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

**No. 21-0732**

**(An Appeal from Cabell County Civil Action No. 18-C-240)**



**Administrator Larry Crawford, individually and in his official capacity; Captain Carl Aldridge, individually and in his official capacity; C.O. Paul Diamond, individually and in his official capacity; C.O. Don Vance, individually and in his official capacity; C.O. David Rodes, individually and in his official capacity; C.O. Joshua Scarberry, individually and in his official capacity; and The West Virginia Regional Jail and Correctional Facility Authority, an agency of the State of West Virginia**

**Defendants Below, Petitioners**

**vs.** **No. 21-0732**

**Michael A. McDonald,**

**Plaintiff Below, Respondent.**

# REPLY BRIEF

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## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent did not request oral argument or include a statement regarding oral argument in Respondent's Brief. The Petitioners maintain their position stated in Petitioners' Brief regarding oral argument and decision, in that oral argument may be unnecessary unless the Court, in its discretion, feels it is needed to aid the Court in its decision.

## ARGUMENT

### I. STANDARD OF REVIEW

The parties agree that this Court should apply a *de novo* standard of review in an interlocutory appeal of a denial of a motion for summary judgment. Syl. Pt. 1, *Findley v. State Farm Mut. Aut. Ins. Co.,* 213 W.Va. 80, 576 S.E.2d 807 (2002); Syl. pt. 2, *City of St. Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011). In determining whether to grant summary judgment, the Court is "to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Although the facts and inferences must be viewed in a light most favorable to the non-moving party, that party must produce "concrete" evidence which would allow a reasonable finder of fact to return a verdict in its favor. *Id.,* 192 W.Va. at 193, 451 S.E.2d at 759. Respondent does not dispute that qualified immunity provides more than immunity from damages, but also affords immunity from the burdens of litigation itself. *See J.H. v. W.Va. Div. of Rehab. Servs.*, 224 W.Va. 147, 157, 680 S.E.2d 392, 402 n.12 (2009).

### II. THE CIRCUIT COURT COMMITTED ERROR IN RELYING UPON ASSERTIONS OF FACT UNSUPPORTED IN THE RECORD.

This Court, in reaffirming the continued viability and importance of the defense of qualified immunity, has set forth a clear mandate that courts denying this defense at the summary judgment phase must sufficiently support their decisions. Syl. pt. 4, *The West Virginia DHHR v.*

*Payne*, 231 W.Va. 563, 746 S.E.2d 554 (2013). In its Order of September 2, 2021, the circuit court failed to clearly identify material facts which are disputed by competent evidence, and failed to provide a description of the competing evidence or inferences which allegedly give rise to a dispute precluding summary judgment, as required by *Payne*, *supra*. *Payne* requires that the Court's Order denying summary judgment based upon qualified immunity include such a description; or, if no such competent evidence of disputed facts is found in the record, summary judgment should be entered in favor of the Petitioners based upon qualified immunity. *See J.H. v. W.Va. Div. of Rehab. Servs.*, 224 W.Va. 147, 157, 680 S.E.2d 392, 402 n.12 (2009).

The circuit court's order contains numerous factual assertions that are either contrary to the record presented below or are not factually supported by the record presented below. Respondent attempts to minimize this issue by asserting that any errors are harmless error. However, Respondent's Brief only serves to highlight the absence of evidence supporting Respondent's factual assertions and argument, given that the majority of alleged facts relied upon by Respondent in support of the lower court's decision contain no citations to the factual record. Because these factual assertions are crucial to Mr. McDonald's opposition to summary judgment, the error cannot be considered harmless.

Mr. McDonald asserts that his rights were violated while he was in the restraint chair. One of Respondent's Counsel's primary arguments is that, while Mr. McDonald was in the restraint chair, he was "denied access to the bathroom, was rarely fed, if at all, and rarely supplied water[.]" Respondent's Brief, p. 1. Another significant argument asserted by Respondent's Counsel is that Mr. McDonald "in fact did vomit and urinate on himself while in the restraint chair for twenty-eight hours." Respondent's Brief, p. 8. Mr. McDonald's Counsel alleges that he was denied medical care. Respondent's Brief, p. 26. These assertions are repeated throughout Respondent's

Brief, but are accompanied by no citation to the record, because there is no evidence supporting these assertions contained in the record. Mr. McDonald attempts to excuse this by stating that "Defendants/Petitioners failed to inquire as to this issue during the discovery phase and during [Mr. McDonald's] deposition." Respondent's Brief, p. 8. Mr. McDonald misunderstands his burden to present a triable issue of fact pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. At this stage of the case, mere argument and assertion are not enough to overcome a properly supported Motion for Summary Judgment.

