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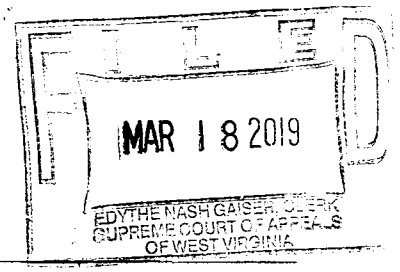

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 BRIEF

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ASSIGNMENTS OF ERROR

1. **The circuit court erred by applying a notice pleading standard rather than a heightened pleading standard to a motion to dismiss based on qualified immunity.**

2. **To the extent that the circuit court found that the Regional Jail Authority is not immune from any of the claims because it agreed with the Plaintiff that the Regional Jail Authority is not a state agency, it erred, because the Regional Jail Authority is a state agency.**

3. **The circuit court erred in not finding that the Regional Jail Authority is immune from each claim for relief in Counts I through VI, because each claim alleges the violation of executive, administrative policy-making decisions, or discretionary governmental functions.**

4. **The circuit court erred in not finding that the Regional Jail Authority is immune from Respondent's claim for wrongful death, because Mr. Grove did not have a clearly established statutory of constitutional right to be placed on suicide watch.**

STATEMENT OF THE CASE

The Respondent, the Estate of Cody Lawrence Grove (hereinafter "the Estate"), filed its Complaint on the last day of the statute of limitations period on December 7, 2017, alleging seven causes of action related to inmate Cody Grove's suicide that occurred in December 2015 at the Eastern Regional Jail.[1] Thereafter, the Regional Jail Authority moved to dismiss due to sovereign immunity (failure to plead under and up to liability policy limits), lack of pre-suit notice to a state agency, and qualified immunity, among other grounds.[2] Because the Respondent failed to give the Regional Jail Authority pre-suit notice, and because the Estate did not limit recovery under and up to liability insurance policy limits, on April 12, 2018, the Circuit Court, applying a "heightened

[1] Complaint. App. at 6-21.
[2] Regional Jail Authority First Motion to Dismiss. App. at 33-47.

pleading" standard, dismissed without prejudice all claims against the Regional Jail Authority for lack of jurisdiction.[3]

The Estate then attempted to correct the deficiencies in its initial pleading by providing proper pre-suit notice, limiting recovery to the Regional Jail Authority's liability insurance policy limits, and adding more facts to the Amended Complaint.[4] Mr. Grove contends that the Amended Complaint "clarifies the basis of Plaintiff's claims."[5] The Estate's Amended Complaint also added an additional party, Primecare Medical of West Virginia, Inc. ("Primecare"), which provides all medical services including mental health evaluations at the Eastern Regional Jail.[6]

The Amended Complaint alleges that on December 8, 2015, Cody Grove was known to be a heroin addict while he was an inmate at the Eastern Regional Jail.[7] The Estate broadly alleges that Mr. Grove was a suicide risk because he was addicted to heroin without alleging any facts that the Regional Jail Authority was on notice of Mr. Grove actually being suicidal.[8] Nonetheless, the Estate claims that the Regional Jail Authority, correctional officer Joshua David Zombro, and Primecare Medical of West Virginia, Inc. all caused Mr. Grove to commit suicide by failing to protect Mr. Grove from himself.[9] The Estate alleges that Mr. Grove was known by the Regional Jail Authority to be a heroin addict and that fact placed the Regional Jail Authority on notice of Mr. Grove being a suicide risk.[10] The Estate alleges that "upon information and belief, the

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[3] Order Dismissing Regional Jail Authority. App. at 123-130. The Circuit Court stated that "heightened pleading is required [so the court can] determine whether the Regional Jail Authority is immune from suit for the alleged wrongful conduct." App. at 125.
[4] *See* Amended Complaint. App. at 133-144.
[5] Grove Response to Motion to Dismiss. App at 73.
[6] *Id.*
[7] Amended Complaint ¶ 7. App. at 135.
[8] *Id.*
[9] Amended Complaint ¶ 11. App. at 136.
[10] *Id.*

Defendants are jointly and severally liable for the placement in the general population, as opposed to on full Suicide Watch, before Cody Grove's death."[11] Finally, the Estate broadly alleges that Mr. Grove committed suicide by hanging himself while on "'suicide watch,' 'medical watch,' and/or under a heightened level of monitoring and /or supervision."[12] The Estate refers to Mr. Grove being on "heightened watch."[13] "Heightened watch" is not a term used by the Regional Jail Authority, but it may refer to the fact that Mr. Grove was being treated for apparent heroin withdrawal by Primecare when he committed suicide.[14]

Based on these allegations, the Estate asserts causes of action for: 1) deprivation of constitutional rights; 2) negligent supervision; 3) negligent training and retention; 4) negligent and intentional infliction of emotional distress; 5) general negligence; 6) wrongful death; and 7) injunction.[15] Pertaining to the final cause of action, the Estate seeks injunctive relief to "enjoin such conditions of confinement to assure such conditions are not repeated," and to "enjoin such negligent acts and omissions to assure they are not repeated."[16] The Estate in addition to the injunction is seeking both compensatory and punitive damages from the Regional Jail Authority.[17]

The Regional Jail Authority moved to dismiss the Amended Complaint because: 1) a former inmate's estate lacks standing to enjoin general conditions of confinement at a regional jail; 2) the Regional Jail Authority is qualifiedly immune; 3) Counts I, IV, and VII fail to state a claim

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[11] Amended Complaint ¶ 43. App. at 141.
[12] Amended Complaint ¶ 6. App. at 135.
[13] Grove Response to Regional Jail Authority Motion to Dismiss. App. at 266.
[14] Regional Jail Authority Answer and Cross-Claim. App. at 173-187. Mr. Grove was in the medical unit of the jail under the care of Primecare Medical of WV Inc. when he committed suicide.
[15] Amended Complaint. App. at 133-144.
[16] Amended Complaint ¶¶ 53-54. App. at 142-143.
[17] Amended Complaint. App. at 143.

