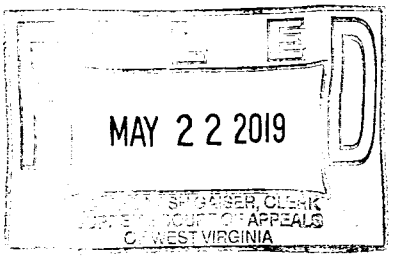
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 18-1083




JOSHUA DAVID ZOMBRO,

Petitioner,

v.

THE ESTATE OF CODY LAWRENCE GROVE,

Respondent.

---

# REPLY BRIEF

---

James W. Marshall, III(WV Bar #10677)
BAILEY & WYANT, PLLC
300 Foxcroft Ave.
Suite 100B Room 8
Martinsburg, West Virginia 25401
(304) 901-2000

Michael W. Taylor (WV Bar #11715)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

*Counsel for Petitioners*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Rules**

## I. ARGUMENT

### A. Circuit Court erred in failing to conduct a proper analysis of qualified immunity standard as required by this Court.

The Circuit Court's sole finding related to qualified immunity is:

> [T]he Plaintiff has set forth a sufficient basis to deny Defendant Zombro's Motion to Dismiss. The Court finds that the Plaintiff has set forth in the First Amended Complaint sufficient facts to put Defendants on notice of the nature of the Plaintiff's claims. The Plaintiff has provided sufficient clarity so that the Defendants can understand the nature of Plaintiff's factual claims and legal theories of the action.

App. 0374. This is clearly insufficient in light of this Court's precedent in determining whether qualified immunity is applicable. This was clearly, sufficiently and specifically argued and supported in the opening brief by Petitioner Zombro (hereinafter "Petitioner"). In response to Petitioner's argument that the Circuit Court failed to conduct the proper analysis of the qualified immunity standard as announced by this Court, Respondent asserts two arguments. First, Respondent asserts that Petitioner does not "define" what is required under the "heightened pleading" standard. Second, Respondent asserts that the Circuit Court's failure to apply the proper qualified immunity standard is irrelevant because Petitioner did not file a motion for more definite statement in accordance with Rule 12(e) of the *West Virginia Rules of Civil Procedure*. Both of these arguments are inapposite to the specific issue raised on the appeal – that the Circuit Court failed to follow this Court's precedent regarding the proper analysis of qualified immunity. However, both of these arguments will be addressed below.

With respect to the argument regarding "defining" the "heightened pleading" required, Petitioner need not "define" what pleading standard is required because this Court has consistently outlined what is required to be pled and what a trial court is required to analyze in response to a

motion asserting qualified immunity.[1] Specifically, "[T]o survive a motion to dismiss, a plaintiff's complaint must 'at a minimum . . . set forth sufficient information to outline the elements of his claim.'" *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015) citing to *Price v. Halstead*, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987). "[I]n civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Marple*, 236 W. Va. at 660, 783 S.E.2d at 81; citing to *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996). The purpose of requiring "heightened pleading" by a plaintiff permits a framework by which a circuit court may engage in an analysis to determine whether a plaintiff has a sufficient claim to overcome the qualified immunity. *See* Syl. Pts. 10 & 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014); *see also Marple*, 236 W. Va. at 662, 783 S.E.2d at 83. "If the complaint fails to allege a cognizable violation of constitutional or statutory rights it also has failed to state a claim upon which relief can be granted." *See Marple*, 236 W. Va. at 663, 783 S.E.2d at 84; citing to *Hutchison*, 198 W.Va. at 149 n.12, 479 S.E.2d at 659 n.12.

This framework should not come as any surprise to Respondent, as this framework was provided consistently throughout the various briefings on the motions to dismiss. *See e.g.* App. 0034 (West Virginia Regional Jail and Correctional Facility Authority's (hereinafter "RJA") Motion to Dismiss); App.0060 (Petitioner's Reply to Plaintiff's Response to Petitioner's Motion to Dismiss); and App. 0150 (Petitioner's Motion to Dismiss Amended Complaint). In fact, the Circuit Court specifically outlined the pleading standards related to qualified immunity in the Order granting Regional Jail's Motion to Dismiss. App. 0124 – 125. Therefore, Respondent's

[1] The Circuit Court similarly defined what is required to be pled related to qualified immunity in the Order Granting the Regional Jail's Motion to Dismiss. *See* App. 0124 – 0125.

argument of a failure by Petitioner to define the requirements to overcome qualified immunity on a motion to dismiss is inconsistent with the record, as well as ignores this Court's precedent.

