No. 21-0732

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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;
The WEST VIRGINIA REGIONAL JAIL and CORRECTIONAL FACILITY AUTHORITY, an agency of the State of West Virginia;
and, JOHN DOE, unknown person or persons,

Petitioners,

v.

MICHAEL A. McDONALD,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

1. **THE CIRCUIT COURT DID NOT RELY UPON ASSERTIONS OF FACT UNSUPPORTED BY THE RECORD.**

2. **THE CIRCUIT COURT'S DENIAL OF SUMMARY JUDGMENT TO LARRY CRAWFORD AND CARL ALDRIDGE BASED UPON QUALIFIED IMMUNITY WAS CORRECT.**

3. **CORRECTIONAL OFFICERS DIAMOND, VANCE, RODES AND SCARBERRY ARE NOT ENTITLED TO QUALIFIED IMMUNITY BASED ON THE RECORD PRESENTED BELOW.**

4. **THE WVRJCFA IS NOT ENTITLED TO QUALIFIED IMMUNITY BASED ON THE RECORD PRESENTED BELOW.**

FACTUAL and PROCEDURAL HISTORY

Plaintiff below/Respondent Michael A. McDonald (Respondent) was incarcerated at Western Regional Jail (WRJ) in Barboursville, Cabell County, West Virginia, a jail operated by Petitioner/Defendant below West Virginia Regional Jail and Correctional Facility Authority (WVRJA), in June, 2016, when he was allegedly subjected to abuses at the hands of Petitioners/Defendants below C.O. Diamond, C.O. Vance, C.O. Rodes, C.O. Scarberry, C.O. Wallace and C.O. Fleming. These Petitioners/Defendants are hereinafter sometimes referred to as "the individual Defendants." Petitioners/Defendants WVRJA, Crawford and Aldridge are sometimes referred to as "supervisory Defendants." Specifically, during Respondent's June, 2016 incarceration at WRJ, Diamond, without being provoked, sprayed O.C. chemical agent in Respondent's face and eyes from approximately four (4) inches from Respondent's face. Shortly thereafter, the individual Defendants/Petitioners strapped Respondent to a restraint chair where he languished for approximately twenty-eight (28) hours. Respondent was denied access to the bathroom, was rarely fed, if at all, and rarely

supplied water and urinated and regurgitated on himself. As Respondent was a pre-trial detainee, these abuses clearly violated the Fourth, Ninth and Fourteenth Amendments of the United States Constitution. As Defendants/Petitioners correctly stated in their various Motions and Petitioners' Brief, the Eighth Amendment is inapplicable as Respondent was not a convicted felon at the time of the abuses.

As argued in Circuit Court, when reviewing Respondents' Motions and subsequent Petitioners' Brief, it seems they are a bit askew in regard to the facts as presented by the evidence, especially the limited video produced. First, Respondent was clearly upset in being placed in a holding cell that was packed to the gills with other inmates and calmly made it known to the officers without threats of violence or self-infliction of pain. **Please see** JA video at 1:08 AM. Second, there were several options besides implementing O.C. spray directly into Respondent's eyes when the officers confronted him. The video clearly shows a docile Respondent who had his hands down to his side when sprayed. There were four (4) officers surrounding him. As argued below, all these officers had to do was simply place their hands on Respondent's wrists, put them behind his back and walk him to where they wanted him to go. In fact, when asked "if there is four officers, couldn't you have just placed your hand on his wrist and another officer placed his hand on the wrist and escort him into that holding cell?" Respondent Diamond testified in his deposition "that could have happened, yes." (**320-1**). However, that was not done. As argued, Respondent Diamond obviously subscribes to the "shoot first, ask questions later" method of use of force. As will be described in detail below, this is excessive force/cruel and unusual punishment.

As for Respondent's conduct in the WRJ yard after being sprayed, he clearly was attempting to alleviate the extreme burning of his eyes and skin from the O.C. spray by using the clothes he had on his person. As argued below, Respondent would be remiss in not informing the Court the O.C. spray implemented wound up in both Respondent's rectum and urethra in addition to his face, eyes and chest, thereby causing insurmountable pain and discomfort forcing Respondent to act in a painful and erratic manner in his futile pleas for relief. Additionally, any attempts by the individual Defendants/Respondents of decontaminating Respondent were half-hearted, at best, as the O.C. spray was present for hours. Further, in order to get the attention of the officers Respondent had to use body parts such as his head to knock on the door as he was fully restrained and it was the only manner to get medical assistance. As for Respondents' collective assertion Respondent was likewise erratic in disrobing, any loss of clothing was due to it falling down/off of Respondent while fully restrained and unable to pull up pants, not some intentional motive such as being disruptive or truculent. As stated in Circuit Court, this Court should keep in mind Respondent was in extreme pain and discomfort due to the O.C. and its after effects on all of his body parts, some more sensitive than others.

