

DO NOT REMOVE  
FROM FILE

**FILE COPY**

MAY 22 2019

---

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

**DOCKET NO. 18-1076**

---

THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY  
AUTHORITY,

*Defendant Below, Petitioner,*

v.

THE ESTATE OF CODY LAWRENCE GROVE,

*Plaintiff Below, Respondent.*

(On Appeal From Order of the Honorable Laura V. Faircloth; Circuit Court of Berkeley County,  
West Virginia; Case No. 17-C-529)

---

**PETITIONER'S REPLY BRIEF**

---

Matthew R. Whitler (WV State Bar No. 7628)  
Anthony J. Delligatti (WV State Bar No. 12345)  
*PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC*  
261 Aikens Center, Suite 301  
Martinsburg, West Virginia 25404  
Telephone: 304.260.1200  
Facsimile: 304.260.1208  
Email: [mwhitler@pffwv.com](mailto:mwhitler@pffwv.com)  
Email: [adelligatti@pffwv.com](mailto:adelligatti@pffwv.com)  
*Counsel for the West Virginia Regional Jail and  
Correctional Facility Authority*

**TABLE OF CONTENTS**

1. **Because the Estate concedes that the Regional Jail Authority is a state agency not subject to punitive damages, the Court must reverse the circuit court’s denial of the Motion to Dismiss Respondent’s claim for punitive damages. .... 6**

2. **The Court should deny the Estate’s Motion to Amend the Appendix and should not consider the supplemental appendix because none of the documentation provided is in the record below and the Estate has failed to show good cause as to why the material was not previously included in the Joint Appendix..... 6**

3. **Rule 12(e) motions are not required prior to filing a Rule 12(b) Motion to Dismiss and should only be filed by a defendant when a complaint “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” ..... 7**

4. **Even considering the Estate’s new allegations and theories of liability, the Regional Jail Authority is immune from the Estate’s allegations. .... 9**

**A. A.The Regional Jail Authority and Officer Zombro were performing discretionary functions. .... 9**

**B. B.The Estate fails to allege the violation of a clearly established statutory or constitutional right..... 11**

5. **The Court should determine whether the Amended Complaint was properly pled and whether the Regional Jail Authority is immune from the Estate’s claims rather than remanding the case back for another round of amendments to the pleadings. 15**

**CONCLUSION ..... 17**

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)..... 15  
*Harbaugh v. Coffinbarger* 209 W. Va. 57, 543 S.E.2d 338 (2000)..... 10  
*Moats v. Preston Cty. Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999)..... 10, 12  
*Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987)..... 15  
*W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751(2014) .... 9

**Statutes**

W. Va. Code § 55-7-5..... 13  
W. Va. Code § 64-12-3 ..... 13

**Other Authorities**

2019 Senate Bill 240..... 13  
W. Va. Code St. R.95-1-12.14..... 12

**Rules**

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure ..... 7  
Rule 12(e) of the West Virginia Rules of Civil Procedure ..... 7, 8  
Rule 6(a) of the West Virginia Rules of Appellate Procedure..... 6  
Rule 7 (g) of the West Virginia Rules of Appellate Procedure ..... 6

Once again, the Estate of Cody Lawrence Grove (“Estate”), has made a series of hyperbolic conclusory statements of liability without connecting the allegations of fact to the elements of causes of action that the Estate has alleged. In fact, the Estate relies on a completely new set of allegations that are not in the record below, and asserts new claims of liability. Rather than address the merits of the West Virginia Regional Jail Authority’s assignments of error or defend the circuit court’s denial of the Motion to Dismiss the Amended Complaint, the Estate asks the Court to 1) look beyond the Amended Complaint; 2) look beyond the court record below; 3) cast aside the requirement that motions to dismiss should be determined only by matters alleged in the complaint; 4) cast aside the requirement that this Court should only review matters in the record below; 5) disregard the heightened pleading requirement for qualified immunity cases, and 6) find that “Officer Zombro and the [Regional Jail Authority] must answer for their acts and omission in a public trial.”<sup>1</sup> The Estate urges the Court to focus on unrelated character evidence from portions of former correctional officer Joshua David Zombro’s confidential personnel file<sup>2</sup> and an incident report from Mr. Grove’s suicide. Neither of these documents are in the circuit court file or were considered by the circuit court. The Estate is in essence admitting that the circuit court’s order is indefensible and the Amended Complaint fails as a matter of law. Instead, the Estate is asking this Court to remand the case to permit him to amend the Complaint a second time: “for further developments of the issue of the application of qualified immunity to the facts of the this case.”<sup>3</sup>

