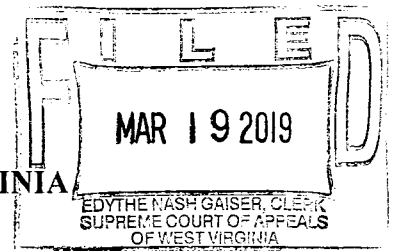


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 18-1083



JOSHUA DAVID ZOMBRO,

Petitioner,

v.

**THE ESTATE OF CODY LAWRENCE
GROVE,**

Respondent.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITES	ii
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE.....	1
III. SUMMARY OF ARGUMENT.....	10
IV. STATEMENT REGARDNG ORAL ARGUMENT	11
V. STANDARD OF REVIEW	12
VI. ARGUMENT	12
A. THE CIRCUIT COURT ERRED IN FAILING TO CONDUCT A PROPER ANALYSIS THE QUALIFIED IMMUNITY STANDARD AS REQUIRED BY THIS COURT.....	12
B. PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY ON ALL CLAIMS PURSUANT TO THIS COURT’S PRIOR HOLDINGS BECAUSE THE PETITIONER DID NOT ENGAGE IN ANY ATS OR OMISSIONS THAT VIOLATED A CLEARLY ESTABLISEHD RIGHT	14
1. The allegations in the First Amended Complaint establish the Petitioner was performing a discretionary function when the decedent committed suicide	16
2. The allegations in the First Amended Complaint does not support the violation of a clear statutory or constitutional right that overcomes qualified immunity.....	17
VII. CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Creighton</i> , 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)	18
<i>Clark v. Dunn</i> , 195 W.Va. 272, 465 S.E.2d 374 (1995).....	14, 15, 16, 17
<i>Covey v. Assessor of Ohio County</i> , 777 F.3d 186 (4 th Cir. 2015).....	18
<i>Crouch v. Gillispie</i> , 240 W. Va. 229, 809 S.E.2d 699 (2018).....	18
<i>Ewing v. Bd. of Educ. of Cnty. of Summers</i> , 202 W.Va. 228, 503 S.E.2d 541 (1998)	12
<i>Hutchison v. City of Huntington</i> , 198 W.Va. 139, 479 S.E.2d 649 (1996)	4, 12, 13, 18
<i>J. H. v. W. Va. Div. of Rehab. Servs.</i> , 224 W. Va. 147, 680 S.E.2d 392 (2009)	17
<i>Lavender v. W.Va. Reg'l Jail & Corr. Facility Auth.</i> , Civil Action No. 3:06-1032, 2008 U.S. Dist. LEXIS 8162 (S.D.W.Va. Feb. 4, 2008).....	16
<i>Parkulo v. West Virginia Bd. of Prob. & Parole</i> , 199 W.Va. 161, 483 S.E.2d 507 (1996) 3, 14, 15	
<i>Pittsburgh Elevator Co. v. West Virginia Bd. of Regents</i> , 172 W. Va. 743, 310 S.E.2d 675(W. Va. 1983).....	3
<i>Price v. Halstead</i> , 177 W.Va. 592, 355 S.E.2d 380 (1987).....	12
<i>State v. Chase Securities, Inc.</i> , 188 W. Va. 356, 424 S.E.2d 591 (1992).....	15
<i>Taylor v. Barkes</i> , 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015)	20, 21
<i>W. Va. Bd. of Educ. v. Marple</i> , 236 W. Va. 654, 783 S.E.2d 75 (2015)	1, 12, 13
<i>W.Va. Dep't of Health & Human Res. v. Payne</i> , 231 W.Va. 563, 746 S.E.2d 554 (2013)	16
<i>W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.</i> , 234 W.Va. 492, 766 S.E.2d 751 (2014)	1, 13, 15, 16, 17
<i>W.Va. State Police v. Hughes</i> , 238 W.Va. 406, 796 S.E.2d 193 (2017)	16
<i>Warner v. Graham</i> , 845 F.2d 179 (8th Cir. 1988).....	18
<i>White v. Pauly</i> , 137 S.Ct. 548, 552 (2017).....	18

Statutes

<i>West Virginia Code</i> §29-12A-5(a)(5)	8
<i>West Virginia Code</i> § 55-7-6(c)(1)	7
<i>West Virginia Code</i> § 55-17-3(a)(1)	3

Rules

Rule 19 of the <i>West Virginia Rules of Appellate Procedure</i>	11
Rule 21(d) of the <i>West Virginia Rules of Appellate Procedure</i>	12
Rule 8 of the <i>West Virginia Rules of Civil Procedure</i>	2
Rule 12(b)(6) of the <i>West Virginia Rules of Civil Procedure</i>	2, 7

Constitutional Authorities

<i>West Virginia Constitution</i>	2, 3, 4, 5, 7, 8, 9, 21
---	-------------------------

Regulations

95 C.S.R. § 1-14.1	5, 18
95 C.S.R. § 1-14.9.2	19
95 C.S.R. § 1-14.9.5	6, 18
95 C.S.R. § 1-14.9.7	6, 18
95 C.S.R. § 1-14.9.11	6, 18
95 C.S.R. § 1-14.9.12	7
95 C.S.R. § 1-12.14	7, 19

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in failing to use the framework for analysis required by this Court in *W. Va. Bd. of Educ. v. Marple* when qualified immunity is raised.