Respondent next argues that Petitioner was required to file a motion pursuant to Rule 12(e) of the *West Virginia Rules of Civil Procedure*. This argument is based upon *dicta* by Justice Cleckley in *Hutchinson v. City of Huntington*. Specifically, Justice Cleckely states, "in cases of qualified or statutory immunity, court ordered replies and motions for a more definite statement under Rule 12(e) can speed the judicial process." *Hutchinson*, 198 W. Va. at 150, 479 S.E.2d at 660. Nowhere within this *dicta* is a requirement that a Rule 12(e) motion be filed. Therefore, any argument that a Rule 12(e) motion must be filed in matters of inadequate pleading is without merit. More importantly, here, Respondent sought leave to amend his Complaint *after* the filing of a motion to dismiss by both Petitioner and RJA. App. 095 - 0109. Within those motions, the deficiencies in Respondent's Complaint were pointed out by Petitioner. *See e.g.* App. 022 - 031. Therefore, while a Rule 12(e) motion as not filed, for all practical purposes, the 12(e) process was followed here. Despite this, Respondent still cannot put forth a claim that overcomes qualified immunity.

Based upon the foregoing, Respondent was given two opportunities to file a Complaint that would survive qualified immunity. The second attempt was filed after deficiencies were asserted by Petitioner and RJA. Despite outlining clearly the requirements to defeat qualified immunity, both Respondent and the Circuit Court failed to utilize the "framework by which a circuit court may engage in an analysis to determine whether a plaintiff has a sufficient claim to overcome the qualified immunity." *See* Syl. Pts. 10 & 11, *A. B.*, 234 W. Va. at Syl. Pts 10 & 11; 766 S.E.2d at Syl. Pts 10 & 11; *see also Marple*, 236 W. Va. at 662, 783 S.E.2d at 83. In sum, the Circuit Court (and Respondent) did not follow the proper qualified immunity determination identified by this

Court in the litany of cases discussed in the briefing of this case. As such, this Court should reverse the Circuit Court's Order and direct the Circuit Court to enter an Order dismissing Petitioner based upon Respondent's failure to overcome qualified immunity. Alternatively, this Court should remand this matter directing the Circuit Court to enter an appropriate Order applying the proper qualified immunity analysis regarding whether Respondent has met the requisite initial showing in his First Amended Complaint to overcome Petitioner's Motion to Dismiss.

**B. Petitioner is entitled to qualified immunity on all claims pursuant to this Court's prior holdings because Petitioner did not engage in any acts or omissions that violated a clearly established right.**

In the opening brief, Petitioner clearly articulated numerous bases for why the Circuit Court erred in denying qualified immunity. *See* Petitioner's Brief at pgs. 14 – 21. Specifically, Petitioner argued, *inter alia* that the allegations in Respondent's First Amended Complaint do not support a violation of the regulations cited and relied on by Respondent. In response to Petitioner's arguments regarding qualified immunity, Respondent asserts three arguments: first, that Petitioner was not performing a discretionary function; second, that his acts/omission violated a clearly established law; and three, Petitioner acted "incompetently." For the reasons asserted below, these arguments are unavailing.

First, Respondent attempts to argue that the performance of safety checks are not discretionary, but rather ministerial. In support of this, Respondent cites to improperly submitted documents that are outside the record and the First Amended Complaint. For the reasons discussed in section C, these documents must be ignored by this Court and otherwise stricken from the record as it relates to the considerations of the issues on this appeal. However, in briefly addressing these arguments for purposes solely of preserving the record, Respondent's reliance upon a Code of Conduct and Oath of Office is inapposite because a Code of Conduct and Oath of Office is not a

"clearly established law" for purposes of imposing any obligation or legal duty. *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659 (qualified immunity is "a two-part test: (1) does the alleged conduct set out ***a constitutional or statutory violation***, and (2) were the constitutional standards clearly established at the time in question?" (emphasis added)); *see also Rivera v. Wohlrab*, 232 F. Supp. 2d 117, 123 (S.D.N.Y. 2002) ("[T]he law is settled that the failure to follow a . . . prison regulation does not give rise to a federal constitutional claim."). Finally, Respondent did not assert alleged violations of the Code of Conduct and Oath of Office as a basis to defeat qualified immunity below and the Circuit Court did not rely on the same in making its determination. Therefore, this Court should not rely on the same now. *Zaleski v. West Virginia Mut. Ins. Co.*, 224 W. Va. 544, 550, 687 S.E.2d 123, 129 (2009) ("Because this argument is now being raised for the first time on appeal, we must necessarily find that the argument . . . has been waived."). Therefore, citing to the Code of Conduct and Oath of Office are irrelevant to defeat qualified immunity.

