturbing the Peace, W.Va. Code, § 61-6-1b.

The Petitioners, Deputy Maston and Trooper Curran, had no probable cause to arrest the plaintiff, Thomas Wagner, for Disturbing the Peace (i.e., Disorderly Conduct), as the officers cannot identify the public that was disturbed, all three participants in the conversation have a different understanding of what was said and heard, and the officers testified Mr. Wagner was not arrested as a result of their conversation.

Pursuant to W.Va. Code, § 61-6-1b (emphasis added), in relevant part:

Any person who, in a public place, ...or on any other property owned, leased, occupied or controlled by the state of West Virginia, ... disturbs the peace of others by violent, profane, indecent or boisterous conduct or language or by the making of unreasonably loud noise that is intended to cause annoyance or alarm to another person, and who persists in such conduct after being requested to desist by a law-enforcement officer acting in his lawful capacity, is guilty of disorderly conduct, a misdemeanor... .

First, there are no grounds for the charge of disturbing the peace because there were no “others” or “another person” (i.e., the public) that was disturbed by the conversation involving Thomas J. Wagner and the officers. *See* W.Va. Code, § 61-6-1b. The conversation lasted no longer than thirty (30) seconds. *Appendix Pgs. 264 (Curran Depo., Pg. 41, lines 19-22)*. There were no people around to hear the conversation. *Appendix Pg. 233 (Maston Depo, Pg. 62, lines 1-5)*. No public citizen called or made a complaint about the conversation. *Appendix Pgs. 265, 268 (Curran Depo., Pg. 55, lines 14-20; Pgs. 87-88, lines 16-24, 1-5)*. There was no intent by Thomas Wagner to disturb the public. *Appendix Pg. 208 (Wagner Depo., Pg. 129-130)*. Both

¹⁷ The defendant officers even provide different perceptions of Thomas Wagner’s alleged intoxication following the arrest. Deputy Maston stated he noted the smell of alcohol, while Trooper Curran notes smell of alcohol, red and glassy eyes, and slurred speech (which apparently was nonexistent during the earlier conversation). *Appendix Pgs. 252-253, 265-266 (Curran Statement; Curran Depo., Pg. 60-61, lines 21-24, 1-3)*.

Respondent's and Petitioners' experts agree that for laws concerning disturbing the peace, that the public does not include law enforcement officers. *Appendix Pg. 287 (McCauley Depo., Pg. 50, lines 8-17)*;¹⁸ *Appendix Pg. 290 (Faulkner Depo., Pg. 100, lines 4-14)*.¹⁹ The aforementioned facts are sufficient to show that no probable cause existed for a prudent man to believe the offense of disturbing the peace had been committed when there were no public citizens who heard the conversation between Thomas J. Wagner and the officers.

Second, the facts are in dispute regarding the substance and manner of the conversation. Thomas J. Wagner says he asks Petitioners if everything was okay for the benefit of himself and his tenants. *Appendix Pg. 208 (Wagner Depo., Pg. 129-130)*. Deputy Maston writes he heard Thomas Wagner ask if the officers needed anything, but Trooper Curran writes he heard Thomas Wagner shouting profanities and acting to provoke an altercation. *Appendix Pg. 257 (Maston Statement)*; *Appendix Pg. 252-253 (Curran Statement)*. Contrary to his written statement, Deputy Maston testified he heard Thomas Wagner use one curse word, but could not hear the curse words Trooper Curran claimed to hear even though he was sitting right next to Trooper Curran. *Appendix Pg. 233 (Maston Depo., Pg. 59, lines 1-8)*.

Besides the fact the defendant officers description of the volume and substance of the communications are inconsistent, even if the officers thought some type of curse word was used

¹⁸ “[W]hen we’re talking about disorderly and the disturbance to the public or to the community, it basically excludes policemen. So...if somebody is swearing at a policeman and acting in a boisterous fashion to offend the dignity of a policeman, that is usually not grounds for a disorderly conduct.” *Appendix Pg. 287 (McCauley Depo., Pg. 50, lines 8-17)*.