Unlike Mr. McDonald, the Petitioners have presented competent evidence in the form of documents demonstrating the factual events that occurred while Mr. McDonald was in the restraint chair. After Mr. McDonald was secured in the chair and transported to an interview room, the restraints were checked by a nurse. JA0186, 0193. Corrections staff monitored Mr. McDonald and maintained a watch log and medical staff conducting checks every 30 minutes and logged those separately. JA0186, 0198-0210. Mr. McDonald's legs and arms were freed at various times and he was allowed to stretch and use the bathroom. JA0199-0210. Mr. McDonald was provided food, water, and medical care the entire time he was in the chair. JA0199-0207. In addition, records from PrimeCare Medical, Inc., the healthcare provider at WRJ, indicate that Mr. McDonald was checked on by healthcare professionals no less than thirty-three (33) times while he was in the restraint chair. JA0208-0210. Mr. McDonald was offered water nearly every time he was checked on by PrimeCare nurses and the use of bed pans to allow Mr. McDonald to relieve himself were offered on at least twelve (12) checks, in addition to the times the watch log indicates Mr. McDonald was taken to the restroom by correctional officers. JA0208-0210.

If Mr. McDonald disputes the facts as set forth in the records, he has an affirmative burden of producing competent evidence to the contrary in the form of affidavits or other evidence in order

to overcome a motion for summary judgment. Rule 56 of the West Virginia Rules of Civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." W.V.R.C.P. 56(e). Mr. McDonald failed to do this. Instead, he relied upon mere argument and assertion. The lower court erred in adopting these arguments and assertions in the absence of any evidence supporting them. The sheer number of unsupported arguments and assertions relied upon by the lower court demonstrate that the error is not harmless, and in fact caused the lower court to wrongfully deny summary judgment to the Petitioners based upon qualified immunity.

Various portions of the circuit court's Order demonstrate reliance on these unsupported assertions regarding events while Mr. McDonald was in the restraint chair. Paragraph 2 of the Order incorrectly states that it is "undisputed individual Defendants strapped Plaintiff to a restraint chair where he languished for approximately twenty-eight (28) hours" JA0002. The term "languished" is disputed based on the watch log and medical log. JA0199-0210. Additionally, Paragraph 2 states "[Mr. McDonald] alleges he was denied access to the bathroom, was rarely fed, if at all, and rarely supplied water and urinated and regurgitated on himself." JA0002. There was no testimony or affidavit by Mr. McDonald, or any other competent evidence presented to the court below to support these statements. These statements are contrary to the record that was presented. JA0199-0210. Therefore, the lower court's reliance on them is error. Because these allegations are central to Mr. McDonald's argument that his rights were violated while he was in the restraint chair, this error cannot be considered harmless.

Paragraph 6 of the Order states "It is further undisputed Defendants have not provided any evidence which contradicts Plaintiff's assertions he was left in this restraint chair for twenty-eight (28) hours non-stop – all the while allegedly vomiting and urinating on himself." JA0004. There is competent evidence in the record which contradicts any assertion that Mr. McDonald was left in the restraint chair for twenty-eight hours non-stop. JA0199-0210. There is no evidence in the record presented that Mr. McDonald allegedly vomited or urinated on himself. Therefore, the statements in Paragraph 6 appear to state the opposite of what is contained in the record.

Respondent argues that the video produced in discovery ends at 2:44 a.m. and does not include video footage of the entire time Mr. McDonald is in the restraint chair. Respondent's Brief, p. 7. Based on this, Mr. McDonald suggests that this Court entertain a "negative inference" against the Petitioners. Respondent's Brief, p. 4. Respondent cites no legal authority for such a request. To the extent Respondent intends to make a request that a jury hearing the case be instructed that it may make an adverse inference, Mr. McDonald has not provided the predicate support for making a request for an adverse inference instruction, and Petitioners deny that such support exists.

More importantly, however, such a request would have no bearing on this Court's review of the issues based upon the record presented pursuant to Rule 56. In opposing a Rule 56 motion, Mr. McDonald has the burden of presenting a triable issue of fact by producing concrete evidence. *Painter v. Peavy*, 192 W.Va. 189, 192-193, 451 S.E.2d 755, 758-759 (1994), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). He may not rest upon mere allegations. W.V.R.C.P. 56(e). If Mr. McDonald has not met his burden of presenting a triable issue of fact by producing concrete evidence, he cannot ask the Court to excuse this fact by entertaining a negative inference based upon the absence of evidence. Before Mr. McDonald can ask this Court to consider an alternative version of the facts, Mr. McDonald must present

competent evidence to support it. Mr. McDonald has not supplied so much as an affidavit setting forth his alleged version of the facts. Thus, there is no evidence upon which the Court could rely other than the documentation demonstrating that Mr. McDonald was given food, water, breaks, access to the bathroom, and medical care during his time in the restraint chair. JA0199-0210.