With respect to Respondent's citation to policies and procedures purportedly violated by Petitioner as being ministerial, this argument fails. First, Petitioner has previously substantially addressed that these regulations were not actually violated and/or otherwise not applicable to the case at bar. *See* Petitioner's Brief at pgs 18 – 21. Respondent does not challenge these arguments. Rather, Respondent simply argues that the regulations place upon Petitioner certain affirmative obligations and are therefore, ministerial. This Court has previously recognized that, even if there is an affirmative obligation to engage in a certain act by a government official, if the performance of that affirmative obligation involves the use of discretion, the act constitutes a discretionary act subject to further qualified immunity analysis. *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 574 n.26, 746 S.E.2d 554, 565 (2013). Assuming *arguendo* that "detect[ing] and

prevent[ing] incidents and/or violations of institutional regulations" is an affirmative obligation of a correctional officer, the manner in which to execute this obligation is highly discretionary. The timing, the manner, the reporting and other aspects of this obligation and all obligation of a correctional officer require discretionary judgments by a correctional officer. Consistent with this Court's prior precedent that a correctional officer's duties are *broadly* discretionary, a fact acknowledged by Respondent, *see* Respondent's Brief at pg. 10, it is clear that the performance of Petitioner's job duties at issue required the exercise of discretion subject to qualified immunity. *A.B.*, 234 W.Va. at 509, 766 S.E.2d at 751.

In addition to Respondent's failure to establish that the Petitioner's acts were ministerial, Respondent relies upon alleged actions by Petitioner that occurred after the suicide to further justify defeating qualified immunity. This, however, is insufficient to overcome qualified immunity. While a violation of a clearly established right is one component of qualified immunity, it is well established that the conduct in violation of a clearly established statutory or constitutional law must be a proximate cause of the injury. *Crouch v. Gillispie*, 240 W. Va. 229, 237, 809 S.E.2d 699, 707 (2018) ("Therefore, in the absence of allegations tying the alleged violations to Raynna's death, we are unable to view this case as more than an abstract assertion that DHHR could have investigated more thoroughly."). As the conduct relied upon by Respondent is all post action conduct, it cannot be a proximate cause of the death of Respondent. It is, therefore, irrelevant to this Court's determination of qualified immunity. Quite simply, Respondent is relying on improper evidence and argument in an effort to influence the Court to reach a result not based upon the law, but on emotion.

Having soundly defeated Respondent's argument that the acts at issue are ministerial and not subject to qualified immunity, Respondent further argues, without support, a number of

violations of regulations and Constitutional rights. As previously stated, Petitioner has previously substantially addressed that these regulations were not actually violated and/or otherwise not applicable to the case at bar. *See* Petitioner's Brief at pgs 18 – 21. As previously stated, Respondent does not respond to these arguments. Instead, in one paragraph, Respondent simply asserts that there was a violation of regulations. This is insufficient. Respondent must plead facts in support of a violation of a clearly established law in order to overcome qualified immunity. *See Marple*, 236 W. Va. at 663, 783 S.E.2d at 84; citing to *Hutchison*, 198 W.Va. at 149 n.12, 479 S.E.2d at 659 n.12. In looking at either Complaint, neither the Circuit Court nor this Court must blindly rely on the citation of a law and an assertion that it was violated without factual support. *Fass v. Nowsco Well Serv.*, 177 W. Va. 50, 53, 350 S.E.2d 562, 564 (1986) (conclusory allegations without factual support are insufficient to overcome a motion to dismiss). Therefore, mere citation to a regulation and an assertion that it was violated, in light of significant and sufficient support that the regulations relied on are not applicable to the case at bar or were not violated is insufficient to overcome qualified immunity.