¹⁹ Q. “I think you said you can swear at an officer as long as you’re not physically threatening them.
A. Yes, sir. As long as other people aren’t there to be offended by that.
Q. Would you agree that police are not considered the public for the purposes of a disorderly conduct?
A. I think that’s correct.”
Appendix Pg. 290 (Faulkner Depo., Pg. 100, lines 4-14).

by Thomas Wagner in the course of speaking with the officers,²⁰ the same is not a crime.²¹ Deputy Maston acknowledged in his deposition there is nothing illegal about using a curse word when speaking with police officers, and his expert, Samuel Faulkner, agrees. *Appendix Pg. 232 (Maston Depo., Pg. 55, Lines 1-15), Appendix Pg. 290 (Faulkner Depo., Pg. 100, lines 4-14).*²²

Similarly, Thomas J. Wagner committed no crime by asking the officers if everything was okay or why they were in the area. “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state.” *Wilson v. Kittoe*, 337 F.3d 392, 399 (4th Cir. (Va.) 2003)(citing *City of Houston v. Hill*, 482 U.S. 451, 462–63, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987)).

Finally, it is again paramount in deciphering the facts of this case to understand the Petitioner officers testified they did not intend to arrest Thomas Wagner after the conversation, nor after the defendant officers began driving towards Mr. Wagner without activating their police cruiser lights or sirens. *Appendix Pgs. 264, 266 (Curran Depo., Pg. 42, lines 17-24 and Pg. 61, lines 13-17); Appendix Pg. 234 (Maston Depo., Pg. 64, lines 13-17).* The reason the officers were not going to arrest Thomas J. Wagner was because there were no factual circumstances that would lend a reasonable officer to believe the offense of disturbing the peace had been committed.

²⁰ It should be noted the officers do not allege they were called a curse word.

²¹ “[D]irecting profane epithets at a police officer does not fall within the fighting words exception to the First Amendment.” *Osborn v. Lohr–Robinette*, No. 1:05–0106, 2006 WL 3761597, at 7 (S.D.W.Va. Dec.20, 2006). “[I]t would violate clearly established law for a law enforcement officer to arrest an individual in retaliation for the use of profanity.” *George v. Kanawha County Sheriff's Dept.*, L 347782, 2 -3 (S.D.W.Va.,2009)(citing *McCurdy v. Montgomery County*, 240 F.3d 512, 520 (6th Cir.2001), which recognized that despite an individual’s repeated use of profanity toward an inquiring law enforcement officer that it is well-established the individual had a constitutional right to verbally challenge the officer’s surveillance.)

iii. Fleeing on Foot, W.Va. Code, § 61-5-17(d).

The petitioners, Deputy Maston and Trooper Curran, had no probable cause to arrest the respondent, Thomas Wagner, for Fleeing on Foot, as the officers testified that Thomas Wagner was not under arrest when he began hustling and/or running towards his home in the rain, and an individual must be under arrest to be fleeing on foot.

Pursuant to W.Va. Code, § 61-5-17(d)(Amended in 2001), Fleeing on Foot:

Any person who intentionally flees or attempts to flee by any means other than the use of a vehicle from any law-enforcement officer, probation officer or parole officer acting in his or her official capacity who is attempting to make a lawful arrest of the person, and who knows or reasonably believes that the officer is attempting to arrest him or her, is guilty of a misdemeanor...

The Petitioner officers testified they had no intention of arresting Thomas Wagner until they saw him head in the direction of his home. *Appendix Pg. 232-234 (Maston Depo., Pg. 55, Lines 12-15; Pg. 62-63, lines 19-24, 1-9); Appendix Pg. 264 (Curran Depo., Pg. 42, lines 17-24).* The fact the officers never turned on their police cruiser lights, sirens, or video camera is further proof the officers did not believe Thomas Wagner was a suspect for any crime.²³

Thomas Wagner testified that after he heard no response from the officers, he put his hood up because it had started to rain harder and headed to his residence. *Appendix 208, 216 (Wagner Depo., Pg. 129-130, lines 24, 1-5; Pg. 190).* The Petitioner officers testified the only reason they arrested Mr. Wagner was because he ran.²⁴ *Appendix Pg. 236 (Maston Depo. Pg. 81, lines 20-22); Appendix Pg. 266 (Curran Depo., Pg. 64, lines 12-14).* Trooper Curran went so far as to testify that, “Innocent people don’t run,” although Trooper Curran had no idea why Mr.

