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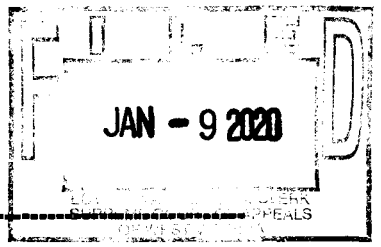

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0741

DO NOT REMOVE FROM FILE

WEST VIRGINIA STATE POLICE,
Department of Military Affairs and Public Safety,
Defendant Below / Petitioner,

vs.

J.H., a minor, by and through his parent and next friend, L.D.,
Plaintiff Below / Respondent.

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

RESPONDENT'S BRIEF

J.H., a minor, by and through
his parent and next friend, L.D.,
Respondent
By Counsel

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

I. STATEMENT OF THE CASE

Respondent generally agrees with the statement of the case presented in Petitioner's brief, except insofar as whether the "facts" as presented and developed to this point are sufficient to serve as the basis for fully informed consideration by the trial and appellate courts of the Rule 12(b)(6), WV R. Civ. P. issues that underlie this appeal. This point is discussed in great detail below..

II. SUMMARY OF ARGUMENT

1. Because the Circuit Court order on appeal deferred ruling on the issue of qualified immunity in favor of additional factual development through discovery, the circuit court order on appeal is interlocutory, and not a final appealable order.

2. The real time video of the events which serve as the basis for the allegations in the complaint is not a matter outside the complaint. If the circuit court considered the video as part of the ruling on appeal (which has not been established), the circuit court did not commit error.

3. The Circuit Court's orders denying in part and deferring ruling on the issue of qualified immunity concerning the individual former trooper defendants below was not appealed by those trooper defendants. Thus, the orders stand. Petitioner has no standing to seek appellate review of these non-appealed orders.

4. Because the Circuit Court has not yet ruled on the claims of negligent and/or reckless training and supervision asserted against Petitioner, those claims are not yet ripe for appeal and should not be considered by this Court.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be placed on the Court's argument calendar pursuant to Rule 18(a), WV R. App. Pro., because the decisional process will be aided by oral argument.

This case is suitable for oral argument under Rule 20, WV R. App. Pro., because it involves the following: 1) an issue of first impression (deferral of a ruling on qualified immunity in favor of factual development through discovery; 2) issues of fundamental public importance, and 3) assignments of error in the application of settled law.

This case should be decided on the merits by the issuance of an opinion under Rule 20(g), WV R.Civ.P., for the following reasons: 1) emphasize the application of settled law; 2) address issues of first impression; 3) address issues of fundamental public importance, i.e., police administration and function; and 4) provide guidance to trial courts and litigants faced with similar issues in the future.

IV. STANDARD OF REVIEW

An interpretation of the *West Virginia Rules of Civil Procedure* presents a question of law subject to a *de novo* review." Syl. Pt. 4, Kesecker v. Bird, 200 W. Va. 667, 671, 490 S.E. 2d 754, 758 (1997).

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).

Motions to dismiss under Rule 12(b)(6) are viewed with disfavor. Chapman v. Kane Transfer Co., 236 SE2d 207 (WV 1977).

V. ARGUMENT

1. The July 26, 2019 interlocutory Circuit Court Order on appeal reflects on its face that the Circuit Court applied Rule 12(b)(6) criteria in denying in part Petitioner's Motion to Dismiss and deferring ruling on Petitioner's claim of qualified immunity in favor of additional discovery. The Circuit Court order presented for appellate review reflects no error by the Circuit Court.

Petitioner claims the Circuit Court committed plain error in considering matters outside the complaint prior to issuing its July 26, 2019 order denying in part Petitioner's Rule 12(b)(6) Motion to Dismiss and deferring ruling on Petitioner's claim of qualified immunity in favor of discovery.

A Court speaks through its orders. State v. White, 425 SE 2d 210, 212 n.2 (WV 1992), citing State ex rel. Eselwine v. Thompson, 207 SE 2d 105, 107 (WV 1973). The Circuit Court order on appeal (App. 167-171) reflects that Petitioner failed to demonstrate (and continues to so fail) that it is beyond doubt that Plaintiff (here, Respondent) can prove no set of facts in support of his claims that will entitle Plaintiff to relief under the First Amended Complaint[1]. Critically, for purposes of addressing the Petitioner's claim that the Circuit Court committed error in considering matters outside the pleading[2] when ruling on the subject motion to dismiss, the subject order is silent on the question of whether the Circuit Court considered matters outside the complaint when creating the ruling on appeal. In other words, in complete compliance with Rule 12(b)(6) and the cases interpreting and applying this rule, the Order on appeal is confined to the sufficiency of the claim set forth within the four corners of Plaintiff's First Amended Complaint - no mention is made in the order under appellate

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[1] A Rule 12(b)(6) motion to dismiss challenges the sufficiency of the claim set forth in the complaint. The Circuit Court cited Chapman v. Kane Transfer Co., 236 SE 2d 207 (WV 1977) as the standard to be applied in deciding a Rule 12 (b)(6) Motion to Dismiss for failure to state a claim for relief. Such motions are viewed with disfavor. Id.