2. The Circuit Court erred when it denied Petitioner's Motion to Dismiss because, pursuant to this Court's decision in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, Petitioner is entitled to qualified immunity from the claims raised in Respondent's First Amended Complaint due to Respondent failing to establish that Petitioner engaged in any act or omission related to the suicide of Respondent's decedent that established the violation of a clearly established right.

II. STATEMENT OF THE CASE

This matter involves the suicide of Cody Lawrence Grove while he was incarcerated at the Eastern Regional Jail. Respondent, the Estate of Cody Lawrence Grove, by Ronald Grove Jr., Administrator, Plaintiff below, seeks to hold Petitioner Joshua David Zombro, a former correctional officer, the West Virginia Regional Jail and Correctional Facility Authority (hereinafter "Regional Jail Authority" or "RJA") and Primecare Medical of West Virginia, Inc. (hereinafter "Primecare") liable for this suicide. Ultimately, Petitioner moved the Circuit Court to dismiss the claims against him on the grounds of qualified immunity. On November 19, 2018, the Honorable Laura Faircloth denied Petitioner's Motion to Dismiss Respondent's First Amended Complaint on the basis of qualified immunity. It is from this Order that this appeal now follows.

Respondent filed his initial Complaint on December 7, 2017, against Petitioner individually and in his official capacity as a former correctional officer of the Regional Jail Authority. JA 0006.¹ The Complaint asserts that, at all relevant times, Petitioner was employed by the Regional Jail Authority and assigned to the Eastern Regional Jail. JA 0007. The Complaint

¹ The West Virginia Regional Jail and Correctional Facility Authority's appeal in this matter is subject matter of Docket No. 18-1076.

makes no other material factual allegations regarding any acts or omissions by Petitioner in support of Respondent's claims. JA 0006-0013. The Complaint otherwise contains conclusory allegations and legal conclusions with no factual support. JA 0006-0013. The Complaint sought to recover against Petitioner for deprivation of constitutional rights pursuant to the *West Virginia Constitution*, negligent supervision, negligent and intentional infliction of emotional distress, and wrongful death. JA 0008-0012.

Subsequently, on January 15, 2018, Petitioner moved to dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. JA 0022-0032. Petitioner argued that he is immune from the claims in the Complaint based upon qualified immunity; that the state constitutional law claims are not actionable for monetary damages; that he has statutory immunity from punitive damages; and that the Complaint failed to comply with Rule 8 of the *West Virginia Rules of Civil Procedure*. JA 0024-0031.² Respondent filed a response in opposition to Petitioner's Motion to Dismiss on February 8, 2018. JA0048-0057. For the first time, Respondent asserts in Response that the decedent's cause of death was a suicide. JA 0049. Respondent further argues in its Response that Petitioner failed in his duties while a correctional officer at the Eastern Regional Jail by not protecting the decedent from harming himself. JA 0052. Respondent, however, provides no actionable facts as to how Petitioner caused the decedent to commit suicide. JA 0049-0054.

Like the Complaint, the Response broadly asserts alleged general violations by Petitioner of the decedent's rights under the *West Virginia Constitution*, but does not identify with any specificity said rights at issue. JA 0052-0053. Respondent asserts in conclusory fashion that the alleged violations were outside the scope of Petitioner's employment and were done in a reckless

² The RJA filed its Motion to Dismiss on January 25, 2018. JA 0033-0047.

manner providing an exception to the immunity rule. JA 0053. No facts have been pled or otherwise asserted to support such an argument. Finally, Respondent argues that the Complaint need not specify what duties Petitioner violated because West Virginia is a notice pleading state and it is only required to set forth a plain statement of his claim. JA 0054.

On February 20, 2018, Petitioner filed his Reply. JA 0058-0067. Petitioner addressed the various shortcomings of Respondent's Complaint and Response. JA 0060-0065. Additionally, Petitioner reasserted his entitlement to qualified immunity, as well as Respondent's inability to recover against Petitioner for claims sounding in negligence, inability to bring claims for monetary damages under the *West Virginia Constitution* and statutory prohibition against an award of punitive damages. JA 0060-0065. Finally, Petitioner joined the Regional Jail Authority's Motion to Dismiss to the extent the claims against him are brought in his official capacity as a former employee. JA 0033-0047.

Thereafter, but before a ruling on Petitioner's Motion to Dismiss, Respondent filed a motion for leave to amend his Complaint on March 14, 2018. JA0095. Respondent sought to amend his Complaint to add Primecare. JA 0095.³ On April 12, 2018, the Circuit Court entered an Order granting the Regional Jail Authority's Motion to Dismiss. JA 0124-0130. The Circuit Court dismissed the claims because Respondent failed to comply with pre-suit notification requirements pursuant to *West Virginia Code* § 55-17-3(a)(1) and otherwise limit recovery to the insurance limits in compliance with this Court's holding in *Parkulo v. West Virginia Bd. of Prob. & Parole*, 199 W.Va. 161, 167, 483 S.E.2d 507, 514 (1996) and *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675, 688–89 (W. Va. 1983). JA 0124-0129.

³ Respondent filed the Response in Opposition to the Regional Jail Authority's Motion to Dismiss on March 14, 2018. JA 0070-0093. Attached to the Response as Exhibit 1 was the Plaintiff's First Amended Complaint that purportedly "clarifies" the basis of Respondent's claim. JA 0073; 0082-0093. The Regional Jail Authority filed its Reply in Response in Support of its Motion to Dismiss on March 22, 2018. JA 0110-0122.