²³ The in-car police camera with audio “shall remain activated from the time that a member initiates contact with a traffic violator or other offender/suspect.” *Appendix Pgs. 273-274 (WV State Police Policy 17 In-Car Audiovisual Recording Equip., Pg. 4).*

²⁴ Deputy Maston testified that whenever somebody starts running “then something’s not right” and at that point we want to “detain him and find out what’s going on.” *App. Pg. 235 (Maston Depo., Pg. 74).*

Wagner was running.²⁵ *Appendix Pg. 264, 268-269 (Curran Depo., Pg. 48, line 20, Pg. 88, lines 23-24; Pg. 91, lines 21-22)*. Following the arrest, Trooper Curran writes that Thomas Wagner “question[ed] both officers’ reasoning for attempting to stop him.” *Appendix Pgs. 252-253 (Curran Statement)*. Trooper Curran testified that he told Thomas Wagner that he was stopped “Because he ran on foot.” *Appendix Pg. 265 (Curran Depo., Pg. 58, Lines 2-5)*.

In order to have had probable cause to arrest Thomas Wagner for the charge of Fleeing on Foot, the Petitioner officers must have been “attempting to make a lawful arrest” of Mr. Wagner, which was not the officers intention pursuant to their testimony, or Mr. Wagner must have known or reasonably believed the officers were attempting to arrest him, which also was not the case pursuant to his testimony. “So based on that information, the only reason the deputy stopped him was for running. And, again, I don’t know of any law that says running is disorderly or against the law.” *Appendix Pg. 286 (McCauley Depo., Pg. 46, lines 11-15)*. There are no facts provided by either the Respondent or Petitioners that support an arrest for Fleeing on Foot.

iv. Obstructing an Officer, W.Va. Code, § 61-5-17(a).

For the purposes of determining if the officers had probable cause to arrest Thomas Wagner, the subsequently charged offense of Obstructing/Resisting an Officer is not relevant insofar as the determination to arrest Mr. Wagner occurred before the alleged obstruction, which Trooper Curran states was Mr. Wagner refusing to give his hand to him. *Appendix Pg. 267 (Curran Depo., Pg. 69, 10-17)*. However, the facts surrounding the charge are indicative of the officers bringing the criminal charge because they unlawfully arrested and injured Mr. Wagner.

Following the arrest, Trooper Curran did not initially inform Thomas Wagner that he was going to be charged with Obstructing an Officer. *Appendix Pg. 266 (Curran Depo., 65, lines 14-*

²⁵ When asked if he knew why Thomas Wagner was running, Trooper Curran responded, “I do not. ...I was actually [] dumbfounded why he ran.” *Appendix Pgs. 268-269 (Curran Depo., Pg. 88, 91)*.

18). Trooper Curran did not state in his written report that Mr. Wagner was being charged with obstruction. It was not until after Thomas Wagner received medical treatment at Sistersville General Hospital, which was attended by Trooper Curran's supervisor, that the charge of Obstructing an Officer was constructed.²⁶ *Appendix Pg. 267 (Curran Depo., Pg. 69, 10-17).*

The charge of Obstructing an Officer was added in response to the injury the Petitioners caused to Thomas J. Wagner. As explained by expert, R. Paul McCauley, Ph.D.:

[O]bstruction goes to the notion of resistance. You know, you didn't comply with what we're saying, you resisted. Police are trained and I think in your police training document it also mentions that – let me be indelicate. It's called a cover your ass charge, a CYA and it says if you hurt somebody during an arrest process, cover your ass and make sure you have a reasonable charge that would justify the use of force.

And my question and my opinion is it appears to me that this obstructing justice is – was filed for the purpose of making a resistance point to justify the injury that occurred when, in fact, he was a public intoxicated person, according to them, who was told to go home.

He was on this way home and then he was, according to him, slammed, according to the police pinned against the banister and arrested. And he was hurt and they said, well, what are we going to charge him with?

We can't just charge him with walking home or running after we told him to stop, so we'll put a charge of obstructing on it and see what sticks. And that's just simply not what we're suppose[d] to be doing, but that's what I believe happened here.

Appendix Pg. 287 (McCauley Depo., Pg. 98-99, lines 14-24, 1-15). While the alleged facts surrounding the charge of Obstruction is not relevant to the reason for arrest, the facts show the officers brought the charge to attempt and justify their injury of Thomas J. Wagner.