Respondent contends the most egregious acts of cruel and unusual punishment concern the use of the restraint chair. It is undisputed Respondent languished in the "devil's chair" for over 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.[1] In fact, the manufacturer clearly states on its website and accompanying instructional

1 As stated in Respondent's Response to Petitioners' Motion for Summary Judgment, the manufacturer states the maximum amount of time in restraint chair is two (2) hours. However, several other national standards

video "Detainees should not be left in the SureGuard Safety Restraint Chair for more than two hours. The SureGuard Safety Restraint Chair should **never** be used as a means of punishment." **325,** emphasis in original. While Petitioners repeatedly claim Respondent was treated with humanity and fairness by given bathroom breaks, food and water and time to stretch and prevent atrophy, this is just not true and no evidence supports this contention. It is undisputed video of the very long incident/incidents cuts off at 2:44 AM – over twenty-six (26) hours before Plaintiff/Respondent was finally released from the restraint chair. **JA – video**. Petitioners have not provided any evidence which contradicts Respondent's assertions he was left in this restraint chair for twenty-eight (28) hours non-stop – all the while regurgiting and urinating on himself. On a related note, the video and records reflect officers with a hand-held video camera filming Respondent's alleged erratic behavior and actions. In fact, a log entry states "all interactions with sprayed inmate was [sic] recorded." **327.** This video evidence was not supplied to Respondent during the discovery phase. To that end, Respondent argues only a negative inference towards Petitioners can be deduced from failing to disclose the same, namely, contradicting any assertion of belligerence on behalf of Respondent.

Respondent argues Petitioners had other means to subdue him in a less Draconian manner. For example, if Petitioners believed Respondent was a threat to himself or others, the individual Petitioners could have placed Respondent in an interview room, with or without restraints. If that was not feasible, Respondent could have been placed in a non-contact interview room, again, with or without restraints. If Respondent espoused suicidal threats,

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state ten (10) hours maximum time with long breaks every two (2) hours.

which no evidence suggests, the individual Petitioners/Defendants could have placed him in a suicidal "pickle suit" in one of the aforementioned rooms. These methods have been employed hundreds of times prior to the incidents which gave rise to this civil matter.

Additionally, the record reflects there seems to be contradictory statements/evidence surrounding Respondent's actions and his time in the restraint chair. For example, even though individual Petitioners/Defendants state Respondent was being loud and erratic, nothing in the records indicate a psychiatric consult was ordered. **318**. Also, the "Offender Watch Log" shows several entries wherein Respondent was calm, docile and just sitting breathing. **332-7**. However, he was still kept in the restraint chair after these entries clearly show Respondent should have been released. As addressed more thoroughly below, WVRJA policy and procedure dictates "when the inmate's actions cease, force should cease." This was not done, hence the alleged excessive force/cruel and unusual punishment, the ultimate violation of 42 U.S.C. 1983 and all other of Respondent's claims.

While Respondent argues the acts of excessive force/cruel and unusual punishment were dreadful, the individual Petitioners/Defendants did not stop with physical torture. Sadly, during his time in the restraint chair Respondent alleges he was constantly and consistently ridiculed, embarrassed, laughed at for urinating on himself and mentally abused. The 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. Simply put, Respondent argues the emotional toll of the injuries still exist and still haunt him.

A Complaint in this matter was filed on or about May 2, 2018 alleging various claims against all Petitioners. Various Petitioners were served shortly thereafter and discovery

commenced. All Petitioners filed their joint Motion for Summary Judgment on or about April 5, 2021. Respondent filed his Response to Petitioners' Motion for Summary Judgment on June 15, 2021 and a Hearing on the Motion for Summary Judgment was held before the Honorable Christopher D. Chiles on June 30, 2021. The lower Court entered its Order denying Petitioners' Motion for Summary Judgment on September 2, 2021. It is from that Order Petitioners filed their joint appeal and Respondent Michael McDonald timely responds to Petitioners' Brief.

LEGAL AND FACTUAL ARGUMENTS

Standard of Review

Respondent partially accepts the Standard of Review as set forth Petitioners' Brief. The recognized standard is "it is well-established that [t]his Court reviews *de novo* the denial of a motion for summary judgment." In regard to the Summary Judgment standard, this Court held that when there is a genuine issue of material fact, the Court views the evidence in the light most favorable to the nonmoving party. Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995). This Court further held in Painter v. Peavy that summary judgment is appropriate only when the nonmoving party cannot "satisfy the burden of proof by offering more than a mere 'scintilla of evidence,'" and "produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." 192 W.Va. 189, 451 S.E.2d 755 (1994). Simply put, if the nonmoving party can produce evidence that a reasonable jury could return a verdict in its favor, summary judgment should be denied. As clearly stated above and below, Respondent has met any and all burdens concerning this standard.

I. The Circuit Court relied on facts and allegations supported by the record.

The facts in conjunction with the allegations presented to the lower Court were clearly deduced in the discovery phase and in the record. First, while Respondent concedes former Defendants Wallace and Fleming were contained in the style of the lower Court's September 2, 2021 Order, that in no way is prejudicial to the remaining parties as the style used was the original style of the case and the Order can simply be amended to reflect the remaining parties.2

Second, Defendants/Petitioners have issue with who "strapped Plaintiff to a restraint chair where he languished for approximately twenty-eight (28) hours" claiming the "individual Defendants" were only Diamond and Rodes. However, all remaining individual Petitioners/Defendants were complicit in assuring Respondent remained in the restraint chair for the following twenty-eight (28) hours. As for the term "languished," while the watch log and medical log claim Respondent was given bathroom and other breaks, Respondent disputes that assertion because, as stated above, video of the incident cuts off at 2:44 AM – over twenty-six (26) hours before Respondent was finally released from the restraint chair. This video was requested and received by Respondent in the discovery phase and was presented as stated – no more, no less. To that end, Respondent argues, and will argue at trial, any negative inference in refusing to supply video of the **entire** incident must be taken in a light unfavorable to the Petitioners as they have sole dominion over the production and storage of any and all videos.