The Estate concedes that the Amended Complaint’s claim for punitive damages fails to state a claim for relief because as a state agency the Regional Jail Authority is immune from

---

<sup>1</sup> Response at p. 18.

<sup>2</sup> The Regional Jail Authority provided a copy of Officer Zombro’s entire personnel file to Respondent’s counsel subject to an agreed to protective order.

<sup>3</sup> Response at p. 18.

punitive damages.<sup>4</sup> But the Estate still claims that the remainder of its claims in the Amended Complaint, as well as the new ones asserted on appeal should survive.

The Estate argues that 1) it is premature to rule on a motion to dismiss because at this point “it is impossible to identify all facts supporting Plaintiff’s complaint”;<sup>5</sup> 2) the Regional Jail Authority “omit[ted] critical and relevant facts from its version of the statement of the case which strip” the Regional Jail Authority of qualified immunity;<sup>6</sup> 3) the Regional Jail Authority failed to file a Rule 12(e) motion for a more definitive statement which would have cured the defects in the Amended Complaint;<sup>7</sup> and 4) the Estate’s new allegations raised only on appeal demonstrate that the Regional Jail Authority is not entitled to qualified immunity.

The Regional Jail Authority maintains that this Court should not consider the supplemental appendix, but should instead focus on the claims alleged in the Amended Complaint. At the appellate level, the Estate abandons any notion that the Regional Jail Authority was on notice or should have been on notice that Mr. Grove was suicidal, and further disregards its claim that Mr. Grove should have been placed on suicide watch. Rather, the Estate now claims that liability be based on the failure to prevent Mr. Grove’s suicide by not properly monitoring an inmate not known to be suicidal.

Below each of the Estate’s arguments are addressed.

---

<sup>4</sup> Response at p. 7-8.

<sup>5</sup> Response at p. 1, footnote 1. The standard of reviewing the sufficiency of a complaint is not whether all facts supporting the claim have been discovered, but whether a claim for which relief could be granted has been alleged.

<sup>6</sup> Response at p. 1.

<sup>7</sup> Response at p. 3.

- 1. Because the Estate concedes that the Regional Jail Authority is a state agency not subject to punitive damages, the Court must reverse the Circuit Court's denial of the Motion to Dismiss Respondent's claim for punitive damages.**

Despite arguing in circuit court that the Regional Jail Authority is not a state agency and thus not immune from punitive damages, the Estate concedes that the Regional Jail Authority is a state agency and is not subject to punitive damages. Because the circuit court erred in failing to dismiss the Estate's claims for punitive damages, the Court must reverse the decision below and order that the claim for punitive damages against the Regional Jail Authority be dismissed with prejudice.

- 2. The Court should deny the Estate's Motion to Amend the Appendix and should not consider the supplemental appendix because none of the documentation provided is in the record below and the Estate has failed to show good cause as to why the material was not previously included in the Joint Appendix.**

Rule 7 (g) of the West Virginia Rules of Appellate Procedure permits a party to file a motion for leave to file supplemental appendix of "matters from the record not previously submitted," and the party must "set forth good cause why the material was not previously included" in the appendix. Moreover, the record is limited to "papers and exhibits filed in the proceedings in the lower tribunal, the official transcript or recording of proceedings, if any, and the docket entries of the lower tribunal."<sup>8</sup> Finally, Rule 7 requires that the appendix items be "accurate reproductions."