for which relief could be granted by not alleging any facts to support a claim for relief; 4) state agencies are not subject to punitive damages; and 5) no independent cause of action exists for a violation of the West Virginia Constitution.[18]

The Estate opposed the Regional Jail Authority's Second Motion to Dismiss by arguing: 1) more discovery is necessary prior to the Court assessing the sufficiency of the Amended Complaint; 2) deceased former inmates have standing to enjoin some unknown activity at the Regional Jails; 3) the Regional Jail Authority is mistaken and does not know why it is being sued; 4) the determination of qualified immunity is premature; 5) a plaintiff may seek punitive damages against the Regional Jail Authority because it is not a government agency; and 6) the Regional Jail Authority violated Mr. Grove's rights as a criminal defendant to due process, confront witnesses, assistance of counsel, public trial, and to subpoena witnesses, and denied the Estate's right to access to courts by filing the Motion to Dismiss.[19] The Estate's claims for violating Mr. Grove's criminal trial rights were not pled in either the Complaint or the Amended Complaint; rather, the Estate simply alleged those additional claims in response to the Regional Jail Authority's Second Motion to Dismiss. Because none of those claims were actually pled, the Regional Jail Authority will not fully address them in this brief.[20]

After the Regional Jail Authority replied in support of dismissal, the Circuit Court announced at a hearing on Motions to Dismiss by all three Defendants that it was denying all

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[18] Regional Jail Authority Second Motion to Dismiss. App. at 188-262.
[19] Grove Response to Second Motion to Dismiss. App. at 263-284.
[20] Even if the Plaintiff pled the claims for violations of Mr. Grove's criminal trial rights, they fail because 1) Mr. Grove waived his criminal trial rights when he committed suicide, 2) criminal trial rights are not within the scope of any duty to stop inmate suicides, 3) the issues are moot because the state never indicted Mr. Grove and the State voluntarily dismissed all charges as it cannot prosecute a dead person, and 4) the Plaintiff lacks standing because the only obtainable relief for the violation of a criminal trial right is a new criminal trial, and not money damages.

motions to dismiss without oral argument.[21] The Court further ordered the Defendants to submit any objections to the Estate's proposed orders.[22] Notably, the Court stated that it "hasn't had an opportunity to review" the proposed orders, and "I haven't read the orders at this point so I'm not sure what needs changed."[23] Nonetheless the circuit court opined that "Mr. Taylor has taken quite a bit of time in putting together some comprehensive orders."[24] Rather than take up argument on the motions to dismiss, or address each ground for dismissal, the circuit court simply stated that it was denying "all aspects" of the motions to dismiss.[25] When counsel for Regional Jail Authority inquired about qualified immunity and whether the Regional Jail Authority is immune from a claim of punitive damages, the Court stated:

> Well, I'm not exactly sure what it is that Mr. Taylor has indicated in his order and that's a good point because I don't think that necessarily as we move forward [the Regional Jail Authority] will be subject to punitives, but I want to see what the development of the evidence is before I grant **any** motion to dismiss.[26]

The Regional Jail Authority asserted 26 objections to the Estate's proposed order including: 1) making findings of fact as to what occurred rather than findings of fact as to what is alleged; 2) the failure to apply a heightened pleading standard to claims where qualified immunities are asserted; 3) the failure to analyze qualified immunity; 4) the failure to find that the Regional Jail Authority is immune from the claims asserted including punitive damages; and 5) the failure to find analyze what statutory or constitutional rights are alleged to be violated.[27]

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[21] August 27 Hearing Order. App. at 349. August 27, 2019 hearing transcript. App. at 514 - 527.
[22] August 27 Hearing Order. App. at 349. August 27, 2019 hearing transcript. App. at 514 - 527.
[23] August 27, 2019 hearing transcript. App. at 519, 521.
[24] August 27, 2019 hearing transcript. App. at 519.
[25] *Id.*
[26] August 27, 2019 hearing transcript (emphasis added). App. at 524.
[27] Regional Jail Authority Objections to Proposed Order. App. at 328-339; August 27, 2019 hearing transcript. App. at 524.

Nonetheless, the Circuit Court entered an Order denying the Second Motion to Dismiss on all grounds applying a notice pleading standard and without any analysis of immunities.[28] It should be noted that different judges ruled on the first and second motions to dismiss, and applied two separate pleading standards. Nonetheless, the Court ruled narrowly on the first Motion to Dismiss ruling only on the constitutional sovereign immunity and pre-trial notice grounds for dismissal.[29] The Order Denying the Second Motion to Dismiss was much broader and applied a notice pleading standard.[30] The entirety of the Circuit Court's analysis in its Order denying the Regional Jail Authority's Motion is contained in one paragraph:

> The Court finds that 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.[31]

The Order does not make any citations to the Amended Complaint and does not address whether the Regional Jail Authority is qualifiedly immune from any of the Estate's claims. Moreover, the Order does not reference whether a heightened pleading standard should be applied in the analysis of the Amended Complaint.[32] In fact, the Order, which applied only to the Regional Jail Authority's Second Motion to Dismiss spends more text discussing a certificate of merit under the

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[28] Order Denying Second Motion to Dismiss. App. at 367-370.
[29] Order Dismissing Regional Jail Authority. App. at 123-130.
[30] Order Denying Second Motion to Dismiss. App. at 367-370.
[31] Order Denying Second Motion to Dismiss. App. at 370. Additionally, the Circuit Court Order made a number of mistakes as to facts that were not alleged in the Amended Complaint including: 1) adding an additional Defendant (Thomas J. Weber – CEO of Primecare); 2) finding that Officer Zombro was an employee of Primecare; and 3) finding that Mr. Grove was under the direct supervision of Officer Zombro when he committed suicide. All of those are not true and were not alleged in the Amended Complaint. The Amended Complaint does allege that Officer Zombro missed a "check of Cody Grove's welfare," not that Mr. Grove was under Officer Zombro's supervision at the time. App. at 136. The Regional Jail Authority refers to the hourly security checks of each unit as "unit checks."
[32] Order Denying Second Motion to Dismiss. App. at 370.