Importantly, the Circuit Court held that, because qualified immunity was alleged, the heightened pleading standard of *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996) was required. JA 0124. The Circuit Court did not address Petitioner's Motion to Dismiss and no ruling was ever made on this motion. JA 0124-0130. On April 25, 2018, the Circuit Court entered an Order granting Respondent's Motion to Amend the Complaint. JA 0132.

On May 9, 2018, Respondent filed the First Amended Complaint adding Primecare as a party to the litigation. JA 0134-0144.⁴ Respondent again asserts that Petitioner was employed as a corrections officer at the Eastern Regional Jail. JA 0135. With regards to the factual allegations against Petitioner, Respondent asserts one factual allegation:

On the day Defendants allowed Cody Grove to hang and kill himself, Defendant Zombro was to perform regular checks of Cody Grove's welfare. Upon information and belief, Defendant missed at least one (1) of those safety checks allowing Cody Grove to hang and kill himself. This was a violation of law, regulation, Cody Grove's legal rights and Defendant's own policies and procedures.

JA 0136. Despite this sole factual allegation against Petitioner, Respondent identifies seven (7) different causes of action, four of which are directed against Petitioner. JA 137-144.

Count I asserts deprivation of constitutional rights under the *West Virginia Constitution*. JA 0137. Respondent generally asserts deprivation of rights, privileges and immunities under the *West Virginia Constitution*, statutes and common laws of the state, state regulation and the "Defendants'" own policies and procedures. JA 137. Count I also alleges the acts of Petitioner were cruel and unusual punishment in violation of the *West Virginia Constitution*. JA 137. Finally, Respondent asserts the decedent was deprived of "a right to be secure in his person" under the *West Virginia Constitution*. JA 137.

⁴ In a separately filed Petition for Writ of Prohibition, Primecare seeks relief from this Court regarding the Circuit Court's Order denying its Motion to Dismiss the claims against it in the First Amended Complaint. (Docket No. 18-1071).

Count II alleges negligent supervision asserting Petitioner failed to properly monitor, supervise and protect the decedent without justification. JA 0137. Respondent also alleges in the same Count that Petitioner was acting within the scope of his employment and that his actions or omissions are subject to the doctrine of *respondent superior*. JA 0137. Respondent reasserts that the unidentified conduct of Petitioner amounts to cruel and unusual conduct prohibited by the *West Virginia Constitution*. Finally, Respondent asserts that Petitioner's conduct 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 against Petitioner, the Regional Jail Authority and Primecare. JA 0138.

Count IV purportedly brings a claim against Petitioner, Regional Jail Authority and Primecare for negligent and intentional infliction of emotional distress. JA 0138-0139. This Count states:

State law and common law claims and causes of action are asserted by Plaintiff against Defendants as follows: (a) Torts of negligent and intentional infliction of emotional distress; and, (b) Tort of outrageous and atrocious conduct.

JA 0138-0139. The only other allegations in this Count are a list of claimed damages. JA 0139.

Finally, Count VI purportedly asserts a claim of wrongful death against Petitioner, Regional Jail Authority and Primecare. JA 0140. In support of this claim, Respondent broadly asserts the decedent's death was proximately caused by the acts, omissions, malicious intent, negligence, bad faith and other acts and omissions of Petitioner, Regional Jail Authority and Primecare. JA 0140. The Amended Complaint then goes on to assert that Petitioner, Regional Jail Authority and Primecare violated the following:

38. The Defendants are required to follow West Virginia's Administrative Regulations, which set forth minimum standards for operation of jails.

39. 95 C.S.R. § 1-14.1 sets forth that inmates have "prompt access to necessary

medical, dental and psychiatric care provided in a reasonable manner by licensed personnel."

40. 95 C.S.R. § 1-14.9.5 sets forth that "there shall be a written suicide prevention and intervention program that is reviewed and approved by a qualified medical or mental health professional. All jail facility staff who are responsible for inmate supervision shall be trained in the implementation of the program. The staff shall be responsible for intake screening and identification of potentially suicidal inmates in an effort to prevent suicide."

41. 95 C.S.R. § 1-14.9.7 sets forth, in pertinent part, as follows:

A receiving medical screening appraisal to elicit information pertinent to the inmates' health shall be performed on every inmate at the time of admission. The screening shall be recorded on a form which has been approved by the responsible physician. Screening is a means to discover and prevent health and safety threats to both inmates and staff. The goal of receiving screening shall be to detect any ... potential for suicide, or other medical or psychiatric problems before the inmate is placed within the jail population. When the inmate has been transferred from another facility and is accompanied by a previously completed screening form, the form shall be reviewed and verified. The receiving screening shall be conducted by a health-trained staff member. The screening inquiry shall include the following topical areas:

- a. Current illness and health problems, including dental problems;
- b. Venereal diseases and other infectious diseases;
- c. Current medication and special health requirements;
- d. Use of alcohol or other drugs, including types of drugs used, mode of use, amounts used, frequency of use, date or time of last use, and history of problems which may have occurred after cessation of use;
- e. Past and present treatment or hospitalization for mental disturbance or attempted suicide; and,
- f. Other health problems as may be identified by the responsible physician.

42. 95 C.S.R. § 1-14.9.11 sets forth, in pertinent part, as follows:

Potentially suicidal and psychotic patients are emergencies and require prompt attention ... All sources of assistance for mentally ill or impaired inmates shall be identified in advance of need and referral procedures shall

be in place for use in cases where the need exists.

