IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0741

THE WEST VIRGINIA STATE POLICE, DEPARTMENT OF MILITARY AFFAIRS and PUBLIC SAFETY,

Defendant Below, Petitioner,

v.

J.H., a minor, by and through his partner and next friend, L.D.,

Plaintiff Below, Respondent.

Appeal from an order of the Circuit Court of Berkeley County (CC-02-2019-C-161)

PETITIONER'S BRIEF

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B. The Circuit Court of Berkeley County erred as a matter of law in its order of July 26, 2019 when it denied the State Police's motion to dismiss the vicarious liability claim on qualified immunity grounds despite its earlier finding, in response to the Trooper Defendants' motions to dismiss, that there was an absence of well-pleaded facts to show that the Trooper Defendants used excessive force and that a mere allegation of injury during the course of an arrest was insufficient to overcome qualified immunity.

C. The Circuit Court of Berkeley County erred as a matter of law in its order of July 26, 2019 when it denied the State Police's motion to dismiss the negligent training and supervision claim on qualified immunity grounds, even though neither J.H. nor the Circuit Court identified any clearly established law the State Police was alleged to have violated in its training and supervision of the Trooper Defendants.

II. STATEMENT OF THE CASE

Respondent J.H. alleged that Defendants Michael Kennedy and Derek Walker were State Troopers, "acting both within and outside the scope of their duties" at the relevant time. (App. 000073 at ¶¶ 3, 5). He also alleged that on November 19, 2018, Troopers Kennedy and Walker, along with Defendants Deputies Christopher Merson and Austin Ennis, "acting together as a mob" "brutally and severely beat" him. *Id.* at 000074 ¶ 7.

J.H. brought two counts against the State Police: First, a count of vicarious liability, claiming that the alleged actions of Troopers Kennedy and Walker were imputed to the State Police under the doctrine of *respondeat superior*. *Id.* at ¶¶ 8-9. The alleged actions of Troopers Kennedy and Walker that were to be imputed to the State Police were that the Troopers violated ten different statutes of the West Virginia Code, causing J.H. harm, and that Troopers Kennedy and Walker negligently and intentionally inflicted emotional distress upon him. *Id.* at 000074-76 ¶¶ 12, 14, 16. Second, J.H. brought a direct claim against the State Police for negligent training and supervision. *Id.* at 000074 ¶ 10.

Before the State Police filed its initial response to the complaint, the Trooper Defendants each filed motions to dismiss, arguing, *inter alia*, that they were entitled to qualified immunity from J.H.'s claims because J.H. did not identify in the complaint a clearly established law or right that either of the Trooper Defendants violated. The Circuit Court denied Trooper Kennedy's motion to dismiss by an order entered June 22, 2019 and Trooper Walker's motion to dismiss by an order entered July 15, 2019. *Id.* at 000062-64, 000077-80. In both orders, the Circuit Court found that there was "an absence of well-pleaded facts to allow the court to determine whether the physical actions visited upon J.H. was [sic] objectively reasonable force to effect an arrest or a gratuitous infliction of pain on a recalcitrant prisoner." *Id.* at 000063, 000078-79. The Circuit Court further found that a simple allegation of injury during the course of an arrest is insufficient to particularly plead facts to overcome an assertion of qualified immunity. *Id.* at 000064, 000079. Nevertheless, the court did not make a ruling on the qualified immunity defense but deferred the question and permitted discovery to proceed. *Id.*

The State Police also moved to dismiss the claims against it. The State Police argued that, despite the Circuit Court's earlier orders, J.H. had not made sufficient specific factual allegations

on the face of the complaint that, even if true, could state a violation of clearly established law against the Trooper Defendants. *Id.* at 000097. Consequently, if the Trooper Defendants were entitled to qualified immunity from the direct claims against them, the State Police was entitled to qualified immunity from the vicarious liability claim against it. *Id.* The State Police further argued that it was entitled to qualified immunity from the negligent training and supervision claim because J.H. did not plead any facts, taken as true, that would show the State Police violated clearly established law in its training and supervision of the Trooper Defendants. *Id.* at 000099-102.

The Circuit Court denied the State Police's motion to dismiss by an Order entered on July 26, 2019. *Id.* at 000167-71. The Circuit Court devoted only one paragraph of its Order to discussing qualified immunity. The Circuit Court again merely stated that it was not making any findings regarding qualified immunity and was deferring the question to permit a factual inquiry. *Id.* at 000170.