As shown by applying the facts to the criminal charges alleged, the Petitioner officers engaged in oppressive and objectively unreasonable actions of using excessive force on Thomas Wagner without lawful grounds to arrest him. The facts do not support the charges alleged, nor

²⁶ Q. Do you know why you didn't add that in the initial charges that you advised Tom of?

A. I do not know.

Appendix Pg. 267 (Curran Depo., Pg. 69-70, lines 23-24, 1).

the excessive use of force exhibited. The charges alleged by Petitioners were merely to cover-up their actions of hurting Mr. Wagner for no lawful or excusable reason. For these facts, qualified immunity does not apply.

Next, in its Appeal Brief, the Petitioners attempt to compare the facts stated above with the case of *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011). The Petitioners appear to argue that the use of force is justified when an individual fails to comply with an officer's instruction, noting the *Botkins* Court found the use of force reasonable when a St. Albans police officer pistol-whipped Mr. Botkins, who was kneeling on the ground with a cast on his arm. *Petitioner's Appeal Brief, Pgs. 17-18*. While the actions of the St. Albans police officer cannot necessarily be condoned, the facts listed in *City of Saint Albans v. Botkins, supra*, are quite different from the facts involving the respondent, Thomas Wagner, and the petitioners, Deputy Maston and Trooper Curran. The most obvious and glaring difference between the cases were the safety and potential threats faced by the police officers in *Botkins*.

In *City of Saint Albans v. Botkins, supra*, the court was very careful to state the incident involved a heated confrontation between two (2) groups of young men, six (6) young males total, that included shouting and cursing, which occurred at 3:00 a.m. in the morning in a fast-food drive-thru with an individual who was running toward the scene, and that two (2) of the males were carrying objects that could serve as weapons. *City of Saint Albans v. Botkins*, 228 W.Va. at 401-402, 719 S.E.2d at 871-872. In this situation, the court held the officer did not know the extent of the threat imposed by the group, whether others outside the group would pose a threat, how much of a risk the group posed to the public including those at the restaurant, and that the officers' own safety may have been at stake; and therefore, a reasonable officer may have determined that force was necessary. *Id.*

Quite different than in *City of Saint Albans v. Botkins, supra*, the present case involving the respondent, Thomas J. Wagner, and the petitioners, Deputy Maston and Trooper Curran, involves no threat or danger to the public or the officers, and the Petitioners admit this fact. *Appendix Pg. 262-263 (Curran Depo., Pg. 35, Lines 20-24, Pg. 40, lines 3-4); Appendix Pg. 232 (Maston Depo., Pg. 57)*. The facts here involve one (1) fifty (50) year-old man described as heavy-set and balding, who the officers knew from previous friendly interactions, walking on a sidewalk to his home, empty handed, with no other person in sight, in the little town of Middlebourne. The Petitioner officers admitted they were not going to stop or arrest Mr. Wagner and only did so because they did not know the reason he started back to his home in the rain. There is not even a consensus in the officers' statements as to whether Trooper Curran told Mr. Wagner to go home or remain at his location. Moreover, the Petitioners' expert admits that Mr. Wagner cannot be found to have disobeyed an officer's instruction if he did not hear the officers.²⁷ The officers did not even turn on their police cruiser lights, sirens, video camera or audio. The facts in this case could not be more different from the facts described in *City of Saint Albans v. Botkins, supra*.

Moreover, Thomas Wagner was arrested without probable cause that any crime had been committed; and therefore, any use of force by the officers is unlawful and excessive. Alternatively, even if the officers would have had probable cause to arrest Mr. Wagner, which is opposed by the facts, the officers engaged in excessive force given the circumstances.

The law provides that the determination of excessive force in the context of arrests or investigatory stops "is not capable of precise definition or mechanical application" but analyzed under the "objective reasonableness standard," which "is whether the officers' actions are

²⁷ "Q. What happens if Mr. Wagner can't hear the officers? Is he disobeying them if he can't hear them? ...A. Yeah. I don't know who to answer that. I mean, if you can't hear, I don't know how I can hold that against you." *Appendix Pg. 291 (Faulkner Depo., Pg. 149)*.

‘objectively reasonable’ in light of the facts and circumstances confronting them” taking into account “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham v. Connor*, 490 U.S. 386, 395-7 (1989); *City of Saint Albans v. Botkins*, 228 W.Va. at 399-400.