Respondent argues that Mr. McDonald remained in the restraint chair "eighteen (18) hours longer than what the maximum is allowed by the chair's manufacturer, national standards and WVRJA rules and regulations dictate." Respondent's Brief, p. 3. Paragraph 6 of the Order adopts this argument, stating, "As stated in Defendants' Motion, Plaintiff languished in the 'devil's chair' for twenty-eight (28) hours – eighteen (18) hours longer than what the maximum is allowed by the chair's manufacturer, national standards and WVRJA rules and regulations dictate." JA0004. The court's task on a summary judgment motion is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994) (additional citation omitted). This paragraph appears to go beyond that scope to make a factual finding based on arguments presented by Mr. McDonald. Such findings are inappropriate at the summary judgment stage where facts are disputed.

Moreover, there is insufficient evidence presented to support this finding. With respect to the alleged manufacturer instructions, Mr. McDonald provided a single document to the court purporting to be manufacturer instructions for the restraint chair. JA0325. The document states "[d]etainees should not be left in the SureGuard Safety Restraint Chair for more than two hours." While a reasonable interpretation of this statement is that a detainee should not be left in the chair for more than two hours without breaks, Mr. McDonald asserts that two hours is a maximum time limit. Respondent's Brief, p. 3, fn 1. However, Mr. McDonald has not presented the court with any testimony providing any context for how this document is to be interpreted or how it applies,

particularly in light of breaks that Mr. McDonald was provided while in the restraint chair. Moreover, it is entirely unclear what is meant by the term "national standards" used in Paragraph 6, as no citation to any source is included. In Respondent's Brief, Mr. McDonald states in footnote 1 that "several other national standards state ten (10) hours maximum time with long breaks every two (2) hours." Respondent's Brief, pp. 3-4, fn 1. These alleged "national standards" are not identified or contained in the record, and therefore the circuit court's reliance on "national standards" is without support in the record. Other than Counsel's assertions, there is nothing in the record which provides a maximum time. Finally, Respondent has not identified what portion of the jail policy was allegedly violated. Policy 9031 provides:

> When it is necessary (for the safety of the inmate) to restrain an inmate for longer than two (2) hours, staff shall utilize only medically approved restraining devices such as, but not limited to, the stokes basket, restraint chair system, leather restraints, or bed. Correctional staff shall check the inmate at least every fifteen (15) minutes and the medical staff shall monitor the inmate every thirty (30) minutes to ensure that the restraints are not hampering circulation and to determine the general well being of the inmate.

JA0430-0431. The record demonstrates that this policy was followed, and the circuit court's finding to the contrary is without support in the record.

In a related argument, Counsel for Respondent asserts that "he was constantly and consistently ridiculed, embarrassed, laughed at for urinating on himself and mentally abused." Respondent's Brief, p. 5. Mr. McDonald's Counsel asserts "[t]he alleged acts of the individual Petitioners/Defendants were so hateful and hurtful Respondent has sought psychological counseling with Dr. David Frederick of Huntington, West Virginia." Respondent's Brief, p. 5. There is no citation to the record for these assertions because none exists. Again, rather than relying on sworn testimony, Mr. McDonald is relying solely on argument of counsel, which is not sufficient to meet the evidentiary burden to overcome summary judgment. Mr. McDonald has not

presented any testimony or affidavit supporting these assertions, and therefore it is error for the court to rely upon them in the face of contrary evidence presented in the record. The lower court erroneously relied on these unsupported assertions in Paragraph 9 of the Order. JA0005-0006.

Respondent's Brief similarly asserts a series of alleged facts related to Mr. McDonald's behavior while he was decontaminating from being sprayed with O.C., without a single citation to the factual record. Respondent's Brief, p. 3. These include allegations that the O.C. spray "wound up in both Respondent's rectum and urethra," that "the O.C. spray was present for hours," that using his head to knock on the door was the "only manner to get medical assistance," and that Mr. McDonald did not intend to disrobe, but that his clothes fell off and he was unable to pull up his pants. Respondent's Brief, p. 3. Again, Mr. McDonald has not submitted an affidavit in support of these assertions, nor cited to any other evidence in the record, and therefore they are not competent evidence to consider for purposes of a Rule 56 motion or this appeal. In some respects, these assertions are contrary to the record, which shows that Mr. McDonald admitted that he had pulled down his pants and made lewd hand gestures with his genitals, and was giving the officers "something to look at." JA0176-0177. Paragraph 5 of the Order states that "Defendants argue Plaintiff testified he deliberately disrobed to give the officers 'a show.' However, Plaintiff confirmed he said so jokingly since his clothes were already falling off due to being fully restrained in handcuffs." JA0003. There was no evidence presented to the lower court or this Court that Mr. McDonald made any statement "jokingly" as stated in Paragraph 5.