Medical Professional Liability Act, which has nothing to do with the Regional Jail Authority's Motion.

SUMMARY OF ARGUMENT

First, the circuit court erred by applying a notice pleading standard rather than a heightened pleading standard to a motion to dismiss based on qualified immunity. Under a heightened pleading standard, the Estate's Amended Complaint fails because it fails to allege facts that give rise to a facially plausible claim. Rather, the Amended Complaint disguises conclusory statements of liability as fact. Additionally, the Court should adopt the federal court plausibility pleading standard as set forth in *Twombly* and *Iqbal,* wherein lower courts must assess the facts alleged to determine whether the complaint states "enough facts to state a claim to relief that is plausible on its face."[33] Under *Twombly* and *Iqbal* a court may not accept a complaint's threadbare recitals of a cause of action's elements, supported by mere conclusory statements of law and fact as true.[34] Because the Estate's Amended Complaint rests on sweeping conclusive claims of liability without alleging facts in support, the Estate fails to state a claim under Rule 8 of the West Virginia Rules of Civil Procedure.

Second, to the extent that the circuit court found that the Regional Jail Authority is not immune from any of the claims because it agreed with the Estate that the Regional Jail Authority is not a state agency, it erred, because the Regional Jail Authority is a state agency.

Third, the Court must reverse the circuit court's finding that the Estate stated a claim for punitive damages against the Regional Jail Authority, because the Regional Jail Authority is

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[33] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).; *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)

[34] *Twombly,* at 556, 127 S.Ct. at 1955; *Iqbal* at1949-50 and 677-278

absolutely immune from punitive damages under W. Va. Code § 55-17-4(3).

Fourth, the Regional Jail Authority is immune from the Estate's claims because each claim alleges violations of executive, administrative, policy-making decisions, or otherwise discretionary governmental functions.

> To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).[35]

Additionally,

> To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.[36]

The Estate alleges the following six duties were violated by the Regional Jail Authority:[37]

A. Duty to properly hire correctional officers.

B. Duty to train correctional officers.

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[35] Syl. Pt. 10, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).
[36] *Id.* at Syl. Pt.11.
[37] Complaint paragraph 9, 45.

C. Duty to retain correctional officers.

D. Duty to supervise correctional officers.

E. Duty to provide a safe and secure confinement facility.

F. Duty to place Mr. Grove on suicide watch.

Applying *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.,* duties A, B, C, and D, are discretionary functions from to which the Regional Jail Authority is immune. Additionally, the duty to provide a safe and secure confinement facility, and the duty to place Mr. Grove on suicide watch are discretionary functions.

Fifth, there is no clearly established statutory or constitutional that required the placement of Mr. Grove on suicide watch or that required extra monitoring. In *Taylor v. Barkes,*[38] 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.[39] Here, as in *Taylor v. Barkes,* the Estate has failed to allege the violation of a clearly established statutory or constitutional right.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 20 oral argument is proper in this case because this appeal addresses many areas of public importance including: 1) the degree to which state agencies may be subject to the burdens of litigation prior to a trial court making findings on assessing qualified immunity; 2) what "heightened pleading" requires for claims against state agencies; 3) whether the Court should adopt a plausibility pleading standard in West Virginia; and 4) when correctional institutions may be held liable for inmate suicides. Accordingly, the Regional Jail Authority requests oral argument

[38] *Taylor v. Barkes*, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015).
[39] *Id.*

under Rule 20 of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

A "circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the "collateral order" doctrine."[40] This Court reviews such a denial of a motion to dismiss *de novo*.[41]

"[T]he purpose of a motion to dismiss is to test the formal sufficiency of the complaint."[42] "For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true."[43] However, to survive a motion to dismiss, a plaintiff's complaint must "at a minimum . . . set forth sufficient information to outline the elements of his claim."[44]

Although Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is broad and Rule 8 only requires mere notice pleading for most civil pleading in West Virginia, "a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint . . . .'"[45] Moreover, "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff."[46] Determining claims of immunity is a question of law for courts to decide:

> Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of

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[40] *W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015).
[41] Syl. Pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998).
[42] Footnote 11, *Davis v. Eagle Coal and Dock Co.*, 220 W.Va. 18, 21, 640 S.E.2d 81, 84 (2006).
[43] *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978).
[44] *Price v. Halstead*, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987).
[45] *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).
[46] *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996).

> the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.[47]

Here, the Regional Jail Authority asserts that it is qualifiedly immune. Accordingly, heightened pleading is required to determine whether the Regional Jail Authority is immune from suit for the alleged wrongful conduct.

ARGUMENT

1. The trial court incorrectly applied a notice pleading standard rather than a heightened pleading standard.

A. The Circuit Court failed to apply the "heightened pleading" required when the defense of qualified immunity is asserted.

Although Rule 8 only requires mere notice pleading for most civil pleading in West Virginia, "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff."[48] While a Plaintiff need not "anticipate the defense of immunity in his complaint . . ., court ordered replies [under Rule 7(a)] and motions for a more definite statement under Rule 12(e) can speed the judicial process."[49] Thus, if a court believes it could better rule on qualified immunities by the plaintiff providing more detailed facts, it can *sua sponte* order a Rule 7(a) reply or a Rule 12(e) more definitive statement.

This Court, in *Hutchison,* provides a framework for how a circuit court should determine whether more detailed pleadings are appropriate. Prior to ruling on immunities:

> the trial court should first demand that a plaintiff file 'a short and plain statement of his complaint, a complaint that rests on more than conclusion alone.' Next, the court may, on its own discretion, insist that the plaintiff file a reply tailored to an answer pleading the defense of statutory or qualified immunity. The court's discretion

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[47] *Id.*, 198 W.Va. at 148, 479 S.E.2d at 658 (internal citations omitted).
[48] *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996).
[49] *Id.* 198 W. Va. at 150, 479 S.E.2d at 660.