43. Significantly, 95 C.S.R. § 1-14.9.12 sets forth that there shall be consultation between the jail facility administrator and the responsible physician or their designees prior to the making of housing assignment; therefore, upon information and belief, the Defendants are jointly and severely liable for the initial placement of Cody Grove in the general population, as opposed to on full Suicide Watch, before Cody Grove's death.

44. Also 95 C.S.R. § 1-12.14 states the “[i]nmates who are classified as potentially suicidal shall be continuously monitored which shall include a verbal exchange between the inmate and monitoring staff.”

JA 0140-141. Respondent then asserts “[b]ut for the Defendants’ conduct and inactions before and after December 8, 2015, when Defendants found Cody Grove hanging in his jail cell, Cody Grove would not have died.” JA 0142. Thus, Respondent asserts the decedent’s father and brother are entitled to recover various damages from Petitioner, the Regional Jail Authority and Primecare under *West Virginia Code* § 55-7-6(c)(1) as the beneficiaries of the decedent’s estate. JA 0142.

On March 21, 2018, Petitioner moved to dismiss the First Amended Complaint for failure to state a claim under Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. JA 0146-0153. In the motion, Petitioner reasserts qualified immunity on all claims against him. JA 0148. Petitioner argues that there is no violation asserted of a clearly established statutory or constitutional right and that Respondent failed to assert any material facts in the First Amended Complaint establishing a claim sufficient to overcome qualified immunity. JA 0148-0149. Petitioner further asserts that in addition to qualified immunity, there is no cause of action for money damages against Petitioner for alleged violations of the *West Virginia State Constitution*.⁵

⁵ Petitioner asserts that West Virginia has not enacted a vehicle similar to 42 U.S.C. § 1983 for which a person may recover monetary damages for alleged violations of the *West Virginia Constitution*. Thus far, this Court has only recognized a violation of the Due Process Clause in the *West Virginia Constitution* as actionable for monetary damages. See *Hutchinson*, 198 W.Va. 139, 479 S.E.2d 649. Petitioner asserted below that no such private cause of action for monetary damages existed. The Circuit Court’s Order implied otherwise in that it did not dismiss this claim by Respondent. However, as only the issue of qualified immunity is immediately appealable, Petitioner does not waive and does not intend to waive his position that there is no private cause of action for monetary damages for alleged violations of the *West Virginia Constitution* outside of the Due Process Clause.

JA 0151.

On June 13, 2018, Respondent filed a Response to Petitioner's Motion to Dismiss the Amended Complaint. JA 0157-0165. Respondent asserts, "[s]imply put, Defendant Zombro failed in his duties while a guard at the Eastern Regional Jail to protect Plaintiff's decedent from hanging himself." JA 0160. Respondent additionally argues that Petitioner does not have qualified immunity under the facts presented because the Petitioner was sued in both his individual and official capacities citing to the caption of the First Amended Complaint. JA 0161. Next, Respondent asserts that Petitioner's alleged act violated clearly established laws of which he reasonably should have known or if he acted outside the scope of his employment, he has no immunity. JA 0161. Third, Respondent argues that Petitioner is not immune from liability pursuant to W.Va. Code §29-12A-5(a)(5). JA 0161.⁶

Respondent additionally argues violation of the decedent's rights under the *West Virginia Constitution*, such as: 1) deprivation of the right to enjoy life and liberty, means to acquire and possess property, ability to pursue happiness and safety without due process pursuant to Art. III, § 1 of the *West Virginia Constitution*; 2) liberty and life without due process and the judgment of his peers in violation of Art. III, § 10 of the *West Virginia Constitution*; and 3) deprivation of the right to a public trial for the crimes raised against him in violation of Art. III, § 14 of the *West Virginia Constitution*. JA 0161-0162. Respondent then argues Petitioner's Motion to Dismiss causes additional constitutional violations because: 1) it is an attempt to deny or delay access to the courts in violation of Art. III § 17 of the *West Virginia Constitution*; 2) it attempts to persuade the Court not to permit a public examination at trial of the past and continuing efforts to deny the Respondent's decedent's constitutional rights in violation of Art. I, § 2 of the *West Virginia*

⁶ The Petitioner never raised an immunity pursuant to W.Va. Code § 29-12A-5(a)(5) that provides immunities to political subdivisions. The Petitioner is a former corrections officer and was an employee of the State.

Constitution; 3) deprivation of rights to a civil jury trial pursuant to Art. III, § 13 of the *West Virginia Constitution*; and, 4) deprivation of Respondent's access to the court and a speedy resolution of his claims in violation of Art. III, § 17 of the *West Virginia Constitution*. Respondent states that these alleged violations were outside the scope of the Petitioner's employment and were done in a reckless manner and provide exemption to immunity. JA 0162. Finally, Respondent asserts that violations of the regulations and the Code of State Regulation prohibit the application of immunity. JA 162-0163. On June 25, 2018, Petitioner filed his Reply.⁷ JA 529-535.