Third, as for the undisputed amount of time Respondent spent in the restraint chair (twenty-eight hours) and its colloquial term "devil's chair," these issues are harmless error. While

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2 Like other issues addressed below, Respondent argues Petitioners could have simply alerted the Circuit Court to this harmless error to amend the Order. The docket sheet indicates this was not done. JA 546.

Petitioners are correct in stating they did not assert the term and amount of time in their Motion for Summary Judgment, the facts remain and constitute no error which would be presented to the trier of fact as the issues could be addressed in a pre-trial conference before the lower Court.

Fourth, Respondent in fact did vomit and urinate on himself while in the restraint chair for twenty-eight (28) hours. The fact Defendants/Petitioners failed to inquire as to this issue during the discovery phase and during his deposition is of no fault of Plaintiff/Respondent. Further, as with the other issues addressed above, these disputes can be resolved during the pre-trial conference by and through various motions and have no bearing in regard to this appeal.

Finally, Petitioners take issue with Respondent counsel addressing a remark during the hearing on the Motion for Summary Judgment held before the Honorable Christopher D. Chiles on June 30, 2021. Specifically addressed in the hearing, Plaintiff/Respondent advised the lower Court that in their Motion for Judgment on the Pleadings, Petitioners/Defendants Crawford, Aldridge and WVRJA, in referring to the individual Petitioners/Defendants' conduct towards Respondent, stated "no purpose could ever be served by such criminal conduct." **103**. Basically, the lower Court and this Court are presented with a novel concept and argument – three (3) Petitioners/Defendants claiming the other Petitioners/Defendants committed criminal acts. This issue's relevance is compounded by <u>all</u> parties being represented by the same counsel. In summary, if the parties and/or their counsel did not believe the statement, they should not have made it and, therefore, the lower Court did not err when addressing such a potent claim of criminal culpability. Like all other issues throughout both appellate briefs, this can be addressed by and through pre-trial Motions and arguments at the pre-trial Hearing.

II. The Circuit Court did not err in denying dismissal of claims under to the doctrine of qualified immunity for all Defendants/Petitioners and, relatedly, under the doctrine of vicarious liability/*respondeat superior* in regard to Defendants/Petitioners WVRJA, Crawford and Aldridge.

As most of Defendants'/Petitioners' remaining arguments before this Court revolve around the doctrine of qualified immunity and vicarious liability, Plaintiff/Respondent will address them together as needed for the sake of judicial economy and convenience. Further, as the lower Court did not err in denying Defendants'/Petitioners' Joint Motion for Summary Judgment and the same arguments are made by those parties in this appeal, Plaintiff/Respondent will rely on the arguments he made and addressed in Circuit Court.

VICARIOUS LIABILITY/SCOPE OF EMPLOYMENT REGARDING SUPERVISORY DEFENDANTS/PETITIONERS

In their Motion for Summary Judgment, Defendants/Petitioners WVRJA, Crawford and Aldridge, supervisory Defendants, did not address vicarious liability or scope of employment as it pertains to the individual Defendants. However, they did address it in their joint appeal. As argued in Circuit Court, Plaintiff/Respondent believes these legal theories needed to be addressed as they pertain to Defendants/Petitioners WVRJA's, Crawford's and Aldridge's argument regarding qualified immunity. As stated in the Complaint, Plaintiff/Respondent asserts various negligence claims against Defendants/Petitioner WVRJA, Crawford and Aldridge including negligent training and supervision in addition to the claims against the individual Defendants/Petitioners and non-party offenders. To that end, Plaintiff/Respondent seeks to hold Defendants/Petitioners WVRJA, Crawford and Aldridge liable in their own right in addition to being vicariously liable for the misconduct of WRJ employees who were clearly acting within the scope of their employment, including the individual Defendants/Petitioners. Concerning the

theory of vicarious liability, Defendants/Petitioners WVRJA, Crawford and Aldridge can clearly be held liable for the individual Defendants/Petitioners and non-party employees performing duties within the scope of their employment by engaging in the alleged conduct.

In West Virginia, scope of employment has been broadly defined and applied this Court. In Syllabus Point 4 of Griffith v. George Transfer and Rigging, Inc., 157 W.Va. 316, 201 S.E.2d 281 (1973), this Court held that whether the agent "was acting within the scope of his employment and about his employer's business at the time of a collision, is generally a question of fact for the jury and a jury determination on that point will not be set aside unless clearly wrong."

This Court repeatedly has held, consistent with Griffith, the issue of whether the acts committed by an employee or agent were within the scope of employment, thereby rendering the employer or principal liable under *respondeat superior*, is a question of fact for a jury to decide, even where the acts in question were tortious, violent, or criminal. For example, in Nees v. Julian Goldman Stores, Inc., 109 W.Va. 329, 154 S.E. 769 (1930), the store manager had left the premises and had gone to the home of a pregnant customer to retrieve certain unpaid goods. While at the customer's home, the store manager physically attacked and injured her, causing her to have a miscarriage. In affirming the judgment for the plaintiff against the manager's employer, this Court held in Syllabus Point 1:

> The test of liability of the principal for the tortious act of his agent is whether the agent at the time of the commission of the act was acting within the scope of his authority in the employment of the principal, and not whether the act was in accordance with his instructions. If such act be done within the scope of authority, and in furtherance of the principal's business, the latter is responsible. (Gregory's Adm. v. Railroad, 37 W.Va. 606). And where the evidence and circumstances are in sharp conflict respecting the scope of the authority of the agent, a jury question arises which should be submitted with

proper instructions.