The State Police moved the Circuit Court to stay its proceedings pending this appeal. The Circuit Court held a hearing on the motion to stay on August 30, 2019.

During the hearing on the motion to stay, and in its order denying the motion, the Circuit Court revealed that it considered a "dashcam" video of the incident at issue when deciding to deny the State Police's motion to dismiss. *Id.* at 00196:23-197:16; 000209-10. J.H. submitted the video in response to Trooper Walker's motion to dismiss. *Id.* at 000066. The Circuit Court, however, did not indicate in its order denying Trooper Walker's motion that it considered the video in reaching its decision. *Id.* at 000077-79. To the contrary, the Circuit Court stated that its decision was "[b]ased solely on the amended complaint[.]" *Id.* at 000078.

This Court has jurisdiction to hear this appeal because the order being appealed denied the State Police's motion to dismiss, which was based, in part, on the grounds of qualified immunity.

Thus, the order is subject to immediate appeal under the "collateral order doctrine." Syl. Pt. 1, *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015).

III. SUMMARY OF ARGUMENT

When the Circuit Court ruled on the State Police's motion to dismiss, it committed three errors. First, the court committed plain error by considering matters outside of the pleadings at the Rule 12(b)(6) stage. Specifically, the court considered "dashcam" video of the incident at issue that was submitted by J.H. in response to the motion to dismiss filed by Trooper Walker.

Second, the Circuit Court denied the State Police's motion to dismiss the vicarious liability claim against it, despite its earlier finding that the complaint lacked sufficient allegations to state a violation of clearly established law by the Trooper Defendants. Given this finding, the court should have granted the motions to dismiss of the Trooper Defendants and the State Police. Instead, the court permitted discovery to go forward.

Finally, the Circuit Court denied the State Police's motion to dismiss the negligent training and supervision claim. The Circuit Court did not consider the State Police's motion in regard to this claim at all, even though J.H. did not plead any facts that, if proven true, would show a violation of clearly established law in the State Police's training and supervision of the Trooper Defendants. Instead, the Circuit Court simply held that discovery in general could proceed.

IV. STATEMENT REGARDING ORAL ARGUMENT

The State Police respectfully submits that oral argument under Rule 20 is appropriate in this appeal. First, this appeal involves issues of first impression—whether a circuit court may consider matters outside the pleadings submitted by a non-moving party in response to a motion to dismiss under Rule 12(b)(6) and whether an interlocutory appeal under the collateral order doctrine is proper when a circuit court refuses to rule on qualified immunity in response to a Rule

12(b)(6) motion. Second, this appeal involves issues of fundamental public importance—whether a public agency may be forced to undergo time-consuming and expensive litigation even if a plaintiff does not plead sufficient facts in the complaint to state a violation of clearly established law by the public agency.

V. STANDARD OF REVIEW

A *de novo* standard of review applies to the Circuit Court's July 26, 2019 order. First, there is an issue of whether the Circuit Court properly applied the West Virginia Rules of Civil Procedure in considering matters outside of the pleadings when deciding a motion under Rule 12(b)(6). "An interpretation of the *West Virginia Rules of Civil Procedure* presents a question of law subject to a *de novo* review." Syl. Pt. 4, *Keesecker v. Bird*, 200 W. Va. 667, 671, 490 S.E.2d 754, 758 (1997).

Second, this Court reviews a circuit court's order denying a motion to dismiss using a *de novo* standard. *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015). When deciding a motion to dismiss under Rule 12(b)(6), "the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). Despite this liberal standard, however, the essential material facts to support the claim must appear on the face of the complaint. *Fass v. Nowsco Well Serv.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986). Moreover, "sketchy generalizations of a conclusive nature unsupported by operative facts" do not set forth a cause of action. *Id.* at 52-53, 350 S.E.2d at 563-64. Finally, "'in 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 (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996)).

VI. ARGUMENT

A. The Circuit Court Committed Plain Error by Considering Matters Outside the Pleadings When Deciding the State Police's Motion to Dismiss Without Providing Notice to the State Police and Without Converting the Motion Into One for Summary Judgment.