On July 9, 2018, the Circuit Court held a hearing on outstanding motions, as well as conducted a status conference. JA 468. The Circuit Court decided it would hear Petitioner's Motion at a later date contemporaneously with the Regional Jail Authority's motion. JA 0492-0493. Subsequently, just prior to the August 27, 2018, hearing where the outstanding motions to dismiss were to be heard, Respondent submitted proposed Orders denying each motion to dismiss. JA 0306-0327; 518-519. The hearing went forward wherein the Circuit Court informed the parties that Respondent's proposed Orders were the Circuit Court's ruling. JA 0522. The Circuit Court indicated it wanted to see the development of the evidence before granting any motions to dismiss. JA 0524. The Circuit Court permitted Petitioner, Regional Jail Authority and Primecare to file objections as to the form of the proposed Orders, but not the content of the Orders. JA 0522-0523.

On September 6, 2018, Petitioner joined in the objections filed by the Regional Jail Authority and submitted 18 separate objections in his own right. JA 0328-0355; 0356 – 0366. In pertinent part, Petitioner raised the following objections:

Objection to the Circuit Court entering an Order that does not apply the heightened

⁷ Petitioner notes that the Regional Jail Authority was served with the First Amended Complaint and filed an Answer to the First Amended Complaint and Cross Claim against Primecare on June 26, 2018. JA 0172-0173. A second Motion to Dismiss was filed by the Regional Jail Authority on June 26, 2018. JA 0188-0262. Respondent filed his Response on July 10, 2018. JA 0263-0284. The Regional Jail Authority's Reply was filed on July 25, 2019. JA 0286-0295.

pleading standard when qualified immunity is raised. JA 0359.

Objection to the Circuit Court entering an Order without identifying the facts asserted in the First Amended Complaint that constitute a violation of a well-known statutory or constitutional right, and without identifying the clearly established statutory or constitutional right violated. JA 0360.

Thereafter, on November 19, 2018, the Circuit Court entered its order denying Petitioner's Motion to Dismiss. JA 0372-0374. The Circuit Court held the decedent committed suicide while under the supervision of Petitioner. JA 0372.⁸ The Circuit Court held Respondent set forth a sufficient basis to deny Petitioner's Motion to Dismiss. JA 0374. The Circuit Court further held:

Furthermore, the Court agrees with the Plaintiff that it is not a matter of expertise upon which a reasonably prudent person would need to rely in being able to understand what protocols were or were not violated in allowing a person under the custody and control of the [RJA] to hang himself while he was under a suicide watch. The Certificate of Merit was filed on July 17, 2018 in accordance with the Court's Order, and the Court does not find that the failure of the Plaintiff to have filed it sooner in any prejudiced the rights of the [RJA]. In this Court's judgment, it merely states the obvious which is a legislative exemption from filing a Certificate of Merit.

JA 0374.⁹ The Circuit Court's Order makes no specific findings of any factual allegations raised in Respondent's First Amended Complaint that overcome qualified immunity at this stage. Furthermore, the Circuit Court's Order contains no findings regarding the clearly established right Petitioner's alleged actions or omission violated. As a result, Petitioner now appeals this Order.

III. SUMMARY OF ARGUMENT

While the Circuit Court's Order denied Petitioner qualified immunity, the Circuit Court did so without identifying the clearly established constitutional or statutory right at issue. Additionally, the Circuit Court's Order failed to identify any factual basis to support an alleged

⁸ The Circuit Court's Order further states Petitioner is a former employee of Primecare. JA 0372. Petitioner was not an employee of Primecare. Furthermore, there is no allegation in the Complaint or First Amended Complaint supporting this finding.

⁹ The decedent was not on suicide watch. JA 521-522.

violation of a constitutional or statutory law. As a result, because the Circuit Court did not follow this Court's framework for analysis of qualified immunity, the Circuit Court committed error. As explained below, if the Circuit Court would have gone through the qualified immunity framework for analysis, the Circuit Court would have dismissed Petitioner from this matter. Therefore, this Court should reverse the Circuit Court's order denying qualified immunity for the reasons argued herein. In the alternative, this Court should Order the Circuit Court to provide an Order following this Court's framework for qualified immunity analysis.

Furthermore, in applying the qualified immunity framework for analysis announced by this Court, it is clear Petitioner is entitled to a reversal of the Circuit Court's Order denying Petitioner qualified immunity. In order for Respondent's First Amended Complaint to withstand a motion to dismiss on the basis of qualified immunity, at the very least, it must identify a clearly established right and factual allegations that, if true, establish the violation of the clearly established constitutional or statutory right. Here, Respondent's First Amended Complaint fails to establish a clearly established constitutional or statutory right. Moreover, Respondent's First Amended Complaint fails to plead any factual support to sustain an alleged violation of a constitutional or statutory right. As a result, the Circuit Court erred in denying Petitioner's Motion to Dismiss on the basis of qualified immunity.

IV. STATEMENT REGARDING ORAL ARGUMENT

Petitioner asserts that oral argument is necessary and appropriate, pursuant to the criteria set forth in Rule 19 of the *West Virginia Rules of Appellate Procedure* because the matters set forth involve assignments of error in the application, or lack thereof, of clearly settled law regarding qualified immunity. Additionally, Petitioner asserts oral argument may be necessary and

appropriate pursuant to Rule 20 of the *West Virginia Rules of Appellate Procedure* because qualified immunity of public employees is an issue of fundamental public importance.

V. STANDARD OF REVIEW

Review of a circuit court's order denying a motion to dismiss de novo. *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015); citing to Syl. Pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998).