Another important misstep in the lower court's Order is contained in Paragraph 10, where the circuit court inexplicably mentions unrelated arguments in connection with an earlier Motion for Judgment on the Pleadings. JA0092-0109. Paragraph 10 states that certain Petitioners "took the stance that the individual Defendants' actions/inactions were criminal and outside the scope of

their employment at the WRJ." JA0006. This is not a correct characterization. The Motion for Judgment on the Pleadings is a distinct motion with a different standard of review, because, for purposes of the motion, the allegations in the Plaintiff's pleading must be taken as true. "A motion for judgment on the pleadings presents a challenge to the legal effect of given facts rather than on proof of the facts themselves." *Copley v. Mingo County Bd. Of Educ.*, 195 W. Va. 480, 466 S.E.2d 139 (1995). Any argument in connection with the Motion for Judgment on the Pleadings must be viewed in the context of that standard of review, taking the allegations in the pleading as true, and it was presented in that context.

In stark contrast, for purposes of a Motion for Summary Judgment, allegations in the pleadings are no longer accepted as true. Instead, the parties must present evidence of the facts. The Petitioners have at all times denied the factual assertions alleging wrongful conduct, as demonstrated by their denials of alleged wrongful conduct contained in their Answers to the initial Complaint and Amended Complaint. JA0033, JA0043, JA0053, JA0080. At no time have any of the Petitioners taken the position that any conduct in connection with this case was, in fact, criminal, because the Petitioners have at all times denied the factual assertions alleging wrongful conduct. The argument made in the earlier Motion for Judgment on the Pleadings is not a factual assertion or admission on the part of the Petitioners, and it is error to treat it as such.

Respondent has contributed to this error by repeatedly arguing that arguments made in support of the prior Motion for Judgment on the Pleadings has some bearing upon summary judgment. Respondent incorrectly states, "three (3) Petitioners/Defendants claim[] the other Petitioners/Defendants committed criminal acts." Respondent's Brief, p. 8. This argument is incorrect and attempts to conflate two completely different legal concepts. Respondent is attempting to equate the legal argument accepting the facts in the pleading as true with a factual

admission. To the extent that Paragraph 10 of the Order adopted this argument, it is an incorrect finding which is contrary to the record, which demonstrates a denial of all allegations of wrongdoing by Petitioners. Its presence in the Order is also contrary to the appropriate standard of review which must consider facts based on competent evidence, and not the allegations in the pleadings or any argument based upon the legal fiction of accepting those allegations as true.[1]

## III. THE CIRCUIT COURT'S DENIAL OF SUMMARY JUDGMENT TO LARRY CRAWFORD AND CARL ALDRIDGE BASED UPON QUALIFIED IMMUNITY IS BASED UPON AN INCORRECT APPLICATION OF THE LAW.

### A. THE CIRCUIT COURT ERRED IN CONCLUDING THAT MR. MCDONALD HAS ALLEGED VIOLATION OF CLEARLY ESTABLISHED LAW IN CONNECTION WITH SUPERVISION AND TRAINING.

Mr. McDonald asserts claims against Crawford and Aldridge for negligent supervision and training. The circuit court incorrectly concluded that the various general statements and provisions cited by Mr. McDonald constituted "clearly established law" in connection with supervision and training, and therefore incorrectly denied summary judgment on these claims.

Mr. McDonald argues that W.Va. Code §31-20-9, as well as the "Mission Statement" constitute "clearly established law" which was allegedly violated by Petitioners. Respondent's Brief, p. 16. As argued in Petitioner's Brief, W.Va. Code §31-20-9 and the "Mission Statement" does not constitute a clearly established law for qualified immunity purposes because they do not prescribe any specific behavior and do not clearly define any rights.[2]

In addition, the circuit court makes reference in its Order to other potential sources of "clearly established law," including unspecified "policies and provisions." JA0015. In

[1] The circuit court erroneously included C.O. Wallace and C.O. Fleming in the style of its Order, as well as in paragraph 1 of the order, though these parties had been dismissed with prejudice. JA0001-0002, JA0066-0067. This shows a lack of careful review in preparing the order and, taken with other inaccuracies, contributes to reversible error.

[2] The "Mission Statement" is not contained in the record, thus, no citation is provided by Respondent.