In this matter, the Petitioner officers charged Thomas Wagner with public intoxication and disturbing the peace, which are non-violent offenses. The officers admit they knew Mr. Wagner, he had no weapon, had nothing in his hands, he was alone, and that neither officer was in any fear of danger. Finally, the facts show that both officers testified that Thomas Wagner was not under arrest before he began home in the rain thereby negating any charge he was resisting an arrest. There is no justifiable reason for the officers to have used the level of force utilized to arrest and cause injuries to Mr. Wagner.

C. The decision of the Circuit Court of Tyler County must be affirmed as the West Virginia State Police and Tyler County Sheriff’s Department are not entitled to qualified immunity.

Pursuant to the underlying factual basis before the court, qualified immunity is not applicable to the West Virginia State Police and Tyler County Sheriff’s Department because the agencies are liable for the unlawful conduct of its employees, Trooper Curran and Deputy Maston. Further, the Tyler County Sheriff’s Department is liable for its failure to appropriately educate and train its employee, Deputy Maston, and investigate his use of force.

1. The West Virginia State Police is not entitled to the vicarious application of qualified immunity because it is liable for the actions of Trooper Curran; and the Tyler County’s Sheriff’s Department is not entitled to statutory immunity because it is liable for the acts of Deputy Maston.

This Court has determined that a state agency may be liable for any wrongful acts committed by an officer pursuant to the doctrine of vicarious liability. *Pruitt v. West Virginia*

Dept. of Public Safety, 222 W.Va. 290, 298, 664 S.E.2d 175, 183 (2008)(The court held that “genuine issues of material fact existed as to whether trooper violated clearly established laws or engaged in fraudulent, malicious, or otherwise oppressive acts, precluding summary judgment declaring DPS immune from vicarious liability, based on asserted immunity of trooper, on state-law claims.”) In *Pruitt*, the court provided that “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...must be determined on a case-by-case basis.” *Id.*, 222 W.Va. at 299, 664 S.E.2d at 184. In this matter, qualified immunity is not applicable to the West Virginia State Police, which is liable for the violations of Respondent’s constitutional rights and Trooper Curran’s unlawful conduct.

On the other hand, the Tyler County Sheriff’s Department is a political subdivision that is governed by the Governmental Tort Claims and Insurance Reform Act (“Tort Reform Act”), W.Va. Code, § 29-12A-1, *et seq.* The Tort Reform Act governs the statutory immunities provided to political subdivisions, including the Tyler County Sheriff’s Department, and provides statutory liability upon political subdivisions for the negligent conduct of its employees. W.Va. Code, § 29-12A-4 (1986).²⁸

The Tort Reform Act provides political subdivisions with statutory immunity for damages as a result of injury, death, or loss caused by an act or omission of a political subdivision or an employee; however, the Tort Reform Act provides express statutory liability upon a political subdivision for damages “caused by the negligent performance of acts by their employees while acting within the scope of employment.” W.Va. Code, § 29-12A-4(b)(1), (c)(2). *Mallamo v. Town of Rivesville*, 197 W.Va. 616, 624-625, 477 S.E.2d 525, 533-534 (1996)(The Town of Rivesville was determined not liable for an intentional act of the police chief because

²⁸ Appendix Pg. 177-178 provides a brief history of governmental immunity in West Virginia.

§29-12A-4(c)(2), provides political subdivision are liable only for negligent acts by employees.)

W.Va. Code, § 29-12A-4(c)(2)(emphasis added), specifically provides:

(c) Subject to sections five and six of this article, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(2) Political 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.

Also, it is noteworthy that § 29-12A-5(a)(5), which provides that a “political subdivision is immune from liability if a loss or claim results from: Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;” applies to the “decision-making,” “formulation,” and “planning process in developing a governmental policy,” and “does not provide immunity to a political subdivision for the negligent acts of the political subdivision’s employee performing acts in furtherance” of that policy providing police, law enforcement or fire protection. See Syl. Pts. 3, 4, 5, *Smith v. Burdette*, 211 W.Va. 477, 566 S.E.2d 614 (2002)(The Court held fact issues as to whether police officer acted negligently precluded summary judgment for the city.)²⁹

The respondent, Thomas J. Wagner, may recover against the Tyler County Sheriff’s Department, if its employee, Deputy Maston, performed a negligent act within the scope of his employment. W.Va. Code, § 29-12A-4(c)(2). “Any person having a claim against a political subdivision within the scope of this article may sue such political subdivision for any appropriate relief including the award of money damages within the liability limitations established in section seven of this article.” W.Va. Code, § 29-12A-8. As discussed below, the defendant,

²⁹ See also related cases, *Mallamo v. Town of Rivesville*, 197 W.Va. 616, 477 S.E.2d 525 (1996); *Beckley v. Crabtree*, 189 W.Va. 94, 428 S.E.2d 317 (1993).