VI. ARGUMENT

A. THE CIRCUIT COURT ERRED IN FAILING TO CONDUCT A PROPER ANALYSIS OF THE QUALIFIED IMMUNITY STANDARD AS REQUIRED BY THIS COURT.

The Circuit Court's Order denying Petitioner's Motion to Dismiss the First Amended Complaint failed to analyze the allegations raised in the First Amended Complaint under the qualified immunity analysis discussed below, which requires a heightened pleading standard. JA at 0373. "[T]o survive a motion to dismiss, a plaintiff's complaint must 'at a minimum . . . set forth sufficient information to outline the elements of his claim.'" *Marple*, 236 W. Va. at 660, 783 S.E.2d at 81; citing to *Price v. Halstead*, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987). "[I]n civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Marple*, 236 W. Va. at 660, 783 S.E.2d at 81; citing to *Hutchison*, 198 W.Va. at 149, 479 S.E.2d at 659. The purpose of requiring "heightened pleading" by a plaintiff permits a framework by which a circuit court may engage in an analysis to determine whether a plaintiff has a sufficient claim to overcome the qualified immunity. See Syl. Pts. 10 & 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014); see also *Marple*, 236 W. Va. at 662, 783 S.E.2d at 83. "If the complaint fails to allege a cognizable violation of constitutional or statutory rights it also has failed to state a claim upon which relief can be

granted.” See *Marple*, 236 W. Va. at 663, 783 S.E.2d at 84; citing to *Hutchison*, 198 W.Va. at 149 n.12, 479 S.E.2d at 659 n.12.

This framework, discussed in depth below, in essence requires a pleading to set forth a clearly established constitutional or statutory right that, if the allegations of the pleading are true, were violated by the conduct of a defendant. When a defendant raises the issue of qualified immunity in a motion to dismiss or motion for summary judgment, the trial court must, at the very least, specifically identify the constitutional or statutory right at issue, along with the facts that, if true, may constitute a violation of these rights. See *A.B.*, 234 W. Va. at Syl. Pts. 10 & 11, 766 S.E.2d at Syl. Pts 10 & 11; see also *Marple*, 236 W. Va. at 662, 783 S.E.2d at 83. The Circuit Court’s Order denying Petitioner’s Motion to Dismiss did neither. JA 0372

Rather, the Circuit Court’s Order simply states that the decedent committed suicide while in the custody of the Regional Jail Authority and under the supervision of Petitioner, a former correctional officer.¹⁰ JA 0372. Specifically, the Circuit Court found:

[T]he Plaintiff has set forth a sufficient basis to deny Defendant Zombro’s Motion to Dismiss. The Court finds that the Plaintiff has set forth in the First Amended Complain sufficient facts to put Defendants on notice of the nature of the 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.

JA 0374. The Circuit Court’s Order then proceeds to discuss the certificate of merit filed on July 17, 2018, and found that an earlier filing would not have prejudiced the rights of the Regional Jail Authority. JA 0374.

At no point in any of the pleadings by Respondent or the Circuit Court’s Order is there an identification of a clearly established constitutional or statutory right and whether there was

¹⁰ The Circuit Court’s Order also mistakenly states Petitioner is/was an employee of Primecare. JA 0372. Petitioner is not named in the First Amended Complaint as an employee of Primecare and never worked for Primecare. JA 0134-0135.

conduct on the part of Petitioner that may, if true, violate the same. In other words, the Circuit Court clearly did not follow the proper qualified immunity determination identified by this Court in the litany of cases discussed herein. If the Circuit Court had followed this Court's direction in analyzing qualified immunity, based upon the analysis *infra*, the Circuit Court would have dismissed Petitioner. As such, this Court should reverse the Circuit Court's Order and direct the Circuit Court to enter an Order dismissing Petitioner based upon the Respondent's failure to overcome qualified immunity, as stated in more detail below. Alternatively, this Court should remand this matter directing the Circuit Court to enter an appropriate Order applying the proper qualified immunity analysis regarding whether Respondent has met the requisite initial showing in his First Amended Complaint to overcome Petitioner's Motion to Dismiss.

B. PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY ON ALL CLAIMS PURSUANT TO THIS COURT'S PRIOR HOLDINGS BECAUSE THE PETITIONER DID NOT ENGAGE IN ANY ACTS OR OMISSIONS THAT VIOLATED A CLEARLY ESTABLISHED RIGHT.

Petitioner enjoys qualified immunity from the claims raised in the First Amended Complaint and therefore the claims raised by Respondent against him should be dismissed from the underlying cause of action, with prejudice. "Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Syl. Pt. 2, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). In other words, the State, its agencies, its officials, and its employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they are not violating any known law or acting fraudulently, maliciously, or oppressively. *Parkulo*, 199 W. Va. at Syl. Pt. 8, 483 S.E.2d at Syl. Pt. 8. Importantly, "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.” *Hutchinson*, 198 W.Va. at 148, 479 S.E.2d at 658. “The very heart of the immunity defense is that it spares the Defendant from having to go forward with an inquiry into the merits of the case.” *Id.* As stated in more detail below, neither the Respondent’s First Amended Complaint nor the Circuit Court’s Order denying the Petitioner’s Motion to Dismiss overcome the protections afforded to him under the doctrine of qualified immunity. As such, the claims against Petitioner should be dismissed. Therefore, this Court should reverse the Circuit Court’s Order denying qualified immunity.