Respondent's Brief, Mr. McDonald argues that West Virginia C.S.R. § 95-1-1 and Document Number 9031 also constitutes clearly established law that was allegedly violated. However, Respondent does not explain how either of these were violated by Crawford or Aldridge, in connection with supervision or retention of employees or otherwise.

Respondent complains that "no jail/prison defendant in an excessive force/cruel and unusual punishment has ever stated that they violated a 'clearly established law' and, quite frankly, has never given an example of same[.]" Respondent's Brief, p. 17. Petitioners cannot comment on this statement, other to state that this Court has set forth guidance for determining what constitutes clearly established law in this context, and some specificity is required. Respondent has not identified any that qualifies as clearly established law in the context of this case.

### B. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT MR. MCDONALD HAS PRESENTED A TRIABLE ISSUE OF FACT REGARDING ALLEGED FRAUDULENT, MALICIOUS, OR OPPRESSIVE CONDUCT BY CRAWFORD OR ALDRIDGE.

Qualified immunity can be defeated if the agency employee or official acted maliciously, fraudulently, or oppressively. Syl. Pt. 11, *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). Paragraph 40 of the circuit court's Order defines the terms fraud, malice, and oppression. JA0019. In Paragraph 41, the circuit court appears to conclude that a question of fact exists with respect to whether Petitioners behaved maliciously, fraudulently, or oppressively. JA0020. There is no factual support for any conduct on the part of Crawford or Aldridge that could remotely be considered malicious, fraudulent, or oppressive, in connection with training and supervision or otherwise. Respondent discusses the definitions of fraud, malice, and oppression or oppressive. Respondent's Brief, pp. 22-23. Respondent does not engage in any discussion of the factual predicates for any such findings against Crawford or Aldridge. The court's conclusion that qualified immunity is defeated on this basis is unsupported and erroneous.

### C. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT CRAWFORD AND ALDRIDGE CAN BE VICARIOUSLY LIABLE FOR THE TORTIOUS CONDUCT OF OTHER WVRJCFA EMPLOYEES.

Respondent devotes a significant portion of Respondent's Brief arguing that the correctional officers involved in this case were within the scope of their employment. These arguments are not responsive to Petitioners' argument. Petitioners have not asserted as grounds for this appeal that any of the officers were outside the scope of their employment. Instead, Petitioners assert that Crawford and Aldridge cannot be vicariously liable for the allegedly tortious conduct of other correctional officers because Crawford and Aldridge are not their employers. There is no analysis in the Respondent's Brief or the lower court's Order explaining how other correctional officers could be considered employees or agents of Crawford or Aldridge individually. Respondent does not cite any legal authority supporting the proposition that a supervisory official, as opposed to the employing agency itself, can be considered the employer or principal for purposes of vicarious liability. To the extent that this flawed analysis prevented summary judgment from being entered in favor of Crawford and Aldridge, the decision should be reversed.

## IV. CORRECTIONAL OFFICERS PAUL DIAMOND, DON VANCE, DAVID RODES, AND JOSHUA SCARBERRY ARE ENTITLED TO QUALIFIED IMMUNITY ON MR. MCDONALD'S CLAIMS BASED ON THE RECORD PRESENTED BELOW.

The circuit court denied summary judgment to Correctional Officers Diamond, Vance, Rodes, and Scarberry, without conducting any analysis regarding the conduct of each officer in connection with Mr. McDonald's claims. This has resulted in a flawed analysis and an erroneous denial of summary judgment based on qualified immunity. Respondent does not address this issue. Instead, Respondents' Brief perpetuates this problem by continuing to lump all Petitioners together into one collective group, because Respondent is unable to point to evidence of conduct on the part of each Petitioner that could constitute a violation of his rights.

### A. THE CIRCUIT COURT ERRED IN FAILING TO EVALUATE QUALIFIED IMMUNITY IN CONNECTION WITH MR. MCDONALD'S CLAIMS OF VIOLATION OF HIS CONSTITUTIONAL RIGHTS BASED ON ALLEGED EXCESSIVE FORCE AND ALLEGED FAILURE TO PROVIDE MEDICAL CARE.

Mr. McDonald alleges that his constitutional rights were violated based on use of excessive force against him and failure to provide medical care. The circuit court's Order does not identify the "conduct complained of," in connection with each Petitioner. It is vague to the extent that it refers collectively to "the offending officers" without indicating what conduct of each officer is being addressed. Similarly, the circuit court's order does not reach the relevant question of whether *the specific conduct complained of* deprived Plaintiff of any rights, privileges, or immunities and provides no analysis on this central point. Therefore, the court never actually identifies the conduct of each Petitioner that it concludes could constitute a potential violation of Mr. McDonald's rights.