In addition to the inapplicable regulations, Respondent asserts that the Wrongful Death Statute, *West Virginia Code* § 55-7-5, constitutes a clearly established law for purposes of overcoming qualified immunity. First, there is no case in West Virginia, and Respondent cites to none, wherein the Wrongful Death Statute forms the basis of a clearly established statutory or constitutional right sufficient to overcome qualified immunity. This is likely because the Wrongful Death Statute is "remedial" in nature and confers no statutory or constitutional right or obligation upon a State government employee. *See e.g. Baldwin v. Butcher*, 155 W. Va. 431, 437, 184 S.E.2d 428, 431 (1971). Again, qualified immunity is overcome by a violation of a clearly established law for which proximately causes the injury or death. *Hutchison*, 198 W. Va. at 149, 479 S.E.2d

at 659. As there is no affirmative duty or obligation under the Wrongful Death Statute, by its own nature, it cannot constitute a "clearly established law" for purposes of overcoming qualified immunity. Finally, Respondent did not assert the Wrongful Death Statute as a basis to overcome qualified immunity before the Circuit Court and the Circuit Court did not rely on it in making its decision. Therefore, it is not properly before this Court. *Zaleski*, 224 W. Va. at 550, 687 S.E.2d at 129.

Next, Respondent asserts that the Complaint pleads a Due Process violation. However, again, Respondent pleads no facts to establish a Due Process violation. Respondent took his own life by his own actions. The only actions or inactions for which Respondent can assert against Petitioner is a failure to properly perform safety checks. There is no constitutional right to adequate suicide prevention protocols. *See Taylor v. Barkes*, 135 S. Ct. 2042 (2015); *see also* Petitioner's Brief at pg. 20-21. Respondent has done nothing to otherwise identify a constitutional right or identify facts that would support a purported violation of a constitutional right. Due Process rights are vast and merely citing to the Due Process clause is insufficient pleading. Therefore, Respondent still has failed to assert any claim or argument sufficient to overcome qualified immunity before this Court or the Circuit Court.

Finally, Respondent asserts that Petitioner was "plainly incompetent" and therefore, not entitled to qualified immunity. It appears Respondent is creating a new "test" to overcome qualified immunity based upon *dicta*. When this Court referenced "plainly incompetent", this Court was explaining the significant burden plaintiffs' face in overcoming qualified immunity. Specifically, this Court stated "[i]n this vein, unless expressly limited by statute, the sweep of these immunities is necessarily broad. They protect 'all but the plainly incompetent or those who knowingly violate the law.'" *Hutchison*, 198 W. Va. at 148, 479 S.E.2d at 658 (quoting *Malley v.*

*Briggs*, 475 U.S. 335, 341 (1986)). In every case wherein "plainly incompetent" *dicta* has been cited, this Court still engaged in the traditional qualified immunity analysis. *See e.g. Crouch,*, 240 W. Va. 229, 809 S.E.2d 699; *see also Maston v. Wagner*, 236 W. Va. 488, 781 S.E.2d 936 (2015); *Brumfield v. Workman*, No. 18-0109, 2019 W. Va. LEXIS 123 (Mar. 26, 2019). As a result, there is no "plainly incompetent" standard to overcome qualified immunity. The test remains whether a government actor violated a clearly established statutory or constitutional right in the performance of discretionary functions. *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659. Respondent cannot meet his burden to overcome qualified immunity in pleading this case.

Respondent has failed to put forth a claim to support a violation of a "clearly established" statutory or constitutional right that proximately caused the injuries to Respondent. The Circuit Court did not cite to or otherwise analyze whether a "clearly established" law was sufficiently pled in this case. Instead, the sole finding made related to Petitioner and qualified immunity was reduced to one paragraph:

> [T]he Plaintiff has set forth a sufficient basis to deny Defendant Zombro's Motion to Dismiss. The Court finds that the Plaintiff has set forth in the First Amended Complaint sufficient facts to put Defendants on notice of the nature of the Plaintiff's claims. The Plaintiff has provided sufficient clarity so that the Defendants can understand the nature of Plaintiff's factual claims and legal theories of the action.

App. 0374. It is clear, therefore, that the Circuit Court erred in denying the Petitioner's Motion to Dismiss the claims raised against Petitioner in the First Amended Complaint.