This Court should reverse the Circuit Court's order because the court below improperly considered matters outside the pleadings when deciding the State Police's motion to dismiss without providing notice to the State Police and without converting the motion into one for summary judgment. As a result, the State Police had no opportunity to present its own evidence and argument for judgment as a matter of law.

In deciding a motion to dismiss under Rule 12(b)(6), a trial court generally may not consider matters outside the pleadings. *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 536, 236 S.E.2d 207, 211 (1977). This is because a Rule 12(b)(6) motion "goes solely to the sufficiency of the claims *as they are presented in the pleadings*." *Dunn v. Consolidation Coal Co.*, 180 W. Va. 681, 683, 379 S.E.2d 485, 487 (1989) (emphasis added). If, however, a trial court considers matters outside of the pleadings at the Rule 12(b)(6) stage, "the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." W. Va. R. Civ. P. 12(b); *see also* Syl. Pt. 5, *Riffle v. C.J. Hughes Const. Co.*, 226 W. Va. 581, 703 S.E.2d 552 (2010). Failure to provide notice to the other parties and an opportunity to present their own evidence may constitute reversible error. *Riffle*, 226 W. Va. at 589-90, 703 S.E.2d at 560-61; *Dunn*, 180 W. Va. at 684, 379 S.E.2d at 488.

Here, the Circuit Court considered matters outside of the pleadings—a "dashcam" video of the incident in question—without providing notice to the parties, and without providing the other parties an opportunity to present their own evidence. J.H. had earlier submitted the video as

an exhibit to his response in opposition to Trooper Walker's motion to dismiss. App. 000066.[1] Although J.H. submitted the video, the Circuit Court did not provide notice to the parties that it would consider the video in deciding Trooper Walker's motion to dismiss. Indeed, the order denying Trooper Walker's motion made no mention of the video. *Id.* at 000077-79.

The Circuit Court also did not provide notice that it intended to consider the video when deciding the State Police's motion to dismiss.[2] As with the order denying Trooper Walker's motion to dismiss, the order denying the State Police's motion to dismiss did not mention the video. *Id.* at 000167-71.

The State Police only learned that the Circuit Court considered the video in ruling on its motion to dismiss after it had filed this appeal, during a hearing on the motion to stay filed in the Circuit Court. In its order denying the State Police's motion to stay, the Circuit Court discussed the appropriateness of a motion to dismiss when the incident at issue is "documented by a real-time video as in this matter[.]" *Id.* at 000210. During this hearing, the court inquired whether it was required to blind itself to the video in order to decide a motion to dismiss. *Id.* at 000193:15-21. Nonetheless, the court stated on the record that the video was "clearly in [its] mind when [it] was considering [the State Police's] motion." *Id.* at 000196:23-197:16.

It does not matter that it was J.H., and not the State Police, who submitted the materials outside the pleading. Rule 12(b) provides that a motion to dismiss shall be treated as one for

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[1] The State Police was served a copy of J.H.'s response to Trooper Walker's motion to dismiss via West Virginia's E-Filing System. Consequently, the State Police was not served with a copy of the video itself. Upon information and belief, the video included in the Appendix, over the State Police's objection, is the video J.H. refers to.

[2] J.H. mentioned the video in his response to the State Police's motion to dismiss. *Id.* at 000156. The State Police intended to object to consideration of the video in its reply brief, but the Circuit Court entered an order denying the State Police's motion before the State Police had an opportunity to file a reply. *Id.* at 000167. ("The court therefore will dispense with the reply and rule.")

summary judgment if "matters outside the pleading are presented to and not excluded by the court"; it does not distinguish who must present the matters. W. Va. R. Civ. P. 12(b). *See also*, Louis J. Palmer & Hon. Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* 417 (5th ed. 2017) (noting that the court may convert a motion to dismiss into one for summary judgment when "it is the non-moving party who introduces extra-pleading matter"); Charles Alan Wright & Arthur R. Miller, 5C *Federal Practice & Procedure* § 1366 (3d ed. 2004) ("Either the pleader or the moving party or both may bring the conversion provision into operation by submitting matter that is outside the challenged pleading, as courts in every circuit have recognized."); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 558 (4th Cir. 2013) ("On a motion pursuant to Rule 12(b)(6), the court's task is to test the legal feasibility of the complaint without weighing the evidence that might be offered to support or contradict it.")