Petitioner is entitled to qualified immunity on all claims raised against him because Respondent does not assert any facts against Petitioner establishing a violation of a clearly established right. The applicable standard for qualified immunity is as follows:

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).

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.

A.B., 234 W. Va. at Syl. Pts. 10 & 11. Qualified immunity is designed to protect public officials from the threat of litigation resulting from decisions made in the course of their employment. *Clark*, 195 W.Va. at Syl. Pt. 2, 465 S.E.2d at Syl. Pt. 2. Qualified immunity “is broad and protects

‘all but the plainly incompetent or those who knowingly violate the law.’” *W.Va. State Police v. Hughes*, 238 W.Va. 406, 411, 796 S.E.2d 193, 198 (2017). “The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.” Syl. Pt. 5, *W.Va. Dep’t of Health & Human Res. v. Payne*, 231 W.Va. 563, 746 S.E.2d 554 (2013). The application of qualified immunity in this matter is determined by identifying the nature of the alleged acts by Petitioner, and, if they are discretionary, whether they violate a clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive.

1. The allegations in the First Amended Complaint establish the Petitioner was performing a discretionary function when the decedent committed suicide.

Respondent’s sole factual allegation against Petitioner identifies a discretionary function. When determining whether a party is entitled to qualified immunity, the Court must decide if the alleged acts or omissions can be defined as “discretionary functions” and whether such acts or omissions were a violation of clearly established law. *A.B.*, 234 W. Va. at Syl. Pts. 10 & 11, 766 S.E.2d at Syl. Pts 10 & 11. It is well settled that “government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known.” *Clark*, at Syl. Pt. 2 (internal citation omitted). Furthermore, allegations of mere negligence do not rise to the level of a clearly established right and such claims are barred as against a state agency. See *Lavender v. W.Va. Reg’l Jail & Corr. Facility Auth.*, Civil Action No. 3:06-1032, 2008 U.S. Dist. LEXIS 8162 (S.D.W.Va. Feb. 4, 2008).

Respondent’s sole factual allegation against Petitioner asserts as follows:

On the day Defendants allowed Cody Grove to hang and kill himself, Defendant Zombro was to perform regular checks of Cody Grove's welfare. Upon information and belief, Defendant missed at least one (1) of those safety checks allowing Cody Grove to hang and kill himself. This was a violation of law, regulation, Cody Grove's legal rights and Defendants' own policies and procedure.

JA at 136. There can be no dispute that performing the safety checks is a discretionary function. "[G]eneral functions as a correctional officer, like most law enforcement officers, are *broadly* characterized as discretionary, requiring the use of his discretionary judgments and decisions." *See A.B.* 234 W. Va. at 509, 766 S.E.2d at 751. Furthermore, "[I]f a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby." *Clark*, 195 W. Va. at 274, 465 S.E.2d at 376. As a result, the performance of safety checks is a discretionary function.

2. The allegations in the First Amended Complaint does not support the violation of a clear statutory or constitutional right that overcomes qualified immunity.

Because the action of Petitioner at issue is a discretionary function, the second part of the qualified immunity analysis requires the Court to determine whether Respondent's allegations support a finding that Petitioner violated "clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive . . ." *A.B.* 234 W. Va. at Syl. Pt. 11, 766 S.E.2d at Syl. Pt. 11. The finding of a violation of a "clearly established statutory or constitutional right" is critical because "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading immunity is entitled to dismissal before the commencement of discovery." *J. H. v. W. Va. Div. of Rehab. Servs.*, 224 W. Va. 147, 156 n.12, 680 S.E.2d 392, 401 (2009).

In order to determine whether a law is "clearly established", this Court has provided the

following guidance:

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." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Indeed, some courts hold that an "official may not be charged with knowledge that his or her conduct was unlawful unless it has been previously identified as such." *Warner v. Graham*, 845 F.2d 179, 182 (8th Cir. 1988). But, for a right to be clearly established, it is not necessary that the very actions in question previously have been held unlawful. *Anderson v. Creighton*, 483 U.S. at 640, 107 S. Ct. at 3039.

Hutchison, 479 S.E.2d 649, 659 n.11. Specificity within the law is required. See *Crouch v. Gillispie*, 240 W. Va. 229, 235, 809 S.E.2d 699, 705 (2018).

By way of further guidance, the Fourth Circuit Court of Appeals also recognized that "the Supreme Court has repeatedly instructed that we should not 'define clearly established law at a high level of generality.'" *Covey v. Assessor of Ohio County*, 777 F.3d 186, 197 (4th Cir. 2015). Additionally, the Supreme Court of the United States recently reiterated:

as explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

White v. Pauly, 137 S.Ct. 548, 552 (2017).

In this matter, the statutory and constitutional rights purportedly violated by Petitioner are generalities, unspecific, and/or inapplicable to Petitioner. First, the Respondent asserts violations of 95 C.S.R. § 1-14.1 and 95 C.S.R. §§ 1-14.9.5, 7, 11 and 12. JA 135. 95 C.S.R. § 1-14.9.7 discusses medical screenings for inmates to be performed by a "health-trained staff member" to determine, among other things, whether an inmate is suicidal. JA 0141. This is not applicable to Petitioner, as he was a correctional officer. 95 C.S.R. § 1-14.9.11 discusses "psychiatric illness", but sets forth no specific duty for a correctional officer, such as Petitioner. Similarly, 95 C.S.R. §

1-14.9.2 does not apply to Petitioner because it requires a consultation between the jail facility administrator and the responsible physician, which falls under the policies and procedures for the “responsible physician.” As a result, these regulations do not apply to Petitioner.