The Estate's proposed supplemental appendix was not part of the record below and includes markings not in the original documents. Nonetheless, what is most concerning is the Estate's purported good cause for not including it in the Joint Appendix. The parties conferred

---

<sup>8</sup> Rule 6(a) of the West Virginia Rules of Appellate Procedure.

about the contents of the Joint Appendix and the Estate asked that a number of items from the court record be added to the Joint Appendix including a number of items involving a pre-suit subpoena served on the Regional Jail Authority. While the Regional Jail Authority does not believe that the items the Estate insisted on for inclusion were relevant to the Appeal, the items were made part of the record below and were included in the Joint Appendix. Now the Estate claims that the Regional Jail Authority “omits critical and relevant facts from its version of the statement of the case.”<sup>9</sup> The only facts relevant to a Rule 12(b)(6) are the facts alleged in the complaint. Thus, the Regional Jail Authority only included allegations from the Amended Complaint.

Rather than citing to any of the documents it wanted added to the Joint Appendix or the allegations alleged in the Amended Complaint, the Estate cherry-picked records from a former officer’s personnel file to rely on in its opposition to the appeal. The Estate never provided the Regional Jail Authority these items from outside of the record to add into the Joint Appendix. Even if allegations or evidence outside the Amended Complaint were relevant to this appeal, such as an appeal of a summary judgment order, matters outside of the record should not be considered by this Court. Accordingly, the Estate has not shown good cause as to why the Court should consider documents in the supplemental appendix, and therefore, the Court should deny the Estate’s Motion.

- 3. Rule 12(e) motions are not required prior to filing a Rule 12(b) Motion to Dismiss and should only be filed by a defendant when a complaint “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.”**

The Estate argues paradoxically, that the Regional Jail Authority should have filed a Rule 12(e) motion for a more definite statement prior to filing the second Motion to Dismiss so that the

---

<sup>9</sup> Response at p. 1.

“issue would have been squarely brought to a head below,”<sup>10</sup> and also argues that it is premature to rule on a motion to dismiss, because at this point “it is impossible to identify all facts supporting Plaintiff’s complaint.”<sup>11</sup> Furthermore, the Estate insists that “in response to Petitioner’s first motion to dismiss the initial complaint, [the Estate] filed a first amended complaint which laid out in greater detail”<sup>12</sup> the factual allegations in support of its claim for relief. The Estate claimed that its Amended Complaint “clarifies the basis of Plaintiff’s claims.”<sup>13</sup> The First Motion to Dismiss and the Second Motion to Dismiss assert the same grounds for dismissal, except for the jurisdictional grounds the Estate cured prior to serving the Regional Jail Authority with a copy of the Amended Complaint.<sup>14</sup>

Rule 12(e) motions should only be filed by a defendant when a complaint “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.”<sup>15</sup> The Regional Jail Authority never claimed that the Amended Complaint was so vague or ambiguous that it could not frame a responsive pleading. To the contrary, the Regional Jail Authority filed both an answer to the Amended Complaint and a motion to dismiss. The problem with the Amended Complaint is not that it is so vague or ambiguous to respond to; rather, the problem with the Amended Complaint is that it fails to state a claim for which relief could be granted, as the Regional Jail Authority is immune from the Estate’s claims.

---

<sup>10</sup> Response at p. 7.

<sup>11</sup> Response at p. 1, footnote 1

<sup>12</sup> Response at p. 7.

<sup>13</sup> Grove Response to First Motion to Dismiss. App. at 73.

<sup>14</sup> Compare Motion to Dismiss (App. at 33); Second Motion to Dismiss (app at 188).

<sup>15</sup> Rule 12(e) of the West Virginia Rules of Civil Procedure.