Respondent argues that "the level of force used simply regarding the O.C. spray was excessive, unreasonable and punitive." Respondent's Brief, p. 20. However, based on the record, only Cpl. Diamond was involved in deploying O.C. spray. Respondent does not identify any conduct by other officers that could arguably support claims against them in connection with the deployment of O.C.

Additionally, Respondent states "all remaining individual Petitioners/Defendants were complicit in assuring Respondent remained in the restraint chair for the following twenty-eight (28) hours." Respondent's Brief, p. 7. This assertion does not contain any citation to the record or to any facts in the record which arguably support this assertion. Respondent does not cite to any facts that could demonstrate the role that each individual defendant had, if any at all, in Mr. McDonald's continued placement in the restraint chair. It is Respondent's burden to produce a triable issue of fact as to each of his claims against each individual alleged to be at fault.

Significantly, Mr. McDonald does not cite to anything in the record supporting his assertion that he requested, needed, or was denied medical care while he was in the restraint chair or at any other time. He cannot rely upon speculation and conjecture or simply lumping all individuals together.

Respondent's Brief makes reference to "the misrepresentations of defense counsel." Respondent's Brief, p. 27. Respondent's Brief does not identify any alleged "misrepresentations" allegedly made by Petitioners' counsel, so the Petitioners are unable to respond in any detail, other than to strongly deny that any misrepresentations have been made.

### B. CPL. PAUL DIAMOND IS ENTITLED TO QUALIFIED IMMUNITY IN CONNECTION WITH MR. MCDONALD'S CLAIMS OF VIOLATION OF HIS CONSTITUTIONAL RIGHTS BASED ON ALLEGED EXCESSIVE FORCE AND ALLEGED FAILURE TO PROVIDE MEDICAL CARE.

Cpl. Diamond is entitled to qualified immunity because there is insufficient evidence that he violated any clearly established right of Mr. McDonald. The doctrine of qualified immunity provides wide latitude to prison officials in making decisions, so long as the decisions do not violate a clearly established right.

In the case at bar, neither spraying Mr. McDonald with O.C., nor making the decision to place him in the restraint chair, meet the standard set forth by the United States Court in *Iko v. Shreve*, 535 F.3d 225, 235 (4th Cir. 2008). In the specific context of this case, and in light of preexisting law, spraying Mr. McDonald with O.C. was not unlawful. Therefore, it would not have been reasonably apparent to an officer in Cpl. Diamond's position that spraying Mr. McDonald with O.C. was unlawful, and therefore, he is entitled to qualified immunity.

Mr. McDonald's confinement in a restraint chair was also reasonable in light of the circumstances and does not constitute excessive use of force. In this matter, Mr. McDonald was placed in a restraint chair because he was a safety risk to himself and WRJ officers. After being placed in the recreation yard to decontaminate, Mr. McDonald was acting erratically, shouting and

yelling, "but nothing he was saying was making sense. He was just talking out of his head." JA0192. He was banging his head off the door. JA0192.

Respondent continues to argue that there were other means available to subdue Mr. McDonald. Respondent's Brief, p. 4. Paragraph 7 of the circuit court's Order alleges "the evidence showed that, the Defendants had other means to subdue Plaintiff." JA0005. There is no testimony in the record which would support the availability of these alternatives in this situation, and they appear to be based on sheer speculation. Each of these "other means" would not have prevented Mr. McDonald from hitting his head against a door or wall, which is the behavior that was deemed to be creating a danger to Mr. McDonald, and which factored into Cpl. Diamond's decision to place him in a restraint chair. JA0186, 0198.

The only remaining conduct at issue is the continued use of the restraint chair for approximately 28 hours. Courts in the Fourth Circuit have found that "placement of recalcitrant, disruptive, or suicidal inmates in restraint chairs as a means to maintain 'order and control' is not a violation of the Constitution." *Strickland v. Turner*, No. 9:15-0275-PMD-BM, 2018 U.S. Dist. LEXIS 50870, 2018 WL 3151639, at *19 (D.S.C. Jan. 26, 2018), Report Recommendation Adopted, No. 19:15-cv-275-PMD-BM, 2018 U.S. Dist. LEXIS 48251, 2018 WL 1443953 (D.S.C. Mar. 23, 2018) (additional citations omitted). Moreover, Mr. McDonald has failed to present any evidence that the conduct of Cpl. Diamond was punitive in nature. Rather, the totality of the circumstances presented by Mr. McDonald's conduct on the night in question clearly shows that his placement in the restraint chair was initially warranted due to his behavior on the recreation yard and continued to be appropriate as a result of his erratic behavior once in the restraint chair.