[2] Rule 7, WV R. Civ. P., defines "pleadings." The only "pleadings" presented to this court in the Appendix are Plaintiff's Complaint (App. 1) and Plaintiff's First Amended Complaint (App. 73)

review that the Circuit Court considered matters other than the allegations set forth in the Complaint.[3]

Rule 8(a)(1), WV R. Civ. P., requires a short and plain statement of the claim showing that the pleader is entitled to relief. Rule 8(f) requires all pleadings to be construed as to do substantial justice.

As reflected in the July 26, 2019 order on appeal, Plaintiff's First Amended Complaint (App. 73 - 76), at a minimum, sets forth a claim for battery, (App 168) based on the arrest and beating of Plaintiff as set forth in the complaint. Petitioner has failed to demonstrate how this short, plain statement of the claim required by Rule 8(a) fails to meet the Rule 12(b)(6) standard, particularly when the pleading is to be liberally construed as required by Rule 8(f).

Simply put, Petitioner has failed to 1) meet its heavy burden of demonstrating that the First Amended Complaint fails to set forth claims for relief; and 2) demonstrate that the Circuit Court somehow committed reversible error by entering an order which, on its face, makes no mention of the consideration of matters extrinsic to the complaint. The Circuit Court did not need to consider matters extrinsic to the complaint when the complaint met the Rule 12(b)(6) standard on its face.

A. Even if the Circuit Court viewed the real time video of the events detailed in the complaint, Petitioner has failed to demonstrate 1) that the video was a matter extrinsic to the complaint; and 2) the video was relied upon by the Circuit Court in denying in part Petitioner's Rule 12(b)(6) Motion to Dismiss

Setting aside the fact that the July 26, 2019 Circuit Court order on appeal never mentions the Circuit Court considered matters outside the complaint as a basis for the rulings encompassed in the order, the consideration of a real time, immutable, video of the events complained of in the complaint is not necessarily

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[3] Petitioner's claim that the Circuit Court improperly considered matters extrinsic to the complaint when issuing its Rule 12(b)(6) ruling arises from comments made by the Circuit Court at an August 30, 2019 hearing concerning, in part, Petitioner's Motion for Stay of Proceedings pending appeal (App. 192-197).

error.[4] The events depicted on the video are matters intrinsic to the factual allegations in the complaint. Further, Petitioner has not (and/or cannot) demonstrate that the Circuit Court considered the video as part of the court's ruling.

Petitioner cites the following language from Rule 12(b)(7), WV R. Civ. P., in support of the argument that a Rule 12(b)(6) motion to dismiss should be treated as a Rule 56 motion for summary judgment, if the trial court considers matters outside the pleading prior to ruling:

> "If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis added)[5]

Petitioner also cites Riffle v. C.J. Hughes Const. Co., 703 SE 2d 552 (WV 2010) in support of its argument that the Circuit Court committed error "... by considering matters outside the pleading without notice" to Petitioner.

The written allegations in Plaintiff's Complaint are based on events depicted in the video. The events depicted in the video are identical to the matters contained in the complaint. Therefore, the video at issue is not a matter outside the pleading; it is the immutable, real-time basis of the complaint and intrinsic to the

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[4] "The West Virginia Rules of Civil Procedure should be construed liberally to promote justice. Consistent with this liberal approach, a circuit court may look beyond the technical nomenclature of the complaint when ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure to reach the substance of the parties' positions." Syl.Pt.1, Harrision v. Davis, 478 SE2d 104 (WV 1996).

[5] As an aside, both the language from Rule 12 (b)(7) cited above, and the following language from Rule 56(f) view with favor the opportunity of a party to marshall facts and evidence in support of its respective position prior to dispositive ruling by the court: " the court may refuse the application for judgment or may order a continuance to permit... depositions to be taken or discovery to be had or may make such other order as is just." Rule 56(f), WV R. Civ. P. In the case at bar, the Circuit Court has sua sponte deferred ruling on the issue of qualified immunity in favor of discovery.

complaint.[6]

Petitioner was on notice of the video: a) it was used as the basis to discharge former trooper Defendants Kennedy and Walker from their employment with Petitioner; and b) it has been widely disseminated in the public domain - television, newspaper and social media. The video was officially in the court record on July 8, 2019 as an exhibit to Plaintiff's opposition to Defendant former trooper Walker's motion to dismiss (App. 72) - ten days before the July 18, 2019 filing of Petitioner's Motion to Dismiss at issue in the case at bar. The Petitioner concedes its failure to object to the video (see footnote 2, page 7 of Petitioner's brief).