> not to order such a reply ought to be narrow; where the defendant demonstrates that greater detail might assist an early resolution of the dispute, the order to reply should be made. Of course, if the individual circumstances of the case indicate that the plaintiff has pleaded his or her best case, there is no need to order more detailed pleadings.[50]

Although it is unclear from current precedent what "heightened pleading" requires, it clearly requires more specificity of facts than mere notice pleading in order to permit an evaluation of qualified immunity. Moreover, a circuit court must insist on a "particularized showing" of facial plausibility:

> The threshold inquiry is, assuming that the plaintiff's assertions of facts are true, whether any allegedly violated right was clearly established. To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a "particularized showing" that a "reasonable official would understand that what he is doing violated that right" or that "in the light of preexisting law the unlawfulness" of the action was "apparent."[51]

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. 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 applying the requisite heightened pleading standard for qualified immunity and without analyzing the issues of qualified immunity. Rather, the Circuit Court wants "to see what the development of the evidence is before [it] grant[s]

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[50] *Hutchison v. City of Huntington*, 198 W. Va. 139, 150, 479 S.E.2d 649, 660 (1996)(internal quotations omitted).

[51] *Id.* at footnote 11 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)).

any motion to dismiss."[52] Without any analysis of any specific allegations of wrongdoing, the Circuit Court simply ignored the heightened pleading standard and found that:

> . . . 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.

The Regional Jail Authority's awareness and understanding of the Plaintiff's claims were not at issue. Moreover, a defendant understanding 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.

B. The Estate failed to state a claim against the Regional Jail Authority, because it failed to allege enough facts under the "heightened pleading" standard to state a claim to relief that is plausible on its face.

Rather than address the allegations in the Amended Complaint under Rule 12(b)(6), the Circuit Court decided that it would just wait "to see what the development of the evidence is"[53] before addressing whether the Estate's claims are properly pled. Had the Court analyzed the allegations in the Amended Complaint it would have found that all of the Estate's claims are

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[52] August 27, 2019 hearing transcript. App. at 524.
[53] August 27, 2019 hearing transcript. App. at 524.

barebones assertions devoid of factual support.

Count 1 alleges that the:

> "Defendants, jointly, and severally, deprived Plaintiff of rights, privileges and immunities protected by the Constitution of the State of West Virginia, the statutes and common laws of this State, State regulations and Defendants' own policies and procedures."[54]

Count 1 further alleges violations of a number of constitutional rights including the right to be free from cruel and unusual punishment, the right to be secure in one's person, and the right to equal protection of the laws. However, the Estate offered no facts in support of any of those claims.

Count 2 alleges that Officer Joshua David Zombro negligently failed to monitor and supervise Mr. Grove, resulting in cruel and unusual punishment that was "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency and so outrageous as to offend community notions of acceptable behavior giving rise to claims of compensatory and punitive damages."[55] The Estate does not allege what behavior Officer Zombro engaged in or failed to engage in, rather the Estate relies on the inflammatory and conclusory assertion of "extreme and outrageous" conduct.

Count 3 alleges that the Regional Jail Authority failed to train and supervise staff resulting in the failure to prevent Mr. Grove's suicide.[56] The Amended Complaint alleges no facts regarding training that the Regional Jail Authority should have conducted; nor does the Amended Complaint allege that any specific training was not conducted. The Amended Complaint simply provides no explanation of what training, retention, supervision, etc. the Regional Jail Authority should have conducted.

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[54] Amended Complaint ¶ 19. App. at 137.
[55] Amended Complaint ¶ 27. App. at 138.
[56] Complaint ¶ 30. App. at 138.

Count 4 offers no facts but claims that all of the defendants negligently and intentionally inflicted emotional distress upon Mr. Grove or the Estate.

Count 5 re-alleges all of the previous claims, without adding any new claims.

Count 6 alleges wrongful death by the failure of the "Defendants" to place Mr. Grove on suicide watch in violation of the policies and practices of the Eastern Regional Jail. The Estate alleges that "[u]pon information and belief . . . the Defendants ignored both regulation and their own policies, practices, and procedures."[57] Additionally, without any factual support, the Estate alleged that the Defendants "knew or should have known that [Mr. Grove] was a suicide risk."[58] It is unclear what regulations, policies, practices, or procedures the Estate believes were not followed, because the Estate does not specify what regulations, policies or procedures were not followed. Additionally, the Estate alleges no facts that the Regional Jail Authority was on notice of Mr. Grove being suicidal other than the fact that Mr. Grove suffered from heroin withdrawal.

C. The Court should adopt the federal plausibility pleading standard as set forth in *Twombly* and *Iqbal.*

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint must contain "enough facts to state a claim to relief that is plausible on its face."[59] Moreover, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[60] A well-pleaded complaint in federal court must offer more than "a sheer possibility that a defendant has acted unlawfully" to

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[57] Complaint ¶ 46. App. at 142.
[58] Complaint ¶ 47. App. at 142.
[59] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
[60] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

be plausible and survive dismissal for failure to state a claim.[61] Further, a complaint in federal court must contain "more than labels and conclusions" or "formulaic recitation of the elements of a cause of action."[62]

In federal court, where a complaint pleads facts that are "merely consistent with," and not plausibly suggestive, by factual support a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[63] When the plaintiff's allegations "do not permit the court to infer more than the mere possibility of misconduct," the complaint does not satisfy the minimal pleading burden of Rule 8 of the Federal Rules of Civil Procedure.[64]

A claim is facially plausible when the facts pleaded permit the court to reasonably infer that the defendant is liable for the misconduct alleged.[65] Under *Twombly* and *Iqbal* a court may not accept a complaint's threadbare recitals of a cause of action's elements, supported by mere conclusory statements of law and fact as true.[66] A court considering a motion to dismiss should

> begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[67]

Iqbal, like this case, concerned an inmate who alleged mistreatment by the government, and the government officials asserted qualified immunity and the failure to state a claim upon

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[61] *Id.*
[62] *Twombly*, 550 U.S. at 555.
[63] *Id.* at 557 (citation and brackets omitted).
[64] Iqbal, at 1951 and 679.
[65] *Twombly* at 550 U.S. at 556,; *Iqbal* at 1949-50 and 677-278.
[66] *Id.*
[67] *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

which relief could be granted.[68] Iqbal, a Pakistani detainee in the United States, sued US Attorney General John Ashcroft, and FBI Director Robert Mueller, alleging they took a number of unconstitutional actions resulting in his unlawful discrimination while in custody.[69] The Court found the detainee failed to plead sufficient facts for unlawful discrimination.[70]

In another federal case, the administrator of a former inmate's estate sued the Regional Jail Authority and Primecare, the court applied *Twombly* and *Iqbal,* and dismissed the claims against the Regional Jail Authority finding that the Complaint was a "shotgun pleading" and that:

> The Complaint refers numerously to the defendants in a plural sense as it makes formulaic recitations of the elements of the causes of action (if and when the complaint actually lists the relevant elements). A court cannot accept as true legal conclusions that merely recite the elements of a cause of supported by conclusory statements. The Complaint fails to state enough factual matter, accepted as true, to bring the defendants' conduct within the scope of the many tort and state constitutional claims.[71]

Similarly, here the Estate utilizes a shotgun pleading lumping in defendants and conclusory recitals of elements into a litany of claims. As demonstrated above, the heightened pleading for claims where qualified immunity is invoked was not applied in this case. Moreover, the Estate did not plead with sufficient particularity which clearly established rights were violated or facts in support. Finally, the Estate has failed to state a plausible claim for relief in any of its counts because the Amended Complaint is a series of conclusory claims of liability devoid of factual allegations. This Court should adopt a plausibility pleading standard to decrease the cost of litigation and ensure that implausible claims are not forced to be litigated beyond the pleading stage. Other states

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[68] *Id.* 556 U.S. at 666, 129 S. Ct. at 1942.
[69] *Id.*
[70] *Id.* 556 U.S. at 687, 129 S. Ct. at 1954.
[71] *Knouse v. Primecare Med. of W. Virginia*, 333 F. Supp. 3d 584, 592 (S.D.W. Va. 2018).

have adopted a plausibility pleading standard after *Twombly* and *Iqbal*.[72]

None of the Estate's sweeping conclusive claims of liability are plausible, because the Estate does not offer factual support of the claims. Applying either a plausibility pleading standard like in *Iqbal* and *Twombly*, or the heightened pleading standard of *Hutchison* the Amended Complaint fails to state a claim for relief under Rule 8 of the West Virginia Rules of Civil Procedure. Thus, the Estate's claims should have been dismissed and the circuit court erred by denying the Regional Jail Authority's Motion to Dismiss the Amended Complaint. Accordingly, the Court should reverse the circuit court's Order and remand with instructions to dismiss Counts I through VI.

2. The Regional Jail Authority is a state agency despite the Estate's claim to the contrary.

The Plaintiff argued multiple times below that the Regional Jail Authority is not a state agency or instrumentality, and thus the Regional Jail Authority is not protected by qualified immunity and can be subject to punitive damages.[73] Plaintiff's novel argument that the Regional Jail Authority is not a state agency or instrumentality fails with a quick review of how the legislature has organized the executive branch.

Article VII Section 1 of the West Virginia Constitution provides that the executive branch

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[72] See *Warne v. Hall*, 2016 CO 50, ¶¶ 15-17, 373 P.3d 588, 593–94 (Colorado Supreme Court focused on "procedural uniformity" between state and federal courts, especially since Colorado's Rules of Civil Procedure are modeled on the Federal Rules.) See also *Sisney v. Best Inc.*, 2008 S.D. 70, 754 N.W.2d 804 (South Dakota); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879 (2008)(Massachusetts); *Bean v. Cummings*, 2008 ME 18, 939 A.2d 676 (Maine); *Potomac Dev. Corp. v. D.C.*, 28 A.3d 531 (D.C. 2011); *Davis v. State*, 297 Neb. 955, 955, 902 N.W.2d 165 (2017) (Nebraska); *Data Key Partners v. Permira Advisers LLC,* 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693 (Wisconsin).

[73] Response to Motion to Dismiss. App at 74-75, Response to Second Motion to Dismiss. App. at 270-271.

"shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general." Under W.Va. Code § 5F-1-2, the legislature has created nine departments within the executive branch, and each administered by a cabinet secretary who serves at the will and pleasure of the Governor. W.Va. Code § 5F-1-2(a)(5) provides for the Department of Military Affairs and Public Safety ("DMAPS"). DMAPS, at the time of Mr. Grove's suicide, administered ten separate agencies and boards including the Regional Jail Authority.[74] At the time of the suicide, West Virginia Code was clear that the Regional Jail Authority was "a public corporation and governmental instrumentality exercising public powers of the state."[75]

However, effective July 1, 2018, the Regional Jail Authority was consolidated into a new division within the DMAPS, the Division and Corrections and Rehabilitation.[76] The legislature combined three agencies, the Division of Corrections, the Division of Juvenile Services, and the West Virginia Regional Jail and Correctional Facility Authority into a single agency called the Division of Corrections and Rehabilitation.[77] Thus, both before and after the restructuring of DMAPS the Regional Jail Authority and its successor agency were agencies or instrumentalities of the state of West Virginia.