Further, there is no factual basis upon which to attempt to hold Cpl. Diamond liable for the entirety of the time that Mr. McDonald was restrained. Respondent does not address this argument

in Respondent's Brief. According to the record presented, Cpl. Diamond was not present during the entire time because he went off shift. He explained that "there was a period of time where I wasn't on shift, my shift had ended, and it went to another shift." JA0313. It would have then been up to the supervision, as well as medical personnel, "to make a determination based on his behavior how long he was to stay in the chair for his safety for erratic behavior[.]" JA0313. Mr. McDonald was in the chair "for a couple of shifts." JA313. Eventually, Cpl. Diamond came back on shift because he is the individual that ultimately released Mr. McDonald from the chair. JA0207.

In the specific context of this case, and in light of preexisting law, any role that Cpl. Diamond played in continuing to keep Mr. McDonald restrained was not unlawful. Therefore, it would not have been reasonably apparent to an officer in Cpl. Diamond's position that doing so was unlawful, and therefore, he is entitled to qualified immunity.

### C. OFFICERS VANCE, RODES, AND SCARBERRY ARE ENTITLED TO QUALIFIED IMMUNITY IN CONNECTION WITH MR. MCDONALD'S CLAIMS OF VIOLATION OF HIS CONSTITUTIONAL RIGHTS BASED ON ALLEGED EXCESSIVE FORCE AND ALLEGED FAILURE TO PROVIDE MEDICAL CARE.

The circuit court's analysis fails to identify any conduct on the part of Officers Vance, Rodes, and Scarberry specifically that could be considered a constitutional violation, or that would overcome qualified immunity. Respondent's Brief similarly fails to conduct any independent analysis of the conduct of Officers Vance, Rodes, and Scarberry that he believes would establish liability.

Mr. McDonald claims that being sprayed with O.C. was unlawful and violated his rights. However, based on the record, the spraying was done solely by Cpl. Diamond. Other officers may have been present when Mr. McDonald was sprayed by O.C., but there is no evidence that they played any role in that action or decision. Simply being present when Mr. McDonald was sprayed by O.C. does not give rise to a cause of action.

Similarly, the record shows that the decision to place Mr. McDonald in the restraint chair was made by Cpl. Diamond. JA0300. While Officer Rodes is identified as having assisted in placing Mr. McDonald in the restraint chair, there is no evidence that Officer Rodes played any role in making that decision. JA0193, 0198. Beyond the initial decision to place Mr. McDonald in the restraint chair, it was in the discretion of the supervising officer on shift, based upon behavior and input from medical staff, how long the inmate would remain in the restraint chair. JA0313-0314. There is no evidence that Officers Vance, Rodes, or Scarberry were ever in a position of determining when it was appropriate to release Mr. McDonald from the restraint chair, and Mr. McDonald has not produced any documents or witnesses implicating them in any decision that resulted in his continuing to be held in the restraint chair. Mr. McDonald has not pointed to any conduct by these officers involving the restraint chair that he believes to be unlawful.

Petitioners are all "non-medical prison personnel" entitled to rely on the professional judgment of trained medical personnel regarding the need, or the absence of any need for medical treatment. There is no factual support for any allegation that Petitioners were personally involved in the denial of treatment, that they deliberately interfered with treatment, or that they were indifferent to a medical provider's misconduct. In the specific context of this case, and in light of preexisting law, it would not have been reasonably apparent to an officer in the positions of Petitioners that their actions were unlawful, and therefore, they are entitled to qualified immunity.

### D. THE CIRCUIT COURT ERRED IN CONCLUDING THAT MR. MCDONALD HAS ALLEGED VIOLATION OF CLEARLY ESTABLISHED LAW REGARDING HIS TORT CLAIMS AGAINST CPL. DIAMOND AND OFFICERS VANCE, RODES, AND SCARBERRY, AND THEY ARE ENTITLED TO QUALIFIED IMMUNITY.

Mr. McDonald alleges various tort claims against Cpl. Diamond and Officers Vance, Rodes, and Scarberry. The circuit court incorrectly concluded that the various general statements

and provisions cited by Mr. McDonald constituted "clearly established law" in connection with these claims, and therefore incorrectly denied summary judgment.

Mr. McDonald argues that West Virginia Regional Jail and Correctional Facility Authority's Policy and Procedure Statement 9031, regarding use of force, is a "clearly established law" which was allegedly violated. The circuit court erroneously adopted this conclusion in its Order, discussing this Policy and Procedure Statement in Paragraphs 33, 34, 35, and 36. JA0015-0018. However, Policy and Procedure Statement 9031 does not constitute a clearly established law for qualified immunity purposes because it does not clearly define any rights. Policy and Procedure Statement 9031 does not provide any basis to defeat qualified immunity in this case.