The Circuit Court's consideration of the video submitted by J.H.—without providing the State Police with notice and a chance to submit its own evidence—was reversible error. For this reason alone, the Court should reverse the Circuit Court's order denying the State Police's motion to dismiss. Even if the Circuit Court had not considered the video, however, it erred as a matter of law by failing to grant the State Police's motion to dismiss based upon the deficiencies in J.H.'s pleading, as discussed below.

B. The Circuit Court Erred in Declining to Dismiss the Vicarious Liability Claim Against the State Police Because It Expressly Found That J.H. Did Not Plead Sufficient Facts to Overcome the Trooper Defendants' Entitlement to Qualified Immunity.

This Court should also reverse the Circuit Court's order because the Circuit Court erred as a matter of law when it did not grant the State Police's motion to dismiss the vicarious liability claim on qualified immunity grounds and permitted discovery to go forward. Because the Circuit Court earlier acknowledged that J.H.'s pleading did not allege sufficient facts to state a violation

of clearly established law so as to overcome the Trooper Defendants' entitlement to qualified immunity, it was obligated to dismiss the vicarious liability claim against the State Police.

Qualified immunity is more than merely a defense to a suit; the "very heart" of the doctrine is that it spares a defendant from having to go forward with an inquiry into the merits of the case. *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). The ultimate determination of whether qualified immunity bars a civil action is a question of law that is ripe for summary disposition unless there is a bona fide dispute about the facts that underlie the immunity determination. *Id.* at Syl. Pt. 1.

This Court has set forth the analysis to be used to decide whether qualified immunity applies. When the alleged governmental acts or omissions giving rise to liability involve discretionary functions, trial courts must determine whether the alleged acts or omissions violate clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive. Syl. Pt. 3, *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015). Without such a showing, both a state agency and its employees are immune from liability. *Id.*

Thus, in cases where qualified immunity is implicated, trial courts must insist on heightened pleading by the plaintiff. *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659. Public officials and governmental agencies are entitled to qualified immunity "unless it is shown by *specific allegations* that the immunity does not apply. *Id.* at 147-48, 479 S.E.2d at 657-58 (emphasis added). These specific allegations must be more than mere conclusions. *Id.* at 150, 479 S.E.2d at 660. When the allegations in a plaintiff's complaint, even accepted as true, do not state a cognizable violation of constitutional or statutory rights, then the complaint has failed to state a claim upon which relief may be granted. *Id.* at 149, 479 S.E.2d at 659 n.12. Accordingly, when a

complaint fails to allege a violation of clearly established law, dismissal is appropriate. *See Marple*, 236 W. Va. at 660-61, 783 S.E.2d at 81-82 (reversing denial of motion to dismiss on qualified immunity grounds when plaintiff did not identify clearly established law that was violated by defendant's alleged discretionary acts); *W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 203, 800 S.E.2d 230, 241 (2017) (same); *W. Va. Bd. of Educ. v. Croaff*, No. 16-0532, 2017 WL 2172009, at *6-7 (May 17, 2017) (memorandum decision) (same).

Accordingly, if a plaintiff does not plead sufficient facts on the face of the complaint to state a violation of clearly established law that, if proven true, could overcome qualified immunity, the trial court should not permit discovery to proceed. As the United States Supreme Court recognizes, one of the chief purposes of qualified immunity "is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Therefore, until the threshold question of immunity is resolved, discovery should not be allowed. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Helms v. Carpenter*, No. 16-1070, 2017 WL 5513618, at *5 (W. Va. Nov. 17, 2017) (memorandum decision) ("Clearly, under *Hutchison*, the immunity from the burden of a trial on the merits may extend to pretrial discovery.") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Here, the alleged actions underlying J.H.'s causes of action against the Trooper Defendants and State Police involved J.H's arrest. An officer's arrest of a suspect is a discretionary function. *Jarvis v. W. Virginia State Police*, 227 W. Va. 472, 482, 711 S.E.2d 542, 552 (2010). There were no specific factual allegations on the face of the First Amended Complaint regarding fraudulent, malicious, or oppressive conduct by the Trooper Defendants. Therefore, in order to overcome the

Trooper Defendants' qualified immunity, J.H. had to allege specific facts to show that they violated a clearly established law or right. *Marple*, 236 W. Va. at 660, 783 S.E.2d at 81.