See also Syllabus Point 2, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958).

In the first decision issued in the Nees case, Nees v. Julian Goldman Stores, Inc., 106 W.Va. 502, 505, 146 S.E. 61, 62 (1928), this Court elaborated on the elastic nature of what is meant by scope of employment:

> A master may not limit his liability to such conduct of his servant as is discreet and within the bounds of propriety, and avoid liability as to such conduct as is indiscreet and improper. Where a master sends forth an agent he is responsible for the acts of his agent within the apparent scope of his authority, though the agent oversteps the strict line of his duty.

See also Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 381, 504 S.E.2d 419, 431 (1998). This Court also held in Travis that "[w]e have generally accepted the proposition that an employer may be liable for the conduct of an employee, even if the specific conduct is unauthorized or contrary to express orders, so long as the employee is acting within the scope of his general authority and for the benefit of the employer." Travis, at 431, 381. (emphasis added).

Scope of employment has been notoriously difficult for courts and legal scholars to define with any precision. In Faragher v. City of Boca Raton, 524 U.S. 775, 796, 118 S.Ct. 2275, 2287, 141 L.Ed.2d 662, 674 (1998), the United State Supreme Court commented, "[a]s one eminent authority has observed, the 'highly indefinite phrase' is 'devoid of meaning in itself' and is 'obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not.' W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keaton on the Law of Torts 502 (5th ed. 1984)." Some factors that a jury may consider in determining whether certain acts were within the scope of employment can be found in

Restatement (Second) of Agency §228 (1958), where scope of employment is defined as follows:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

In applying the general rule that scope of employment is a factual question that must be resolved by a jury, this Court has held that the following tortious, violent or criminal acts may be found by a jury to be within the scope of employment, rendering the employer liable under *respondeat superior*:

> Fist fight or physical assault--Barath v. Performance Trucking Co., Inc., 188 W.Va. 367, 424 S.E.2d 602 (1992); Porter v. South Penn Oil Co., 125 W.Va. 361, 24 S.E.2d 330 (1943);
>
> Assault with a baseball bat and gun butt-- Musgrove v. The Hickory Inn, Inc., 168 W.Va. 65, 281 S.E.2d 499 (1981);
>
> Intentional shooting--Holliday v. Gilkeson, 178 W.Va. 546, 363 S.E.2d 133 (1987); Cremeans v. Maynard, 162 W.Va. 74, 246 S.E.2d 253 (1978);
>
> Accidental shooting--Beckley v. Crabtree, 189 W.Va. 94, 428 S.E.2d 317 (1993); State ex rel. Bumgarner v. Sims, 139 W.Va. 92, 79 S.E.2d 277 (1953);
>
> Intentional or reckless infliction of emotional distress--Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419 (1998);
>
> Colliding with a pedestrian while driving a car--Meyn v. Dulaney-Miller Auto Co., 118 W.Va. 545, 191 S.E. 558 (1937);

Colliding with another vehicle while driving a car--Griffith v. George Transfer and Rigging, Inc., 157 W.Va. 316, 201 S.E.2d 281 (1973);

Throwing stone or other hard object from a moving train--Griffin v. Baltimore & Ohio Railroad Co., 96 W.Va. 302, 122 S.E. 912 (1924);

Causing bathroom plumbing to flood building--Levine v. Peoples Broadcasting Corp., 149 W.Va. 256, 140 S.E.2d 438 (1965);

Malicious prosecution instituted by employee--Meadows v. Corinne Coal & Land Co., 115 W.Va. 522, 177 S.E. 281 (1934); and

Acts of discrimination in violation of the West Virginia Human Rights Act--Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990).

When applying the above-referenced authorities in conjunction with the facts of this matter and Defendant/Petitioner WVRJA's policies and procedures, Defendants/Petitioners WVRJA, Crawford and Aldridge can be held vicariously liable for the actions and inactions of all WRJ employees, individual Defendants/Petitioners and non-party employees included, as they were performing tasks within their scope of employment.

Like many State of West Virginia agencies, Defendant/Petitioner WVRJA has policies and procedures dictating everything from how to apply for employment to how an employee can be terminated. Pertinent to this civil matter are the duties of an Administrator, Chief Correctional Officer and correctional officer and the job descriptions delineated in the most recent WVRJA Policies and Procedures that Plaintiff's/Respondent's counsel received during discovery.

First, prior to beginning employment with WVRJA, a prospective employee must be administered the Oath of Office found in Section 3033 of the WVRJA Policies and Procedures. **343**. As stated, the Oath of Office requires the WVRJA employee/agent will not only follow constitutional provisions and the laws of the State of West Virginia, but also comply with and enforce the policies, procedures, rules and regulations of the WVRJA.

Second, Section 3027 of the WVRJA's Policies and Procedures, entitled *Job Description*, lists various duties and tasks associated with every job within the WVRJA. Pertinent to this matter are the duties of a Correctional Officer I and Correctional Officer II, the rank various individual Defendants held at the time the excessive force/cruel and unusual punishment was implemented. The duties of these positions within the WVRJA are listed in **344-349**. Also contained in Section 3027 are the *Essential Functions and Tasks* of a WVRJA correctional officer. These duties are also listed on the aforementioned pages.