Respondent's Brief asserts that Mr. McDonald did not receive immediate medical attention as set forth in policy. However, as argued above, Mr. McDonald does not cite to anything in the record supporting his assertion that he requested, needed, or was denied medical care while he was in the restraint chair or at any other time.

Respondent's Brief mentions West Virginia C.S.R. § 95-1-1 as a potential additional source of clearly established law. Respondent's Brief, p. 17. However, Respondent does not cite to any particular portion of the C.S.R. nor provide any explanation of any of its provisions or how they were allegedly violated. At best, Mr. McDonald has alleged nothing more than a violation of abstract rights. Mr. McDonald has not identified any conduct on the part of Cpl. Diamond or Officers Vance, Rodes, or Scarberry that could be considered a violation of a clearly established law or right sufficient to overcome qualified immunity as described in *A.B., supra.* Accordingly, these Officers are entitled to qualified immunity on Mr. McDonald's tort claims.

### E. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT MR. MCDONALD HAS PRESENTED A TRIABLE ISSUE OF FACT REGARDING ALLEGED FRAUDULENT, MALICIOUS, OR OPPRESSIVE CONDUCT BY CPL. DIAMOND AND OFFICERS VANCE, RODES, AND SCARBERRY.

Qualified immunity can be defeated if the agency employee or official acted maliciously, fraudulently, or oppressively. Syl. Pt. 11, *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). There is no factual support for any conduct on the part of Cpl. Diamond, or Officers Vance, Rodes, and Scarberry, that could be considered malicious, fraudulent, or oppressive. Respondent discusses the definitions of fraud, malice, and oppression or oppressive. Respondent's Brief, pp. 22-23. However, Respondent does not engage in any discussion of the factual predicates for any such findings against each of these individuals. Therefore, the circuit court's conclusion that qualified immunity is defeated on this basis is erroneous and unsupported.

## V. THE WVRJCFA IS ENTITLED TO QUALIFIED IMMUNITY ON MR. MCDONALD'S CLAIMS BASED ON THE RECORD PRESENTED BELOW.

The circuit court's Order erroneously concludes in Paragraph 26 "that a prison official, such as . . . WVRJA" can be held liable under the Eight Amendment for deliberate indifference to inmate health or safety. JA0011. Respondent's Brief does not address this issue. This finding is clearly erroneous because the WVRJCFA is a state agency, not a prison official, and is expressly not a person who can be liable for deliberate indifference under 42 U.S.C. § 1983.

With respect to Mr. McDonald's tort claims, the WVRJCFA is entitled to qualified immunity for the same reasons that the individual officers are entitled to qualified immunity. In the absence of a showing that discretionary governmental acts violated clearly established laws of which a reasonable person would have known, "both the State and its officials or employees charged with such acts or omissions are immune from liability." Syl. pt. 11, *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). Because each Petitioner is entitled to qualified immunity, so too is the WVRJCFA.

## CONCLUSION

Respondent's Brief reinforces the fact that Respondent has relied on unsupported allegations and argument in opposing summary judgment, instead of competent evidence and concrete facts as required by Rule 56. As a result, the circuit court's decision to deny summary judgment improperly relies upon information unsupported in the record. When the evidence is viewed in light of the appropriate standard of review, the Petitioners are entitled to summary judgment on all claims.

Therefore, the Petitioners respectfully ask this Court to REVERSE the circuit court's order denying summary judgment on all claims, and to REMAND this case to the lower court with instructions to enter summary judgment on all claims, on the basis that the Petitioners are entitled to qualified immunity.

Respectfully Submitted,

**Administrator Larry Crawford, Captain Carl Aldridge, C.O. Paul Diamond, C.O. Don Vance, C.O. David Rodes, C.O. Joshua Scarberry, and The West Virginia Regional Jail and Correctional Facility Authority,**

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

**No. 21-0732**

**(Circuit Court of Cabell County Civil Action No. 18-C-240)**

**Administrator Larry Crawford, individually and in his official capacity; Captain Carl Aldridge, individually and in his official capacity; C.O. Paul Diamond, individually and in his official capacity; C.O. Don Vance, individually and in his official capacity; C.O. David Rodes, individually and in his official capacity; C.O. Joshua Scarberry, individually and in his official capacity; and The West Virginia Regional Jail and Correctional Facility Authority, an agency of the State of West Virginia**

**Defendants Below, Petitioners**

**vs.** **No. 21-0732**

**Michael A. McDonald,**

**Plaintiff Below, Respondent.**

## CERTIFICATE OF SERVICE

We certify that we have caused to be placed in first class mail, with postage prepaid, a copy of "Reply Brief" to counsel of record as follows:

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DONE this 8th day of March, 2022.

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