**4. Even considering the Estate's new allegations and theories of liability, the Regional Jail Authority is immune from the Estate's allegations.**

**A. The Regional Jail Authority and Officer Zombro were performing discretionary functions.**

On appeal, the Estate abandons any notion that the Regional Jail Authority was on notice or should have been on notice that Mr. Grove was suicidal and disregards the claim that Mr. Grove should have been placed on suicide watch. Rather, the Estate now claims that the Regional Jail Authority is liable to the Estate due to the failure to prevent Mr. Grove's suicide by not properly monitoring him when he was not known to be suicidal. The Estate also claims liability against the Regional Jail Authority for not firing Mr. Zombro after violation of the Regional Jail Authority's policies months prior to Mr. Grove's suicide, which the Estate now asserts would have prevented Mr. Grove from committing Suicide.

First, this Court, in *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, squarely rejected the contention that the Regional Jail Authority can be liable for firing or retention decisions of its correctional officers absent a clearly established legal right, because "the broad categories of training, supervision, and employee retention, as characterized by respondent, easily fall within the category of "discretionary" governmental functions."<sup>16</sup> Additionally, the Estate has not alleged any facts in support of a clearly established right to the termination of Mr. Grove. Moreover, it is tenuous at best to contend that firing Officer Zombro months before Mr. Grove's suicide would have had any impact on Mr. Grove's suicide.

Second, how to monitor inmates and protect inmates from self-inflicted harm is a discretionary function absent some specific duty to monitor a specific inmate who was known to

---

<sup>16</sup> *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 514, 766 S.E.2d 751, 773 (2014).

be suicidal. This Court in *Moats v. Preston County Com'n*, found that actions

for the suicide of another have generally been barred because the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible, courts have allowed such actions where the defendant is found to have actually caused the suicide or where the defendant is found to have had a duty to prevent the suicide from occurring.<sup>17</sup>

...

Recovery for wrongful death by suicide may be possible where the defendant had a duty to prevent the suicide from occurring; to recover, the plaintiff must show the existence of some relationship between the defendant(s) and the decedent giving rise to a duty to prevent the decedent from committing suicide, which relationship generally exists if one of the parties, knowing the other is suicidal, is placed in the superior position of caretaker of the other who depends upon that caretaker either entirely or with respect to a particular matter.<sup>18</sup>

Absent a showing of specific knowledge of a specific threat to a specific inmate, the general duty to protect inmates or maintain a safe premises is a discretionary function wherein Regional Jail Authority administration is tasked with devising and implementing strategies to protect inmates and staff from injury. Because inmates who are not on suicide watch are not on 24 hour a day direct surveillance, most inmates do not have a guard watching them 24 hours a day. To provide such surveillance of all individual inmates in all cells and common areas would be cost

---

<sup>17</sup> *Moats v. Preston Cty. Comm'n*, 206 W. Va. 8, 16, 521 S.E.2d 180, 188 (1999). The Court noted that the exception to the general rule that recovery for suicide is barred applies to "to someone who has a duty of custodial care, knows that the potential for suicide exists, and fails to take the appropriate measures to prevent the suicide from occurring." *Id.* A year after *Moats*, this Court analyzed whether a homeowner or party guest who brought a revolver could be liable to the estate of another party goer who killed himself by playing Russian Roulette with the revolver. In *Harbaugh v. Coffinbarger*, the Court found that a guest's act, whether characterized as intentional suicide or tragic consequence of playing Russian Roulette, constituted an intervening cause as a matter of law for negligence action brought by guest's estate against the gun owner, who brought a revolver to party and gave it to the guest, and against homeowner and party hosts. 209 W. Va. 57, 543 S.E.2d 338 (2000). In *Harbaugh*, Petitioner argued that more discovery should have been permitted prior to the Court finding that the self-inflicted gunshot wound was an intervening cause, but the Court disagreed.