When comparing the authority, duties, functions and tasks of a WVRJA officer as listed in WVRJA's own Policies and Procedures with Plaintiff's allegations, it is abundantly clear that the individual Defendants/Petitioners and other WRJ employees were performing duties well within the scope of their employment. During the day in which Plaintiff/Respondent alleges he was victimized, the individual Defendants/Petitioners, were, at the very least, escorting Plaintiff/Respondent, patrolling cell areas, opening gates and doors on WRJ grounds, patrolling the parameters of WRJ, supervising inmates, exercising physical force to maintain order, attending to Plaintiff's/Respondent's and inmates' needs, enforcing rules and enforcing discipline. Most importantly, several individual Defendants/Petitioners clearly admitted under oath that their actions/inactions were within the scope of their WVRJA employment. **298, 387, 396-7, 420**. To that end, a jury can easily find the individual Defendants/Petitioners and non-party WRJ employees were performing duties well within scope of their employment.

QUALIFIED IMMUNITY IN RELATION TO ALL PLAINTIFF'S/RESPONDENT'S CLAIMS

As stated, Plaintiff/Respondent was subjected to various United States Constitution violations and State common law torts due to his treatment at the hands of all Defendants/Petitioners and seeks to holds all Defendants/Petitioners liable for the same in both direct, indirect and negligence theories of liability. Defendants/Petitioners argued in Circuit Court various reasons why Plaintiff's/Respondent's action and claims against them should be dismissed and, before this Court, why the lower Court erred in not granting summary judgment concerning the same. However, they fail in several regards in their arguments.

First, as addressed above, the supervisory Defendants/Petitioners can be held vicariously liable for the actions of the individual Defendants/Petitioners.[3] Further, in their Motion for Summary Judgment before the Circuit Court and Petitioners' Brief and as addressed above, Defendants/Petitioners fail to address the WVRJA Policy Directives which dictate duties that officers perform within the scope of employment. Defendants/Petitioners partially relied on this Court's decision in West Virginia Regional Jail and Correctional Facility Authority v. A.B., 234 W.Va. 492, 766 S.E.2d 751 (2014). Specifically, in A.B., the first prong revolves around a reviewing court determining "whether 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 otherwise involve discretionary governmental functions." Id., at 23. This Court further held in A.B. that the correctional officer's "general functions as a correctional officer, like most law enforcement

3 Defendants/Petitioners WVRJA, Crawford and Aldridge cannot be held vicariously liable for 42 U.S.C. 1983 violations but can be held vicariously liable for Plaintiff's common law tort claims.

officers, are *broadly* characterized as discretionary, requiring the use of his discretionary judgments and decisions." Id., at 27 (emphasis in original). To that end, all WVRJA employees'/agents' respective actions/inactions could likely be determined to be discretionary.

The second prong in A.B. revolves around the official's acts or omissions being in violation of a clearly established law and/or constitutional rights. As stated in the Complaint and above, Plaintiff/Respondent alleges various constitutional provisions and State tort claims were violated by all Defendants/Petitioners. As for the "clearly established laws" that were violated by Defendants/Petitioners, Plaintiff states that West Virginia Code §31-20-9, *Jail facilities standard commission; Purpose, powers and duties*, defines the duties WVRJA owes to its inmates. In pertinent part, §31-20-9 reads as follows:

> (1) *Prescribe standards for the maintenance and operation of county and regional jails.*
>
> The standards shall include, but not be limited to, requirements assuring adequate space, lighting and ventilation; fire protection equipment and procedures; provision of specific personal hygiene articles; bedding, furnishings and clothing; food services; **appropriate staffing and training**; sanitation, **safety** and hygiene; isolation and suicide prevention; **appropriate medical, dental and other health services**; indoor and outdoor exercise; appropriate vocational and educational opportunities; classification; inmate rules and discipline; inmate money and property; religious services; inmate work programs; library services; visitation, mail and telephone privileges; **and other standards necessary to assure proper operation**. (emphasis added).

At the very least, the Defendants/Petitioners did not adhere to their duty to provide Plaintiff/Respondent with a "safe" environment and did not have "appropriate staffing and training" at WRJ when Plaintiff/Respondent was the alleged victim of excessive/unreasonable force/corporal and cruel and unusual punishment. Further, these Defendants/Petitioners ignored its own "Mission Statement" and policies and provisions which define its duty owed to inmates. To that end, not only was West Virginia Code §31-20-9 violated, WVRJA violated its own

policies, provisions and "Mission Statement." As such, "clearly established laws" were violated by Defendants/Petitioners WVRJA, Crawford and Aldridge.

While these Petitioners argue the aforementioned are not "clearly established laws," Plaintiff/Respondent counsel poses this question to the Court – since no jail/prison defendant in an excessive force/cruel and unusual punishment has ever stated they violated a "clearly established law" and, quite frankly, has never given an example of the same, when, if ever, can a like defendant be held liable for such a violation? As stated throughout this Brief, these Defendants/Petitioners committed atrocities and, as always, seek this Court's blessing in not being held liable for the same. If it were not so sad it would be quite pathetic and disgraceful as inmate beatings in West Virginia jails and prisons at the hands of officers have become commonplace and no accountability exists.

As stated above, other clearly established laws were violated by Defendants/Petitioners, namely, "The West Virginia Regional Jail and Correctional Facility Authority's Policy and Procedure Statement." In A.B., this Court somewhat chastised respondent's counsel for failing to address this provision in her argument. Specifically, the Court held:

> There are, nevertheless, existing state regulations which govern certain aspects of the training, supervision, and retention of jail employees as set forth in the "West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails," West Virginia C.S.R. § 95–1–1 *et seq.* In the instant case, however, respondent has failed to identify a single regulation which the WVRJCFA has violated as pertains to training, supervision, or retention, which proximately caused D.H.'s alleged actions.