Finally, Respondent cites to 95 C.S.R. § 1-12.14, which states:

Observation of potentially suicidal inmates. Inmates who are classified as potentially suicidal shall be continuously monitored which shall include a verbal exchange between the inmate and the monitoring staff. A recording of this monitoring shall be made and placed in the inmate's health record. High risk persons shall be placed on continuous observation.

See 95 C.S.R. § 1-12.14; *see also* JA 0141. It is worth noting at this point in the First Amended Complaint the Respondent asserts the “Defendants are jointly and severely liable for the initial placement of Cody Grove in the general population, as opposed to on full Suicide Watch, before Cody Grove’s death.” JA 0141. Thus, to the extent the decedent was not identified as being suicidal these regulations do not apply to the Petitioner.

However, Respondent asserts, in contrast to the alleged negligence in the placement of the decedent, that “[a]t the time this cause of action arose, Plaintiff was on ‘suicide watch’, ‘medical watch,’ and/or under a heightened level of monitoring and/or supervision.” JA 0135. Thus, assuming *arguendo* the First Amended Complaint is interpreted to allege the decedent was identified as a potentially suicidal inmate, there are no regulations clearly establishing a duty by a corrections officer such as the Petitioner. While 95 C.S.R. § 1-12.14 addresses “continuously monitoring” potentially suicidal inmates, the regulation does not set out specifics of how often potentially suicidal inmates are to be monitored, other than to say there should be a verbal exchange. There are no increments defined as to the verbal exchange. There is no direction as to how often they should be checked. The regulation makes clear that the checks/verbal exchange should be incremental, and documenting the same in the medical file is required. Furthermore, to

the extent an inmate is “high risk”, they would be under “continuous observation”. “Continuous observation” is not the same as performing “regular checks” or “safety checks”, which is the conduct alleged in the Complaint.

In other words, it is not clearly established as to how a correctional officer, such as Petitioner, is to perform “continuous monitoring”. Furthermore, to the extent Respondent asserts the decedent was on a “heightened watch,” there is no clearly established rule or regulation defining a “heightened watch”, nor the steps or procedures a corrections officer is required to follow under the non-existent “heightened watch” standard. Additionally, there is nothing that establishes a security check, the purpose of the security check, and how often those security checks are to be performed. This is extremely important given that, for example, a specified check every hour by a corrections officer on an incarcerated person requiring a verbal exchange would not prevent an incarcerated person from taking his own life if he/she is intent on doing so. Accordingly, there is not clearly established right that could have been violated by the Petitioner.

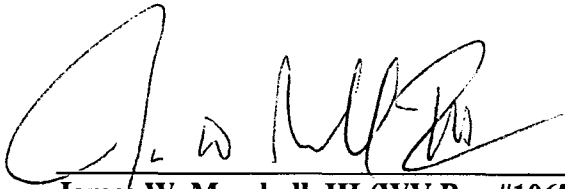
As further guidance, the United States Supreme Court’s decision in *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) is instructive. In *Taylor*, an inmate who had a long history of mental health and substance abuse problems was screened as “routine” and placed in a cell by himself. *Id.* at 2043. Subsequently, the inmate, a day or more later, committed suicide in his cell. *Id.* The Supreme Court ruled that inmates, such as the decedent, do not have a constitutional right to adequate suicide prevention protocols. *Id.* at 2044. The Supreme Court reasoned that deliberate indifference is the standard for an Eighth Amendment violation and that no Supreme Court precedent has held that a failure to screen an inmate related to suicidal tendency is deliberate indifference or that a failure to implement “adequate” policies and procedures amounts to deliberate indifference. Finally, because no case law has established the constitutional right to a suicidal screening, the Supreme

Court reasoned that qualified immunity was appropriate. *Id.* at 2045 (finding that even if the facility's suicide screening and prevention measures were deficient, the officials were not violating any clearly established rights, and therefore qualified immunity applied).

Accordingly, Respondent's First Amended Complaint does not establish the violation of a clearly established right allowing it to overcome the Petitioner's immunity raised in his Motion to Dismiss. Furthermore, based upon *Taylor*, it is clear that Respondent cannot establish a violation of a clearly established constitutional right. The United States Supreme Court has acknowledged the lack of an established right to suicide prevention in a prison setting. Additionally, this Court has never recognized the same under the *West Virginia Constitution*. As a result, Respondent cannot establish the violation of the clearly established constitutional right to overcome the Petitioner's qualified immunity. Therefore, the Circuit Court erred in failing to dismiss the claims raised against Petitioner in the First Amended Complaint.

VII. CONCLUSION

The Circuit Court erred in not applying the analysis set forth by this Court when a Defendant asserts qualified immunity. If the Circuit Court had applied the appropriate analysis pursuant to this Court's precedent, the Circuit Court would have dismissed the claims asserted against the Petitioner in the First Amended Complaint because he did not engage in any acts or omissions which violate a clearly established right. Accordingly, the Petitioner prays this Court will reverse the Circuit Court's Order and direct the Circuit Court to enter an Order dismissing the claims raised against him in the First Amended Complaint with prejudice. Alternatively, this Court should remand this matter directing the Circuit Court to enter an appropriate Order applying the proper qualified immunity analysis as set forth in this Court's prior decisions.



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