<sup>18</sup> *Moats*. at Syl. Pt. 6.

prohibitive, and would likely result in serious privacy concerns. Thus, when an inmate is injured while incarcerated, the fact of injury does not automatically create liability for the Regional Jail Authority for failure to monitor. Therefore, the Regional Jail Authority and its officers have a discretion duty to monitor the jail in a way that the commanding officers see fit to assure officer and inmate safety in light of the resources at his or her disposal, and liability attaches only when there is knowledge of a specific threat, such as knowing that a certain inmate is suicidal.

Here, no facts are alleged to support the claim that the Regional Jail Authority knew or should have known that Mr. Grove was suicidal. Now, on appeal, the only allegation the Estate raises is that Officer Zombro altered a log entry time, which the Estate claims is evidence that Officer Zombro permitted Mr. Grove too much time between Medical Unit security checks which caused or resulted in Mr. Grove's suicide.

Because all of the Estate's claims are for the violation of discretionary duties, the Court must determine whether the Estate pled facts, or even asserted facts on appeal, to support the claim that the violation of those discretionary functions violated a clearly established statutory or constitutional right of which a reasonable government actor would have known, or otherwise engaged in fraudulent, malicious, or oppressive conduct that caused Mr. Grove's suicide.

**B. The Estate fails to allege the violation of a clearly established statutory or constitutional right.**

In *Taylor v. Barkes*,<sup>19</sup> the United States Supreme Court held that any right of an incarcerated person to proper implementation of adequate suicide prevention goals was not a clearly established right and that corrections officials were qualifiedly immune from such claims.<sup>20</sup> Because an inmate's right to suicide prevention measures is not clearly established, officials at

---

<sup>19</sup> *Taylor v. Barkes*, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015).

<sup>20</sup> *Id.*

correctional facilities are protected from liability by qualified immunity for claims of inadequate suicide prevention measures. What distinguishes this case from *Taylor* in favor of the Regional Jail Authority, is that in *Taylor* the inmate disclosed to the correctional institution that he had a history of being suicidal and had made previous attempts at suicide,<sup>21</sup> and yet the correctional institution did not initiate any special suicide prevention measures. In contrast, Mr. Grove had no history of suicide attempts, or suicidal thoughts known to the Regional Jail Authority.

The Estate argues in response to Petitioner's Brief that Officer Zombro was plainly incompetent and violated Mr. Grove's clearly established legal rights by 1) altering a logbook after the suicide in violation of Regional Jail policy; 2) lying about altering the Medical Department logbook after Mr. Grove's suicide; 3) violating the wrongful death statute; 4) violating Mr. Grove's right to due process; and 5) by denying Mr. Grove's criminal trial rights.<sup>22</sup> The Regional Jail Authority is implicated through respondeat superior, as Officer Zombro was an agent of the Regional Jail Authority.

First, as to Officer Zombro altering the log book and lying about the alteration, these actions could not have violated any clearly established right of Mr. Grove, because Mr. Grove had already committed suicide when Officer Zombro altered the log book.

Second, as to the duty to place Mr. Grove on suicide watch or consistently monitor him in order to prevent a suicide attempt, there is a duty only if the Regional Jail Authority knows that the inmate is suicidal.<sup>23</sup> The Estate alleges no facts to support the notion that the Regional Jail Authority knew Mr. Grove was suicidal and seems to on appeal abandon the notion entirely.

---

<sup>21</sup> *Id.* 135 S. Ct. at 2043, 192 L. Ed. 2d at 78.

<sup>22</sup> Response at p. 16-18.

<sup>23</sup> W. Va. Code St. R. 95-1-12.14; Syl. Pt. 6, *Moats v. Preston County Com'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999).

Instead, the Estate now claims that the Regional Jail Authority is a responsible for Mr. Grove's death because it appears Officer Zombro altered the Medical Unit Security Check Log to read 4:51 A.M. instead of 3:51 A.M., and that this alteration is evidence that not performing a unit security check between 3:51 A.M. and when Mr. Grove was found at 6:02 A.M. was too long. However, the Estate cites no clearly established legal right to security checks of regional jail units to be done more frequently than what occurred in this case, but instead broadly claims without explanation that Officer Zombro violated a number of Mr. Grove's rights.