To that end, according to the A.B. Court, the WVRJA Policy and Procedure Statement ("Statement"), as codified by and through West Virginia C.S.R. § 95-1-1, *et seq.*, further affords WVRJA inmates rights and guarantees and is a clearly established law. Paramount and relevant among the provisions in WVRJA's Statement are protection of inmates' safety; care, custody,

control and rights of inmates; supervision of inmates and staff; proper use of force on inmates; proper and immediate medical treatment for inmates; and guarantees of rights of inmates under West Virginia law and the United States Constitution.

In regard to excessive force, the Statement holds in Document Number 9031 "force which is used when unnecessary or which exceeds that which is necessary to accomplish a legitimate purpose, is illegal and constitutes either a tort (assault and battery), a violation of inmate civil rights under the Eighth Amendment or Fourteenth Amendment (Cruel and Unusual Punishment and/or Deprivation of Due Process), or even a crime (assault and battery)." (parentheses and contents in original). **427**. As such, this clearly established law was violated by all Defendants/Petitioners, most particularly the individual Defendants/Petitioners, as the force was excessive, the punishment was cruel and unusual and Plaintiff/Respondent's 42 U.S.C. §1983 rights were violated. In fact, this section of the Statement specifically refers to the elements contained in 42 U.S.C. §1983, addressed more thoroughly below.

On a related note, that same section states "the staff person using force and the subject against whom force was used will receive immediate medical attention, as appropriate." This provision was undoubtedly violated as Plaintiff/Respondent was not afforded proper medical attention when strapped to the restraint chair for an exorbitant amount of time which is also a violation of Plaintiff/Respondent's §42 U.S.C. 1983 rights. *See* Estelle v. Gamble, 429 U.S. 97 (1976). As stated above, Plaintiff/Respondent argues he was not afforded proper medical care and, in fact, still suffers from the physical and emotional injuries sustained due to all Defendants'/Petitioners' actions and inactions. As for Defendant/Petitioner Paul Diamond's assertion that he did administer proper medical care, as with most of the arguments made by

Defendants/Petitioners, either individually or collectively, these are issues for the trier of fact. If Cpl. Diamond believes he can validly defend his actions in front of a jury, he will be afforded that opportunity at trial.

Document Number 9031 further states "once resistance has ceased, the application of force will cease" as well as "force cannot be used to punish an inmate." **427.** This provision likewise was not followed by all Defendants/Petitioners. For the sake of argument, maybe Plaintiff/Respondent was somewhat loud when in the receiving area of WRJ. After being sprayed with O.C., he posed no threat. Nevertheless, without legitimate justification, the individual Defendants/Petitioners placed Plaintiff/Respondent in a restraint chair for several hours past what is subscribed by law. As contained in Statement 9031, "the use of corporal punishment -- infliction of pain as a punishment for violation of a regulation is prohibited." **427.** Simply put, these Defendants'/Petitioners' actions were not only excessive force but also could be construed as corporal punishment.

Also contained in Document Number 9031 of the Statement are the levels of force permitted. "The [WVRJA] has adopted the following levels of control as a guideline to ensure only the amount of force reasonable and necessary to control resistive behavior is utilized:

a. officer presence
b. verbal direction
c. empty hand control (soft/hand)
d. intermediate control devices (soft/hand)
e. deadly force."

427. At the risk of beating a dead horse in his analysis of the events that transpired, Plaintiff's/Respondent's verbal behavior may have been offsetting. However, the video supplied by Defendants/Petitioners show his physical actions denoted complete submission as he posed

no threat. Therefore, the level of force used simply regarding the O.C. spray was excessive, unreasonable and punitive. As Defendant/Petitioner Diamond testified, "if there is four officers, couldn't you have just placed your hand on his wrist and another officer placed his hand on the wrist and escort him into that holding cell?" Defendant/Respondent Diamond testified in his deposition "that could have happened, yes." **(320-1)**. Simply put, there could have been less excessive force used on Plaintiff/Respondent rather than spraying O.C. directly in his face. In Roberson v. Torres, the Sixth Circuit ruled that and officer who deployed pepper spray as a first response without attempting less intrusive means was not entitled to qualified immunity. Roberson v. Torres, 770 F.3d 398, 406 (6th Cir. 2014). In Williams v. Curtin, 631 F.3d 380 (6th Cir. 2011), plaintiff sufficiently stated an Eighth Amendment claim for use of excessive force when he alleged that after asking a question in response to a deputy's command, the deputy and a squad of officers deployed pepper spray. Additionally, Davis v. Pickell, 562 F. App. 387, 392 (6th Cir. 2014), held a prisoner was not resisting or threatening the deputies when they tackled and pepper sprayed him and concluded that "if [the prisoner] was neither threatening nor resisting officers" then the use of chemical spray "on a compliant inmate shocks the conscience" and violates the prisoner's clearly established constitutional rights." That is exactly what happened to Mr. McDonald – he was simply asking questions (verbal command), was not restrained by less excessive hands-on-wrists (empty hand control) and was pepper sprayed directly into his face. Hence, excessive force is obvious in this regard. Nevertheless, as mentioned ad nauseum throughout this Brief, these are issues for the trier of fact and all Defendants/Petitioners have competent counsel to defend their interests and make salient, concise arguments.