### C. Respondent's Motion for Leave to Supplement the Appendix should be denied and respondent's references to the same should be stricken from the record or sealed.

In support of its Response, the Respondent filed a Motion for Leave to file a Supplemental Appendix. However, the Motion for Leave should be denied because the Respondent cannot show good cause as to why it should be allowed to supplement the appendix. Counsel for the Petitioner and counsel for the RJA determined the contents of the Appendix by consulting with counsel for

the Respondent. Pursuant to Rule 7(e) of the *West Virginia Rules of Appellate Procedure,* the parties conferred and counsel for the Respondent identified documents to be included in the Joint Appendix. The Respondent never sought to include the additional documents contained in the purported Supplemental Appendix. Furthermore, the Petitioner did not amend his Notice of Appeal or include any new assignments of error which would in any way change the arguments currently before this Court. As such, the Respondent has failed to establish good cause pursuant to Rule 7(g) of the *West Virginia Rules of Appellate Procedure*.

Additionally, the documents contained in the supplemental appendix are not part of the record before the lower tribunal and thus outside the record. As this court has held on numerous occasions, matters that were not part of the record before the circuit court cannot be considered by the appellate court.[2] The documents contained in the Respondents proposed supplemental

---

[2] *Lee Trace, LLC v. Berkeley County Council*, 2017 WL 1535075 at *1 n.2 (W. Va.)(memorandum)("To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.")(citation omitted); *University Park at Evansdale, LLC v. Musick*, 238 W. Va. 106, 114 n.16, 792 S.E.2d 605, 613 n.16 (2016)("As an appeal from the BER, the circuit court's review on appeal (and therefore on remand) is limited to the record created before the BER and the circuit court operates under the same standard of review as that for an administrative appeal."); *Wolford v. Mountain Top Hunting Club, Inc.*, 2015 WL 7628704 at *5 (W. Va.)(memorandum)(" Petitioners cannot now assert new facts as a way to justify their defective pleading. In *DeVane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999), we held that this Court's appellate review is limited to the record presented on appeal. For the purposes of this appeal, petitioners assertions that the security guards' statements were malicious or made with bad intent in their appellate brief do not remedy the fatal defects in petitioners' complaint and cannot now be added to the record."); *Berkhouse v. Great American Assur. Co.*, 2013 WL 6152414 at *3 n.2 (W. Va.)(memorandum)("While the case was pending on appeal to this Court, Mr. Berkhouse moved to supplement the record with an affidavit on the issue of the insurer's alleged lack of communications with the Charleston Moose Lodge about the exclusion. However, that affidavit was not part of the circuit court's record. Indeed, the language of the affidavit shows that it was created for purposes of this appeal. We denied the motion to supplement the record. 'Although our review of the record from a summary judgment proceeding is de novo, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion .To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.'")(citation omitted); *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 129, 672 S.E.2d 255, 265 (2008)(" In a final effort to support his argument that West Virginia has sufficient contacts with this action to support jurisdiction and venue, Mr. Savarese attached additional correspondence from Allstate involving West Virginia providers to both his Petition for Appeal and his Appeal Brief. However, these materials *were not* submitted to the circuit court, are not a part of the circuit court record and are not properly before this Court.")(emphasis in original); *Legg v. Rashid*, 222 W.Va. 169, 176 n.3, 663 S.E.2d 623, 630 n.3 (2008)("Dr. Legg makes reference in this appeal that Dr. Rashid may have committed fraud in an effort to keep him from filing a legal action against him. Dr. Legg, however, did not raise this issue below."); *Jackson v. Putnam County Bd. of Educ.*, 221 W. Va. 170, 177, 653 S.E.2d 632, 639 (2007)("Upon appeal, appellant Jackson submitted portions of the Policy Manual to this Court. The Board's motion to strike that submission as not part of the record before the Circuit Court was granted. Subsequently, the appellant filed a motion to reconsider and, in addition, a request that this

appendix were obtained through written discovery responses by the RJA. These documents were never entered into evidenced, attached as an exhibit to any document, or submitted for review by the circuit court. As such, they are not part of the record in the circuit court and thus improper for review in the appellate court.