Third, even if inmates had a clearly established legal right to hourly unit security checks or even half-hourly unit checks, the checks would not prevent suicides because suicides by hanging only take a few minutes. That is why 95 CSR 1-12.14 required "inmates who are classified as suicidal [to] be continuously monitored which shall include a verbal exchange between the inmate and the monitoring staff."<sup>24</sup>

Fourth, the Estate further asserts that governmental immunities do not apply when bringing a claim for wrongful death under West Virginia's wrongful death statute W. Va. Code § 55-7-5.<sup>25</sup> There is simply no basis in law to claim that because a person has died that qualified immunity does not apply.

Fifth, the Estate broadly claims without explanation that the "acts and omission of Co-Petitioners" violated Mr. Grove's right to due process. Because the Estate fails to articulate how Mr. Grove's right to due process was violated, it is impossible to respond to it.

Sixth, the Estate claims that:

---

<sup>24</sup> 95 C.S.R. 1-12.14 was in effect at the time of Mr. Grove's suicide. During the 2019 legislative session the Legislature repealed all of Title 95 in Senate Bill 240. W. Va. Code § 64-12-3. The regulation also required the jail to make and retain an audio recording of the conversation while the inmate was on suicide watch.

<sup>25</sup> Response at p.15-16.

In response to Petitioner's Motion to Dismiss Plaintiff's First Amended Complaint, Grove set forth additional constitutional violations sufficient to put Petitioners on notice of Plaintiff's claims and survive the Rule 12(b)(6) motion to dismiss. App. Pg. 161.<sup>26</sup>

What the Estate is citing to as "additional constitutional violations" is the Estate's response in opposition to the Regional Jail Authority's Motion to Dismiss the Amended Complaint where the Estate asserts that the Regional Jail Authority deprived Mr. Grove of the following constitutional rights:

- right to enjoy life
- right to liberty
- right to acquire and possess property
- right to pursue happiness
- right to due process
- right to judgment of his peers
- right to a public criminal trial
- right to confront witnesses against him
- right of assistance of counsel
- right of the ability to prepare a defense
- right to subpoena witnesses
- right to access to the courts
- right to public civil trial
- right to speedy resolution of claims<sup>27</sup>

The Estate does not assert most of the referenced rights in its Amended Complaint, but claims that because the Estate listed constitutional rights that it claims to be violated, then its claims the alleged constitutional violations are "sufficient to put Petitioners on notice of Plaintiff's claims and survive

---

<sup>26</sup> Response Brief p. p. 16

<sup>27</sup> Joint App. p. 161-162. Presumably, under the Estate's understanding of the law, the Estate could have continued the list and asserted all constitutional rights that Mr. Grove lost at death such as the right to marry, right to vote, right to peaceably assemble, etc. The claims for violations of criminal trial rights all fail because 1) Mr. Grove waived his criminal trial rights when he killed himself; 2) such rights are not within the scope of any duty the Regional Jail Authority has to stop inmate suicides; 3) the issues are moot because the state never indicted Mr. Grove and the state voluntarily dismissed the charges as it cannot prosecute a deceased person; and 4) the Estate lacks standing because the only obtainable relief when one of those criminal trial rights are infringed is a reversal of a conviction, and not money damages.

the Rule 12(b)(6) Motion to Dismiss.<sup>28</sup> The Estate is in essence arguing that it can raise and assert additional claims not raised in the Amended Complaint without again amending the Complaint, and that as long as the Estate sets forth a litany of rights without connecting them to the alleged facts, then the claims can survive a motion to dismiss on qualified immunity. This is completely without any supporting legal authority and should be rejected.