Deputy Maston, at the very least, negligently performed his functions as a police officer resulting in serious injuries to the respondent, Thomas Wagner, although the level and degree of Deputy Maston's unlawful actions are for jury determination.

2. The Tyler County Sheriff's Department is not entitled to immunity for the claims of negligent training, retention, and supervision as the agency failed to provide continuing education on the use of force and failed to perform an internal investigation into the excessive force that caused injuries to the respondent, Thomas J. Wagner.

The discovery process has revealed that upon hire, Deputy Maston attended a sixteen (16) week training class and Trooper Curran a thirty-two (32) week training class at the West Virginia State Police Academy. *Appendix Pg. 238 (Maston Depo., Pg. 118, line 23-24); Appendix Pg. 269 (Curran Depo., Pg. 139, line 18)*. The officers testified they both attended a use of force continuum class at the Academy, and Trooper Curran testified that he was shown a PowerPoint presentation. *Id. (Maston Depo., Pg. 118, line 11-21); Appendix Pg. 270 (Curran Depo., Pg. 142, line 13-21)*. The plaintiff does not dispute this training was provided at the Academy.³⁰

While entry-level training occurs at the West Virginia State Police Academy, the sheriff's department is not excluded from responsibility for the training of its deputies, and a sheriff's department is responsible for the supervision of his deputies and is liable when an injury is negligently caused by the deputy. *Mozingo v. Barnhart*, 169 W.Va. 31, 34-35, 285 S.E.2d 497,498-499 (1981). Law enforcement officers are required to annually attend in-service training programs after completion of the entry level Academy training. *Appendix 238-239 (Maston Depo., Pg. 120-121, lines 8-24, 1)*; W.Va. Code, § 30-29-6; W.Va. CSR 149-2-10.

³⁰ Trooper Curran testified the West Virginia State Police Policy and Procedure 10-1, titled Response to Resistance or Aggression, contained a Use of Force Continuum Wheel that showed the "continuation of force based upon the suspect that you are dealing with." *Curran Depo., Pgs. 144-146*. Trooper Curran provided the Use of Force Continuum Wheel in the policy was "actually out of skew from what [he] was taught" and that the "physical presence option" was out of order and should have been where the "lethal force option" was located. *Id.* The inaccuracy goes to the credibility of the Petitioners.

Deputy Maston testified that after he became a deputy in the year 2006, he has never taken a continuing education course on “use of force” even though he is required to take sixteen (16) hours of training each year that are chosen by both himself and the Tyler County Sheriff’s Department.³¹ *Appendix 238-239 (Maston Depo., Pg. 120-121, lines 8-24, 1)*. Deputy Maston testified the Tyler County Sheriff’s Department has not provided him with any individualized training on “use of force,” and his training is limited to the entry-level course at the Academy. *Id. (Maston Depo., Pg. 122, lines 4-9)*. In light of the conduct of Deputy Maston in this case, a question of fact exists as to whether the omission of the Tyler County Sheriff’s Department to require “use of force” training to its officers arises to the level of negligent training especially when the issue concerns the physical safety and well-being of its citizens.

Additionally, no evidence has been provided by the Tyler County Sheriff’s Department that it conducted an internal investigation following the excessive force used to injure the respondent, Thomas J. Wagner. The Respondent’s expert, R. Paul McCauley, Ph.D, testified that the failure to ask questions and hold employees accountable after an incident and lawsuit alerting the sheriff’s department to the use of force that caused an injury “represents a deliberate indifference on the part of the sheriff’s department for holding deputies accountable and for correcting officers misconduct and potential future misconduct[, which] goes to training, supervision [and] discipline[.]” *Appendix Pg. 288 (McCauley Depo., Pg. 131, lines 13-20)*.