Furthermore, the documents contain markings not included in the original. Rule 7(c)(2)(a) of the West Virginia Rules of Appellate Procedure specifically requires certification that, "the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal." Not only are the documents in the supplemental appendix not part of the record below, they contain marks and/or highlights that were not contained in the originals. Supp. App. 3-6 & 9-15, As such, they are not "true and accurate copies" of items.

Finally, the proposed Supplemental Appendix contains excerpts from Petitioner's personnel file. Prior to the disclosure of the documents by the RJA, counsel for the Petitioner, Respondent, the RJA and Primecare entered into an agreed protective order wherein they agreed to maintain the confidentiality of the Petitioner's personnel file. See Respondent's Motion for Leave to File Supplemental Appendix and the Petitioner's Notice of Appeal at 12. Rule 40(c) of

---

Court take judicial notice of the Policy Manual. By order entered on September 7, 2006, this Court denied both the motion and the request."); *DeVane v. Kennedy*, 205 W. Va. 519, 532, 519 S.E.2d 622, 635 (1999)("Finally, even if the Hospital's Medical Assurance policy provided coverage under these circumstances, the sparse appellate record contains nary a trace of this policy to assist our review in this regard. Even though the record is replete with references to the Hospital's insurance, the very policy itself is conspicuously absent from the appellate record. It equally is doubtful whether the concerned parties presented the Medical Assurance policy to the circuit court for its consideration. We have held, on numerous occasions, that this Court's appellate review of a case is limited to the record presented to us on appeal."); *William L. v. Cindy E.L.*, 201 W. Va. 198, 199, 495 S.E.2d 836, 838 (1997)("Unfortunately, the record is sparse and the parties assert conflicting facts. Obviously, we are limited to the record before us. The result we reach in this case may have been different if we had a more complete record."); *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996)("Because the plaintiff filed no fact-specific affidavit, it did not meet its burden to designate specific facts showing a genuine issue for trial. In its argument to this Court, the plaintiff relies heavily on the affidavit of George Bell to support its position that there was a genuine issue of fact as to the statute of limitations. However, the affidavit was not made part of the summary judgment record. Although our review of the record from a summary judgment proceeding is de novo, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion.").

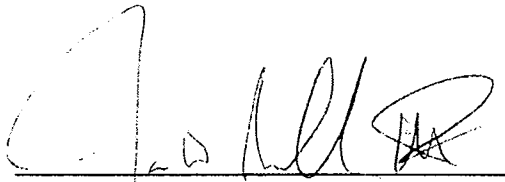
the *West Virginia Rules of Civil Procedure* directs that the portion of the record from the lower tribunal is to remain confidential unless otherwise provided by order of this court. Furthermore, "Whenever a party files a pleading or other document that is confidential in part or in its entirety, the party shall identify, by cover letter or otherwise, in a conspicuous manner, the portion of the filing that is confidential." *Id.* Here, even though the documents are not part of the record before the circuit court, the Respondent attached these documents and referenced the documents in its response brief without taking the necessary steps to preserve confidentiality. Accordingly, the Respondent's motion for leave to file a supplemental appendix should be denied and the proposed supplemental appendix, as well as any references to the same by the Respondent should be stricken from the record. Alternatively, the Respondent's proposed supplemental appendix, and any references to the same, should be sealed as they contain confidential information.

## II. CONCLUSION

The Circuit Court erred in not applying the analysis set forth by this Court when a defendant asserts qualified immunity. Respondent does nothing to dispute this. If the Circuit Court had applied the appropriate analysis pursuant to this Court's precedent, the Circuit Court would have dismissed the claims asserted against the Petitioner in the First Amended Complaint because he did not engage in any acts or omissions which violated a clearly established right. Respondent presents nothing that disputes the arguments asserted by the Petitioner in support of this position. Accordingly, the Petitioner prays this Court will reverse the Circuit Court's Order and direct the Circuit Court to enter an Order dismissing the claims raised against him in the First Amended Complaint with prejudice. Alternatively, this Court should remand this matter directing the Circuit Court to enter an appropriate Order applying the proper qualified immunity analysis as set forth in this Court's prior decisions.

**JOSHUA DAVID ZOMBRO,**

**By Counsel,**



**James W. Marshall, III (WV Bar #10677)**
BAILEY & WYANT, PLLC
300 Foxcroft Ave.
Suite 100B Room 8
Martinsburg, West Virginia 25401
(304) 901-2000

Michael W. Taylor (WV Bar #11715)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222