Because the Code is so clear, the issue of whether the Regional Jail Authority is an agency or instrumentality of the State has not been directly addressed by the West Virginia Supreme Court, but the Court has continually treated the Regional Jail Authority as a state agency and not a political subdivision when assessing qualified immunity.[78] Nonetheless, one inmate in a federal

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[74] W. Va. Code § 5F-2-1(i)(10).
[75] W. Va. Code § 31-20-5.
[76] W. Va. Code § 15A-3-2; 2018 House Bill 4338.
[77] *Id.*
[78] See e.g. *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B* 234 W. Va. 492, 766 S.E.2d 751 (2014). The full case title is "*West Virginia Regional Jail and Correctional Facility Authority,* **an**

civil rights action, argued that the Regional Jail Authority was not a state agency, and the court concluded that the Regional Jail authority is a state agency because: 1) the Regional Jail Authority was created by the Legislature; 2) the Regional Jail Authority's governing board's composition was created by the Legislature; 3) the Regional Jail Authority serves the entire state; 4) the Regional Jail Authority was originally funded and continues, in large part, to be funded from state and federal funds; and 5) the Regional Jail Authority maintains a special account with the State Treasury which consists of a revolving fund containing all appropriations and payments.[79]

Finally, the Code further recognizes the Regional Jail Authority as a state agency when it provides that "[t]he sovereign immunity of the state shall not extend to the contractor or its insurer"[80] when the Division of Corrections, or the Regional Jail Authority, contracts for private prisons or jails, or private services at state prisons or jails.[81]

Because the Regional Jail Authority and its successor agency the Division and Corrections and Rehabilitation are state agencies, governmental immunities may be invoked by the Regional Jail Authority. The Circuit Court erred in not addressing the Regional Jail Authority's claims of qualified immunity or the Estate's claim that the Regional Jail Authority is not a state agency.

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agency of the State of West Virginia, Defendant Below, Petitioner, v. *A.B.*, Plaintiff Below, Respondent." *Id.* (emphasis added).

[79] *Roach v. Burke*, 825 F. Supp. 116, 116–19 (N.D.W. Va. 1993); See also, *Wood v. Harshbarger*, No. CIV.A. 3:13-21079, 2013 WL 5603243, at *6 (S.D.W. Va. Oct. 11, 2013) ("The [Regional Jail Authority] is a state agency."); *Ballenger v. W. Reg'l Jail*, No. 3:15-CV-12558, 2018 WL 3203465, at *2 (S.D.W. Va. May 14, 2018), report and recommendation adopted, No. CV 3:15-12558, 2018 WL 3190755 (S.D.W. Va. June 28, 2018) ("The [Western Regional Jail] is not a suable entity. Rather it is just a facility operated by the West Virginia Regional Jail & Correctional Facility Authority ("WVRJCFA"), a state agency.")

[80] W. Va. Code § 25-5-13.

[81] W. Va. Code § 25-5-6.

3. The Regional Jail Authority is absolutely immune from the Estate's claim for punitive damages.

The Estate asserted a claim for punitive damages against the Regional Jail Authority.[82] The Regional Jail Authority moved to dismiss the Estate's claim for punitive damages, and the circuit court found all of the Estate's claims are stated with "sufficient facts to put [the Regional Jail Authority] on notice of the nature of [the Estate]'s claims." The Regional Jail Authority is aware that the Estate is asking for punitive damages, but W. Va. Code § 55-17-4(3) unequivocally mandates that "[n]o government agency may be ordered to pay punitive damages in any action." Because the Regional Jail Authority is a governmental agency, it is immune from the Estate's claim for punitive damages, and the circuit court erred by not dismissing the claim for punitive damages against the Regional Jail Authority. Accordingly, this Court should reverse the decision below.

4. The Regional Jail Authority is immune from all of the Estate's Claims, because all of the alleged duties violated are discretionary duties and the Estate has not alleged the violation of a clearly established statutory or constitutional right.

A. All of the alleged violations of duties are discretionary governmental functions.

The Regional Jail Authority is immune from all of Plaintiff's allegations in the Amended Complaint under West Virginia's qualified immunity protections to state agencies. Because the Regional Jail Authority is immune from all of the tort claims in the Estate's Amended Complaint, the Circuit Court erred by not finding that the Regional Jail Authority is immune and erred by not dismissing the Estate's claims against the Regional Jail Authority.

"The doctrine of qualified immunity protects government officials 'from liability for civil

[82] Complaint ¶ (e) of prayer for relief. App. at 143.

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[83] As stated above, "[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all."[84]

In cases arising under W. Va. Code § 29–12–5 (waiver of sovereign immunity through liability insurance), "the immunity of the State is coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case."[85]

> To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).[86]

Additionally,

> To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence

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[83] *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)).
[84] *Hutchison v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996).
[85] Syl. Pt. 9, *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).
[86] Syl. Pt. 10, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014).

> of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.[87]

The following table helps explain when the State, its agencies, officials, and employees are entitled to immunity:

Nature of Governmental Acts or Omissions	No Violation of Clearly Established Right Alleged	Violation of Clearly Established Right Alleged
Legislative	Immune	Immune
Judicial	Immune	Immune
Executive	Immune	Immune
Administrative Policy Making	Immune	Immune
Otherwise Discretionary	Immune[88]	**Not Immune**
Otherwise Fraudulent, Malicious, or Oppressive	Immune	**Not Immune. State and agency are immune if employee's act or omission is outside scope of employment.[89]**
Ministerial Nondiscretionary	**Not Immune**	**Not Immune**

[87] *Id.* at Syl. Pt.11.

[88] In *A.B,*. the Court found that the Regional Jail Authority was immune from claims of negligent training, hiring, supervision, and retention, because each were discretionary functions for which no violation of a clearly established legal right was alleged. *Id.* at 234 W. Va. 517, 766 S.E.2d 776.

[89] In *A.B,*. the Court found that the Regional Jail Authority was immune from the intentional sexual assault by a correctional officer against a and inmate because it was "manifestly outside the scope of his authority and duties as a correctional officer." *Id.* at 234 W. Va. 513, 766 S.E.2d 772.