The Supreme Court of the United States has noted that specificity in allegations is especially important in excessive force cases because it is sometimes difficult for an officer to determine how the doctrine of excessive force will apply to the factual situation the officer faces. *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018) (per curiam). It is not sufficient for a court to simply hold that it is clearly established that an officer may not use unreasonable and excessive force and then deny qualified immunity. *Id.* at 1153. Similarly, a plaintiff cannot avoid qualified immunity by a lack of specificity in the pleadings. *Croaff*, 2017 WL 2172009, at *5.

It is well-established that the right of police officers to make an arrest necessarily includes the right to use some degree of physical force to effect it. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Not every push or shove by a police officer in arresting a suspect violates the Fourth Amendment, even if the use of force later seems unnecessary from the peace of a judge's chambers. *Id.*

The First Amended Complaint, however, alleged no specific facts to show that the Trooper Defendants used excessive force in arresting J.H. App. 000073-76. In response to the State Police's motion to dismiss, J.H. failed to identify any specific factual allegations in the pleadings that could overcome the Trooper Defendants' qualified immunity. *Id.* at 000155-66.

In its order denying the State Police's motion to dismiss, the Circuit Court also did not identify any specific allegations in the First Amended Complaint that, if proven true, could overcome the Trooper Defendants' qualified immunity. *Id.* at 000167-71. In fact, the Circuit Court scarcely addressed the State Police's qualified immunity argument. The Circuit Court simply noted incorrectly that no case cited by the State Police applied qualified immunity in the Rule 12(b)(6)

context, even though the State Police cited the *Marple* and *Croaff* decisions in its brief, both of which reversed trial court orders denying Rule 12(b)(6) motions based upon qualified immunity. *Id.* at 000170.

To the contrary, in its orders denying the Trooper Defendants' motions to dismiss, the Circuit Court expressly found that there was "an absence of well-pleaded facts to allow the court to determine whether the physical actions visited upon J.H. was [sic] objectively reasonable force to effect an arrest or a gratuitous infliction of pain on a recalcitrant prisoner." *Id.* at 000063, 000070. Additionally, the Circuit Court acknowledged that a mere "allegation of injury during the course of an arrest is not sufficient to particularly plead facts" overcoming qualified immunity. *Id.* at 000064, 000071. Despite these findings, the Circuit Court did not grant the Trooper Defendants' motions to dismiss. The Circuit Court noted that qualified immunity is not a circumstance requiring specific pleading, despite this Court's holding otherwise in *Hutchison. Id.*

Given its earlier finding, in response to the Trooper Defendants' motions to dismiss, that merely alleging injury during the course of an arrest is not sufficient to overcome qualified immunity and that J.H. failed to plead sufficient facts to allow the court to determine whether the Trooper Defendants used excessive force against him, the Circuit Court was obliged to grant the Trooper Defendants' motions to dismiss on the grounds of qualified immunity, not defer the decision pending completion of discovery. Had the Circuit Court granted the Trooper Defendants' motions to dismiss, there would have been no basis for the vicarious liability claim against the State Police.

The Circuit Court's order, deferring a ruling on the State Police's entitlement to qualified immunity and permitting discovery to proceed, despite its express finding that J.H. failed to plead

sufficient facts to overcome the Trooper Defendants' immunity, was an error of law. Consequently, this Court should reverse the Circuit Court's order.

C. The Circuit Court Erred in Refusing to Dismiss the Negligent Training and Supervision Claim Against the State Police Because J.H. Did Not Identify Any Clearly Established Law That the State Police Violated in Training and Supervising the Trooper Defendants.

The Circuit Court further erred when it did not dismiss the negligent training and supervision count against the State Police. In its order, the Circuit Court did not address this claim at all. Nevertheless, the Circuit Court improperly let discovery proceed on this count without making a threshold finding that J.H. pled sufficient facts that, if proven true, would state a violation of clearly established law. Simply put, J.H. did not plead any facts to show that the State Police either acted maliciously or violated clearly established law in its training and supervision of the Trooper Defendants. Consequently, the Circuit Court should have dismissed this claim against the State Police.