**5. The Court should determine whether the Amended Complaint was properly pled and whether the Regional Jail Authority is immune from the Estate's claims rather than remanding the case back for another round of amendments to the pleadings.**

The Estate's notion that listing rights without connection to allegations of fact meets pleading standards gets to the core of this case. A plaintiff cannot simply name rights or causes of action that do not correspond to factual allegations with the hope of defeating a motion to dismiss. Even mere notice pleading requires a plaintiff's complaint to "at a minimum . . . set forth sufficient information to outline the elements of his claim."<sup>29</sup> However, "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff."<sup>30</sup> Heightened pleading requires more specificity of facts than mere notice pleading in order to permit an evaluation of qualified immunity. The plaintiff rather than simply alleging that an abstract right has been violated, must make a "particularized showing" that a "reasonable official would understand that what he is doing violated" Plaintiff's rights.<sup>31</sup>

Nonetheless, the trial court may not avoid such an inquiry by not addressing the immunity questions when raised. Here, the Regional Jail Authority asserted that it was qualifiedly immune.

---

<sup>28</sup> Response at p. 17

<sup>29</sup> *Price v. Halstead*, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987).

<sup>30</sup> *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996).

<sup>31</sup> *Id.* at footnote 11 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)).

Accordingly, the heightened pleading doctrine required the circuit court to determine whether the Regional Jail Authority is immune from any of the claims. However, the circuit court simply denied the Regional Jail Authority's Motion to Dismiss without evaluating the claims under the requisite heightened pleading standard for qualified immunity and without analyzing each claim for relief. Rather, the Circuit court wants "to see what the development of the evidence is before [it] grant[s] any motion to dismiss,"<sup>32</sup> and without any analysis of any specific allegations of wrongdoing, the Circuit court simply ignored the heightened pleading standard:

. . . the Plaintiff has set forth in it [sic] Complaint sufficient facts to put Defendants on notice of the nature of Plaintiff's claims. The Plaintiff has provided sufficient clarity so that the Defendants can understand the nature of Plaintiff's factual claims and legal theories of the action.<sup>33</sup>

The Regional Jail Authority's awareness and understanding of the "nature of Plaintiff's claims" were not an issue before the Court. Moreover, a defendant's understanding of the nature of a claim and understanding the facts alleged in a complaint is not the pleading standard for assessing whether a state agency is immune from the claims.

A circuit court may not simply wait "to see what the development of the evidence is" before addressing a claim of qualified immunity, as the circuit court did here. Had the circuit court addressed the grounds for dismissal in the Regional Jail Authority's Second Motion to Dismiss and applied the heightened pleading standard, it would have found that the Estate failed to state a claim from which relief could be granted as the Regional Jail Authority is immune from all of the claims in the Amended Complaint.

---

<sup>32</sup> August 27, 2019 hearing transcript. App. at 524.

<sup>33</sup> Order Denying Second Motion to Dismiss, App. at 370.

## CONCLUSION

This Court should adopt the federal *Twombly / Iqbal* plausibility pleading standard for evaluating the sufficiency of a complaint, at least as it relates to claims where qualified immunity is at issue. Additionally, the Court should reverse the circuit court's order denying the Regional Jail Authority's Motion to Dismiss and direct the circuit court below to dismiss with prejudice the Estate's claims because 1) the Estate failed to plead facts demonstrating a plausible claim for relief, and 2) the Regional Jail Authority is qualifiedly immune from each claim for relief. More specifically, the Regional Jail Authority is immune from the Estate's claim for wrongful death, because Mr. Grove did not have a clearly established right to be free from self-harm or to any specific suicide prevention measure. Additionally, the Estate's claims for negligent hiring, training, retaining, and supervision are executive, administrative policy-making functions from which the Regional Jail Authority is immune.

Respectfully submitted,

West Virginia Regional Jail and Correctional  
Facility Authority,

  
Matthew R. Whifler (WV State Bar No. 7628)  
Anthony J. Delligatti (WV State Bar No. 12345)

***PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC***

261 Aikens Center, Suite 301  
Martinsburg, WV 25404  
Telephone: (304) 260-1200  
Facsimile: (304) 260-1208