The Estate alleged the following six duties violated by the Regional Jail Authority:[90]

A. Duty to properly hire correctional officers.

B. Duty to train correctional officers.

C. Duty to retain correctional officers.

D. Duty to supervise correctional officers.

E. Duty to provide a safe and secure confinement facility.

F. Duty to place Mr. Grove on suicide watch.

It is clear from the qualified immunity case law, that a plaintiff must clearly set forth in its complaint facts and a theory of liability for a court to determine whether a defendant is immune from such a claim. Because the Amended Complaint is light on facts and heavy on hyperbolic conclusory statements of liability, it is difficult to ascertain from the Amended Complaint what actions or inactions the Estate believes create liability. For instance, the Estate failed to allege how the Regional Jail Authority: A) failed to properly hire correctional officers or how the violation of that duty caused Mr. Grove to commit suicide; B) failed to properly train correctional officers or how the failure to train caused Mr. Grove to commit suicide; C) failed to properly retain correctional officers or how the violation of that duty caused Mr. Grove to commit suicide; D) failed to properly supervise correctional officers or how the violation of that duty caused Mr. Grove to commit suicide; E) failed to provide a safe confinement facility or how the violation of that duty caused Mr. Grove to commit suicide; F) failed to provide a safe confinement facility or how the violation of that duty caused Mr. Grove to commit suicide; and G) failed to place Mr. Grove on suicide watch when it was required to do so. Moreover, the Estate has failed to allege any clearly

[90] Amended Complaint ¶¶ 9, 45. App. at 135, 141.

established legal rights that were violated.

It appears from the convoluted language of the Amended Complaint, that the Estate alleges many of those broad duties were violated under each Count, to which the Estate comined together and refers to them generally as "acts and omissions of the Defendants"[91] Nonetheless, the case of *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B* provides some clear guidance on many functions the Regional Jail Authority performs that are discretionary functions from which the Regional Jail Authority is immune.[92]

In *A.B.* an inmate alleged that a correctional officer repeatedly raped her and claimed liability against the Regional Jail Authority based on vicarious liability, and negligent hiring, training, retention, and supervision.[93] The Supreme Court, in *A.B.*, found that the Regional Jail Authority is immune from liability for failure to properly train, supervise, retain, or hire, because all of those activities are discretionary functions.[94] Moreover, the Court found that the Plaintiff had not identified a clearly established right which the Regional Jail Authority violated through its training, supervision, and retention of the correctional officer.[95]

Here, like in *A.B.,* the Regional Jail Authority is immune for all of the discretionary functions of hiring, firing, training, and supervising employees. Additionally, to the extent that the Plaintiff claims liability against the Regional Jail Authority are for the failure to adopt some policy or procedure, the Regional Jail Authority is immune, because administrative or executive policy

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[91] Amended Complaint ¶¶ 20,21,22,28, 33 ("conduct of the Defendants"), 37, 49. App. at 134 - 144.
[92] *A.B.* 234 W. Va. 492, 766 S.E.2d 751 (2014).
[93] *Id.*
[94] Id. 234 W. Va. at 513-17, 766 S.E.2d at 772-76.
[95] *Id.* 234 W. Va. at 516, 766 S.E.2d at 775.

making functions are absolutely immune from liability.[96] The general duties alleged by the Estate in Counts 1 through 6, of failure to properly hire, train, retain, and supervise officers are discretionary functions to which the Regional Authority is immune like in *A.B.* Thus, duties A, B, C, and D above are all discretionary functions.

Additionally, the two other duties alleged are discretionary duties. The general duty to monitor inmates and protect inmates from harm is a discretionary duty absent some specific duty to monitor a specific inmate that would create a duty to intervene. This Court in *Moats v. Preston County Com'n*, found that

> Although negligence actions seeking damages 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.[97]
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> . . .
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> 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.[98]

In *Moats*, a mental hygiene commissioner involuntarily committed Joanie Elliott because she had

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[96] Syl. Pt. 7, *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

[97] *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.*

[98] *Id.* at Syl. Pt. 6.

attempted suicide the day before.[99] The Mental Hygiene Commissioner ordered the Sherriff to transport Elliott to Sharpe Hospital for evaluation.[100] The Sherriff knew of the suicide attempt, and while in the Sherriff's custody Elliott drank bathroom cleaner causing her to die eight months later.[101] In *Moats*, the Supreme Court was assessing the qualified immunity of a political subdivision under the West Virginia Government Tort Claims and Insurance Reform Act, which does not limit political subdivision liability to those cases where there is a clearly established legal right. As the Regional Jail Authority is a state agency, this Court must determine whether the Estate sufficiently alleged the violation of a clearly established legal right. The analysis of a clearly established legal right is below in Section 5.

As to the duty to place Mr. Grove on suicide watch, there is a duty to place an inmate on suicide watch only if the Regional Jail Authority knows that the inmate is suicidal.[102] However, the Estate fails to allege any facts that the Regional Jail Authority or Primecare knew or should have known that Mr. Grove was suicidal. Rather the Estate simply concludes that it should have known based on the fact that Mr. Grove was experiencing symptoms of drug withdrawal. Nor did the Estate allege any facts that the suicidal evaluation of Mr. Grove was administered improperly.[103] Rather, the Estate makes unsupported claims of liability without facts in support, thus the claim is not plead with specificity required for claims where governmental immunities are invoked.

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[99] *Id.* 206 W. Va. at 11, 521 S.E.2d at 183 (1999).
[100] *Id.*
[101] *Id.*
[102] 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).
[103] Primecare conducts a medical evaluation of all inmates at intake and makes a determination of whether the inmate is suicidal. Primecare determined that Mr. Grove was not suicidal. App. at 213-214, 256.

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 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 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. 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.

Because all of the Estate's claims are for the violation of discretionary duties, the Court must determine whether the Estate pled facts 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.

B. Because Mr. Grove did not have a statutory or constitutional right to be placed on suicide watch or continuously monitored, the Regional Jail Authority is immune from the Estate's claims.