If the alleged governmental acts or omissions giving rise to a claim fall within the category of discretionary functions, courts must determine whether the plaintiff has shown "that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive[.]" Syl. Pt. 11, *W. Va. Reg'l Jail & Corr. Fac. Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). Without such a showing, the state agency is entitled to qualified immunity. *Id.*

Here, J.H alleged that the State Police was negligent in failing "to properly train its officers and members, including Defendants Kennedy and Walker"; in failing "to seek out, negate, and prevent the execution of any policy and agreement, written or unwritten, wherein its members physically assault and beat up any person accused of a criminal offense who flees or attempts to flee from a member or members, and [in failing] to discipline its members who have engaged in

such conduct in the past"; and in failing "to exercise field supervision over its members so as to preclude the intentional physical assaulting and beating up of criminal suspects." App. 000074 ¶ 10.

"[T]he broad categories of training, supervision, and employee retention . . . easily fall within the category of 'discretionary' governmental functions." *A.B.* at 514, 766 S.E.2d at 773. Because J.H. did not make any allegations that the State Police acted fraudulently, maliciously, or oppressively, the Court applies a two-part test to determine whether qualified immunity applies: "'(1) does the alleged conduct set out a constitutional or statutory violation; and (2) were the constitutional standards clearly established at the time[?]'" *Marple*, 236 W. Va. at 660, 783 S.E.2d at 81 (quoting *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659). If the complaint fails to allege a cognizable violation of constitutional or statutory rights, the inquiry ends at the first step because the plaintiff failed to state a claim upon which relief may be granted. *Id.*

J.H. did not identify in his pleading any clearly established constitutional or statutory violations by the State Police in carrying out the discretionary functions of training and supervising its members. Although J.H. identified a number of statutes allegedly violated by the Trooper Defendants, their conduct is not the focus of the inquiry; instead, the question is whether *the State Police*, in training and supervising the Trooper Defendants, violated a clearly established right. *A.B.* at 517, 766 S.E.2d at 776. In other words, J.H. did not show what the State Police failed to do that it was specifically required to do under a clearly established law or right. *Id.* at 516, 766 S.E.2d at 775.

The Circuit Court, however, did not address the State Police's argument that it was entitled to qualified immunity from the negligent training and supervision count. Rather, the Circuit Court confined its discussion of qualified immunity generally, holding that it was not making any

findings on the issue and deferring its decision pending discovery. App. 000170. As discussed above, however, without a predicate showing that J.H. pled sufficient facts, that if proven true, could state a violation of clearly established law, the Circuit Court should not have allowed discovery to proceed. *Harlow*, 457 U.S. at 818; *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (reversing trial court's order that refused to rule on qualified immunity so as to permit discovery, noting "[T]hat is *precisely* the point of qualified immunity: to protect public officials from expensive, intrusive discovery until and unless the requisite showing overcoming immunity is made." (emphasis in original)).

J.H. simply alleged that the State Police was negligent in the training and supervision of its members, but he did not identify any clearly established law or right that the State Police violated in carrying out these discretionary functions. The State Police is therefore entitled to qualified immunity. Thus, the Circuit Court erred when it did not grant the State Police's motion to dismiss the negligent training and supervision count, and this Court should reverse the Circuit Court's order.

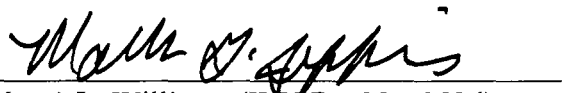
VII. CONCLUSION

The Circuit Court of Berkeley County committed plain error by considering matters outside the pleadings when deciding the State Police's Rule 12(b)(6) motion. It further erred when it failed to grant the State Police's motion to dismiss on the grounds of qualified immunity, both because it had earlier found an absence of factual allegations to defeat the Trooper Defendants' entitlement to qualified immunity and because J.H. did not plead any facts to show that the State Police violated clearly established law in its training and supervision of the Trooper Defendants.

WHEREFORE, Petitioner West Virginia State Police respectfully requests entry of an order reversing the order of the Circuit Court of Berkeley County and remanding the case for entry

of an order granting the West Virginia State Police's motion to dismiss or, in the alternative, entry of an order reversing the order of the Circuit Court of Berkeley County and remanding for further proceedings.

Respectfully submitted this 25th day of November, 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2019, I caused the foregoing "Petitioner's Brief" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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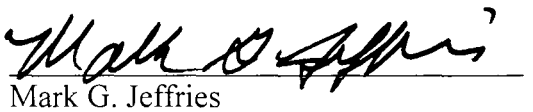

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