A reasonable jury could find the above stated acts and omissions of the Tyler County Sheriff’s Department constitute negligent training and supervision that proximately contributed to Deputy Maston injuring Thomas Wagner.

³¹ “I’ve taken firearms instructor’s courses, along those lines, but other than that, no, sir.” *Maston Depo., Pgs. 120-121, lines 24, 1*.

D. The decision of the Circuit Court of Tyler County to deny the Petitioners' Motion for Summary Judgment must be affirmed as the level of misconduct by Deputy Maston must be determined by a jury before the court can determine whether statutory immunity applies to Deputy Maston pursuant to the Tort Reform Act.

The Governmental Tort Claims and Insurance Reform Act, W.Va. Code, 29-12A-5(b)(1)-(3)(1986), governs the immunities provided to employees of political subdivisions, including the petitioner, Deputy Maston. W.Va. Code, § 29-12A-5(b)(1)-(3)(1986), provides that an employee of a political subdivision is immune from liability unless the employee's acts or omission were "manifestly outside the scope of employment or official responsibilities;" "were with malicious purpose, in bad faith, or in a wanton or reckless manner;" or "[l]iability is expressly imposed upon the employee by a provision of this code."³²

It is for a jury to determine whether Deputy Maston's unlawful actions go beyond mere negligence, imputed to the Tyler County Sheriff's Department, and arise to acts or omissions made outside the scope of employment, with malice or bad faith, or in a wanton or reckless manner, which would nullify the statutory immunity afforded to him as an employee of a political subdivision.

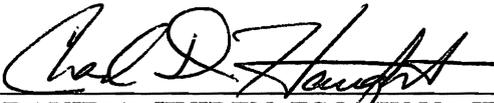
CONCLUSION

The respondent, Thomas J. Wagner, has provided sufficient evidence that shows the Petitioners committed an unlawful arrest and then compounded that wrongful action by filing criminal charges in an attempt to justify their unnecessary use of excessive force that seriously injured the Respondent. The respondent, Thomas J. Wagner, is entitled to a trial by jury to vindicate his statutory and constitutional rights that have been violated.

³² The statute makes clear the statutory immunity conferred upon an employee does not affect or limit any liability of a political subdivision for a negligent act or omission of the employee. W.Va. Code, 29-12A-5(c).

WHEREFORE, the respondent, Thomas J. Wagner, moves this Honorable Court to DENY the Petitioners' Appeal, and AFFIRM the decision of the Circuit Court of Tyler County that denied the Petitioners' motion for summary judgment, so the facts may be determined at trial. The Respondent moves for such other relief that this court deems just and proper.

Respectfully submitted by
Thomas J. Wagner, Respondent,

By: 

DAVID A. JIVIDEN, ESQ. (W.Va. ID. #1889)
CHAD D. HAUGHT, ESQ. (W.Va. ID. #10565)
Jividen Law Offices, PLLC
729 North Main Street
Wheeling, WV 26003
Telephone: (304)232-8888
Facsimile: (304)232-8555
djividen@jividenlaw.com,
chaught@jividenlaw.com
Counsel for Thomas J. Wagner, Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Defendants Below, Petitioners,

v.

W.Va. S. Ct. Case No. 14-1113
(Cir. Ct. C.A.N. 11-C-12)

THOMAS J. WAGNER,

Plaintiff Below, Respondent,

CERTIFICATE OF SERVICE

Service of the BRIEF OF RESPONDENT was provided upon counsel of record herein by mailing a true and correct copy thereof by United States mail, postage prepaid, this 10th day of March, 2015.

Gary E. Pullin, Esq.
Pullin Fowler Flanagan Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545
gpullin@pffwv.com
*Counsel for Deputy J.K. Maston, Tyler County Sheriff's Department,
Trooper S. Curran, and WV State Police, Petitioner*

By: 

DAVID A. JIVIDEN, ESQ. (W.Va. ID. #1889)
CHAD D. HAUGHT, ESQ. (W.Va. ID. #10565)
Jividen Law Offices, PLLC
729 North Main Street
Wheeling, WV 26003
Telephone: (304)232-8888
Facsimile: (304)232-8555
djividen@jividenlaw.com
chaught@jividenlaw.com
Counsel for Thomas J. Wagner, Respondent