Section 4 above demonstrated that the governmental functions alleged in the Amended

Complaint are discretionary. Now we must assess whether Mr. Grove had a clearly established constitutional or statutory right that is alleged to have been violated. "The doctrine of qualified immunity protects government officials '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.'"[104] The Amended Complaint cites violations of the "privileges and immunities protected by the Constitution of the State of West Virginia,"[105] "equal protection of the law,"[106] "the right to be secure in his person under the Constitution of West Virginia,"[107] "cruel and unusual punishment"[108] as well as violations of the Code of State Rules dealing with training officers, and suicidal inmates.[109] The Estate has not alleged how any of the alleged violations of the rights occurred, but the Estate alleges that all of the violations of Mr. Grove's rights resulted in his suicide. Thus, it must determined whether Mr. Grove had a clearly established legal right to be free from self-inflicted harm or suicide by being placed on suicide watch.

A recent United States Supreme Court case found that the right to be free from one's own harm is not a clearly established legal right. In *Taylor v. Barkes,*[110] 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

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[104] *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)).
[105] Amended Complaint at ¶ 19. App. at 137. While there is no "Privileges and Immunities" Clause in the West Virginia Constitution there is in Article IV, Section 2, Clause 1 of the United States Constitution, and a "Privileges or Immunities" in the Fourteenth Amendment to the United States Constitution.
[106] Amended Complaint at ¶ 22. App. at 137.
[107] Amended Complaint at ¶ 21. App. at 137. We take this to mean an allegation of a violation of Mr. Grove's due process rights under Article 3 Section 10 of the West Virginia Constitution.
[108] Amended Complaint at ¶ 26. App. at 138.
[109] Amended Complaint at ¶ 9. App. at 135.
[110] *Taylor v. Barkes*, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015).

immune from such claims.[111] Because an inmate's right to suicide prevention measures is not clearly established, officials at correctional facilities are protected from liability by qualified immunity for claims of inadequate suicide prevention measures. Although *Taylor* is a federal suit for violation of civil rights under 42 U.S.C. § 1983, it is very persuasive authority to apply to this case, because Mr. Grove makes the very same allegation of failing to protect an inmate from suicide, thereby subjecting an inmate to cruel and unusual punishment.

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.[112] Despite that admission, in *Taylor*, the correctional institution did not initiate any special suicide prevention measures.

Here, the Amended Complaint only alleges that Mr. Gove was "addicted to heroin and a possible suicide risk."[113] Many cases have come to the conclusion that those suffering from drug withdrawal symptoms do not have a cause of action when the inmate commits suicide because the inmate is suffering from withdrawal.[114] Although not all inmates with opioid addiction must be

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[111] *Id.*

[112] *Id.* 135 S. Ct. at 2043, 192 L. Ed. 2d at 78.

[113] Amended Complaint at ¶ 7. App. at 135. In this case, Primecare determined Mr. Grove was not suicidal and that there was no need to initiate suicide prevention measures.

[114] See *Broughton v. Premier Health Care Services, Inc.*, 656 Fed. Appx. 54 (6th Cir. 2016) (Officials not deliberately indifferent to inmate who complained of withdrawal symptoms and lack of insomnia medication and then committed suicide after prison refused to provide insomnia medication); *Estate of Thomas v. Fayette County*, 194 F. Supp. 3d 358 (W.D. Pa. 2016) (Detainee suffering from drug withdrawal who had a history of mental illness and a prior suicide attempt committed suicide in jail, but because many similar inmates did not commit suicide there was no particular vulnerability to suicide at the time); *Carroll v. Lancaster County*, 301 F. Supp. 3d 486 (E.D. Pa. 2018) (Pretrial detainee's drug withdrawal was insufficient to place jail medical staff with knowledge of detainee's particular vulnerability to suicide, as would support § 1983 deliberate indifference claim based on due process violation.); *Mayo v. County of Albany*, 357 Fed. Appx. 339 (2d Cir. 2009) (applying New York law) (Pretrial detainee's suicide after being placed in detox program for withdrawal symptoms was not foreseeable)

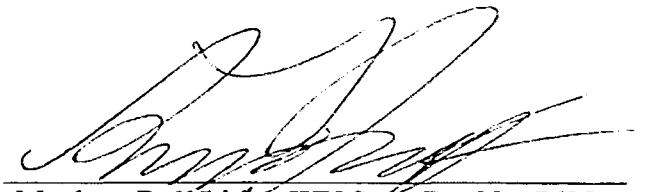
placed on suicide watch, even if the Regional Jail Authority knew Mr. Grove was suicidal beyond knowing that he struggled with heroin addiction, applying *Taylor v. Barkes,* Mr. Grove did not have a clearly established legal right to be placed on suicide watch. While the Estate did not allege any facts supporting the contention that the Regional Jail Authority knew that Mr. Grove was suicidal or had previously been suicidal, even had it known, Mr. Grove did not have a clearly established legal right to be free from self-harm and the Regional Jail Authority is immune from the Estate's claim for wrongful death.

Had the Estate alleged facts that put the Regional Jail Authority on notice that Mr. Grove was suicidal, the Estate would have a better argument that state regulations imposed a clearly established legal right to be placed on suicide watch because 95 CSR 1-12.14 requires continuous monitoring of inmates known to be suicidal. However, Plaintiff only alleges that Mr. Grove suffered from opiate withdrawal, and that fact alone made him suicidal. Opiate withdrawal alone is not enough to place the Regional Jail Authority on notice that an inmate is suicidal. Because the Estate has not identified or pled the violation of a clearly established statutory or constitutional right, the Regional Jail Authority is immune from the Estate's claims and the circuit court erred by not dismissing the Amended Complaint.

CONCLUSION

This Court should adopt the federal *Twombly / Iqbal* plausibility pleading standard for evaluating the sufficiency of a complaint. 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 immune from each claim for relief.

WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITY
AUTHORITY, by counsel



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