As also addressed above, A.B.'s third, and most important, prong concerns whether the individual Defendants/Petitioners were acting within or outside the scope of their employment with the WVRJA when they were alleged to have implemented excessive/unreasonable force upon Plaintiff/Respondent. This Court held that the offending officer's acts of *sexual misconduct* "fall manifestly outside the scope of his authority and duties as a correctional officer." Id., at 36. Most relevant and salient to this matter, this Court further held that "[i]f the public official or employee was acting within the scope of his duties, authority, and/or employment, the State and/or its agencies may be held liable for such acts or omissions under the doctrine of *respondeat superior*, along with the public employee." Id., at 26. As stated above, several individual Defendants/Petitioners clearly admitted under oath that their actions/inactions were within the scope of their WVRJA employment. **298, 387, 396-7, 420**.

As stated, A.B. revolved around an offending officer sexually assaulting a female inmate wherein this Court held *raping* or *sexually assaulting* an inmate was not part of that offending officer's job description. In this matter, it is clear the individual Defendants/Petitioners were acting within the scope of their respective employment and it was for the benefit of Defendants/Petitioners WVRJA, Crawford and Aldridge.

The A.B. opinion also holds "[t]o 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 a 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., 424 S.E.2d 591 (W.Va. 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., Syl. Pt. 11.

First, as stated above, Defendants/Petitioners violated the above-referenced "clearly established statutory laws" when it implemented and/or failed to protect Plaintiff/Respondent from being the victim of excessive force/corporal punishment at the hands of the individual Defendants/Petitioners. Simply put, this requirement is satisfied and the Circuit Court did not err in denying summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.

Second, and as stated above, the A.B. Court held that a governmental entity is not afforded qualified immunity if its acts and omissions are fraudulent, malicious or oppressive. A.B., Syl. Pt. 11. In failing to properly staff and protect Plaintiff/Respondent, these Defendants'/Petitioners' individual and collective acts and omissions clearly fall under the auspices of these parameters. Black's Law Dictionary defines *fraud* as consisting "of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury." Black's Law Dictionary definition of *malice* as an "intentional performance to do a wrongful act" as well as "a malicious act is an intentional, wrongful act performed against another without legal justification or excuse." Various definitions of *oppression* or *oppressive* are "very cruel or unfair," "very unpleasant or uncomfortable" and "the subjugation of one group by another, carried out under conditions of unequal power, and often enforced by threats."

When taking into consideration the ruling in A.B., the above definitions of fraudulent, malicious and oppressive along with the actions implemented on Plaintiff/Respondent by the individual Defendants/Petitioners and the complete and utter failure of Defendants/Petitioners

WVRJA, Crawford and Aldridge to protect Plaintiff/Respondent, it is clear and obvious that no Defendant/Petitioner enjoys a ruling of summary judgment in this matter. Simply put, due to all Defendants'/Petitioners' fraudulent, malicious and oppressive actions and inactions, namely, directly spraying Plaintiff/Respondent in the face with O.C. when there were less oppressive options of use of force and keeping Plaintiff/Respondent in the restraint chair for nearly twenty-eight (28) hours when the records show he was calm and singing during this torturous and tumultuous period, and violation of the aforementioned West Virginia Code sections and federal constitutional protections, Plaintiff/Respondent was subjected to excessive force/cruel and unusual punishment and medically suffered at the hands of the individual Defendants/Petitioners. Most importantly and as previously addressed, these issues are for the trier of fact to decide and the Circuit Court was correct in denying summary judgment in this regard.

On March 25, 2019, this Court addressed qualified immunity in regard to excessive force/cruel and unusual punishment of various West Virginia Division of Corrections offending officers in Ballard v. Delgado, 826 S.E.2d 620 (W.Va. 2019). In affirming the lower Court's denial of summary judgment in regard to alleged Eighth Amendment violations in conjunction with qualified immunity, this Court held that issues of such violations are an issue for the trier of fact. An analysis of Ballard in conjunction with the facts, pleadings and related law in this matter clearly proves Plaintiff's/Respondent's contention that the Circuit Court was correct in denying Defendants'/Petitioners' Motion for Summary Judgment and this Court should uphold that ruling.

PLAINTIFF'S/RESPONDENT'S 42 U.S.C. §1983 CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS/PETITIONERS

As stated, Plaintiff/Respondent seeks to hold the individual Defendants/Petitioners liable for violations of 42 U.S.C. § 1983, which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); *et seq.*, the United States Supreme Court held in order for an individual to prevail on a 42 U.S.C. § 1983 claim, he must prove, by a preponderance of the evidence, each of the following three (3) elements:

> First, that the conduct complained of was committed by a person acting under color of state law;
>
> Second, that this conduct deprived the Plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States; and,
>
> Third, that the Defendants' acts were the proximate cause of the injuries and consequent damages sustained by the Plaintiff.

Further, the United States Supreme Court held that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even if the prisoner does not suffer serious injury. When an inmate does suffer serious injury from the excessive use of force by prison officials, a violation of the Cruel and Unusual Punishment Clause is clear. Id.

As for the first element, it is undisputed the offending officers were "acting under color of state law" as they were performing duties well within the scope of their WVRJA employment.

Second, it is further undisputed Plaintiff/Respondent, as a pre-Trial detainee, is afforded rights, privileges or immunities secured by the constitution or laws of the United States, specifically, the Fourteenth Amendment.

Third, the evidence produced in the discovery phase clearly and unequivocally proves the underlying Defendants'/Petitioners' "acts were the proximate cause of the injuries and consequent damages sustained by the Plaintiff/Respondent" while he was in WVRJA/WRJ custody. As stated above, Plaintiff/Respondent arrived at WRJ on June 26, 2016 and was under the influence of an illegal substance and informed the individual Defendants/Petitioners he did not want to be placed in such a crowded holding cell. At this time Plaintiff/Respondent did not complain of any injuries, pains or soreness. Additionally, Plaintiff's/Respondent's account was not contradicted by any witness, only conjecture and guesswork and there was no tangible evidence which could lead any reasonable person to believe the injuries were not caused by the brutal excessive force/cruel and unusual punishment allegedly implemented by the individual Defendants/Petitioners. Additionally, the United States Supreme Court held in Farmer v. Brennan, 511 U.S. 825, 837 (1994), that a prison official, such as Defendants/Petitioners WVRJA, Crawford and Aldridge, are liable under the Eight Amendment if "he knows of and disregards an excessive risk to inmate health or safety."

Further, after being directly sprayed in the face with the O.C. which travelled to other sensitive parts of his body and, more importantly, not being properly attended to during his time in the restraint chair is a further deprivation of Plaintiff's/Respondent's civil rights. Specifically, as mentioned in a previous section of this Brief, failing to provide proper medical care for a pre-trial detainee is also a violation of 42 U.S.C. § 1983. In Estelle v. Gamble, 429 U.S. 97, (1976), the United States Supreme Court held "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' Gregg v. Georgia, at 173, proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." Id., at 104. As stated, Plaintiff/Respondent was not properly decontaminated after the close burst of O.C. directly in his face. Further, the mere fact Plaintiff/Respondent languished in the restraint chair for nearly twenty-eight (28) hours clearly manifests an egregious failure to provide medical care to an inmate who is obviously suffering.

When taking into consideration the three (3) elements an individual must prove to prevail on a 42 U.S.C. §1983 claim, it is undisputed all are met by Plaintiff/Respondent. Further, couple these facts/evidence with the extremely high burden of Rule 56 of the West Virginia Rules of Civil Procedure, there was no plausible or pragmatic reason for the lower Court to grant Defendants' Motion for Summary Judgment concerning Plaintiff's 42 U.S.C. § 1983 claims and it was correct in denying the same.

The most relevant, recent and prescient case decided by the United States Supreme Court concerning 42 U.S.C. §1983, cruel and unusual punishment and excessive force which clearly refutes the misrepresentations of defense counsel is Kingsley v. Hendrickson, et al., 576 U.S. 389, (2015). In Kingsley, the United States Supreme Court addressed the very issue before this Court. The facts of Kingsley are eerily similar to the facts in this matter. Not unlike Plaintiff/Respondent, Mr. Kingsley was a pre-trial detainee at a jail and was beaten and tazed by four (4) jail officers. While Kingsley was not victimized as significantly as Plaintiff, he filed an excessive force/cruel and unusual punishment lawsuit pursuant to 42 U.S.C. §1983, the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court held as follows: Under 42 U.S.C. §1983, a pre-trial detainee "must show *only* that the force purposely or knowingly used against him was *objectively* unreasonable to prevail on an excessive force claim." Id, syl. pt. 1. (emphasis added). While the United States Supreme Court assert Kingsley hold "[n]evertheless, a court cannot apply this standard mechanically . . . A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at that time, not with the 20/20 vision of hindsight . . . ," the facts above clearly show the unreasonableness of the pain and suffering inflicted upon Plaintiff/Respondent at the hands of the individual Defendants/Petitioners is deliberate and blatant and, using the objective standard, the trier of fact could conclude the same.

Again, considering the high threshold established in Rule 56 of the West Virginia Rules of Civil Procedure coupled with the evidence and the Kingsley decision, it is abundantly clear the Circuit Court was correct in denying Defendants'/Petitioners' Motion for Summary Judgment and objectively permit the jury to determine the reasonableness of the force used

and punishment implemented. Respondent Michael A. McDonald respectfully requests this Honorable Court affirm the Circuit Court's ruling and remand the case for trial.

CONCLUSION and PRAYER FOR RELIEF

Taking into consideration the pleadings, evidence and supporting law in this matter in conjunction with Defendants'/Petitioners' failure to pragmatically provide the Court with arguments to the contrary, this Court has no plausible reason to reverse the Cabell County Circuit Court's September 2, 2021 Order denying Defendants'/Petitioners' Joint Motion for Summary Judgment.

WHEREFORE, for the reasons set forth above, Plaintiff/Respondent Michael A. McDonald respectfully requests this Honorable Court DENY this appeal and remand to Cabell County Circuit Court so the parties can proceed to Trial.

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No. 21-0732

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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;
The WEST VIRGINIA REGIONAL JAIL and CORRECTIONAL FACILITY AUTHORITY, an agency of the State of West Virginia;
and, JOHN DOE, unknown person or persons,

Petitioners,

v.

MICHAEL A. McDONALD,

Respondent.

Certificate of Service

I, Kerry A. Nessel, Esquire, counsel for Plaintiff/Respondent Michael A. McDonald, do hereby certify that on the 15th day of February, 2022, a copy of the attached **MICHAEL McDONALD'S RESPONDENT'S BRIEF** was delivered via US Mail to the following individual:

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