Nothing presented by Petitioner to this Court demonstrates the Circuit Court improperly relied on any matters extrinsic to the complaint at the time of the ruling on appeal.

2. Petitioner West Virginia State Police has no standing to argue the qualified immunity claims of the individual former trooper Defendants when those individual Defendants themselves chose not to appeal the Circuit Court's interlocutory ruling which deferred consideration of the individual Defendants' qualified immunity claims in favor of additional discovery.

Petitioner concedes that "the ultimate determination whether qualified immunity bars a civil action is a question of law that is ripe for summary disposition unless there is a bona fide issue about the facts that underlie the immunity determination" (emphasis added), see page 9 of Petitioner's brief citing Syl.Pt. 1, Hutchison v. City of Huntington, 479 SE2d 649 (WV 1996). This statement implies appropriate factual development (as ordered by the Circuit Court below) prior to a ruling on the issue, especially when, as in the case at bar, the parties disagree whether a sufficient factual basis has been alleged in order to proceed with litigation.

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[6] Information brought out during argument of the motion to dismiss is relevant to the extent that such information is consistent with the allegations. Harrison at 110, citing State ex rel. McGraw v. Scott Runyan Pontiac Buick, Inc., 461 SE2d at 522 n.7 (WV 1995).

Former troopers Michael Kennedy and Derek Walker were discharged from the West Virginia State Police because of their acts and omissions in the arrest and beating of Plaintiff/Respondent. (See Complaints (App 1, 73, respectively, and video submitted as part of the Appendix in this case.) Both former troopers filed motions to dismiss. Both motions to dismiss were denied in part and deferred in part.[7] Both former troopers appeared to recognize the Circuit Court's deferral of a ruling on the issue of qualified immunity in favor of discovery for what the ruling was: interlocutory.

Interlocutory rulings are generally not appealable. However, the circuit court denial (as opposed to deferral as in the case at bar) of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine. WV Board of Education v. Marple, 783 SE 2d 75,81 (WV 2015). Setting aside the fact that the case at bar involves a deferral of a motion to dismiss and not a denial, both former troopers chose not to appeal the ruling. The deadline for such appeals has passed without appeals from the former troopers. Now, Petitioner seeks to appeal rulings concerning defendants that are not parties to this appeal which rulings are now the law of the case below. Arizona v. California, 460 US 605, 618 (1983). See also State ex rel. Frazier & Oxley, LC v. Cummings, 591 SE 2d 728, 734 (WV 2003). Petitioner has no standing to pursue claims of entities not parties to this appeal.

Standing is comprised of three elements: first, the party attempting to establish standing must have suffered an "injury-in-fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court. Findley v. State Farm Mutual Auto Ins. Co., 576 SE2d 807, 821 (WV 2002)

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[7] The Kennedy order is found at App. 62. The Walker order is found at App. 77.

Petitioner has not met the requirements for standing, to-wit: first, it has suffered no injury. At a minimum, it will have to deal with the burdens of litigation to some degree as a custodian of records, if this is truly an "injury." Second, Respondent concedes the burdens of litigation (i.e., "injury") about which Petitioner complains is causally connected to the conduct forming the basis of the lawsuit. Third, Petitioner is unable to demonstrate that its "injury" is likely to be redressed through a favorable decision of the court, at least at this early stage of the litigation, in the absence of discovery and factual development.

Setting aside the issue of whether Petitioner has standing to seek appellate review of a deferred ruling on the issue of qualified immunity, the Circuit Court has quite correctly deferred ruling on the issue in favor of additional factual development through discovery.

The issues raised in support of the Rule 12(b)(6) motions of Kennedy and Walker to dismiss Plaintiff's complaint were similar to the issues raised in support of Petitioner's motion to dismiss, to-wit: a) does WV Code §55-7-9 create a private cause of action based on the statutes that Plaintiff alleges Defendants have violated; and b) are the individual former trooper Defendants and Petitioner protected by qualified immunity? Petitioner West Virginia State Police also argues that because Respondent alleges Defendants Kennedy and Walker acted outside the scope of their employment, Petitioner is not vicariously liable for the actions of their employees, Kennedy and Walker. Petitioner overlooks the fact that Respondent alleged the former troopers were acting both within and outside the scope of their employment. See paragraph 3 of Plaintiff's First Amended Complaint. (App. 73)

The Circuit Court found that Respondent's complaint is clear and plain enough to determine that Respondent's claim is based on the allegation that Respondent was unlawfully beaten incident to Respondent's arrest.(App 63 and 79) The Circuit Court opined further that Petitioner has failed to demonstrate that Respondent can prove no set of facts which would entitle him to relief under Rule 12(b)(6), WV R.Civ.P.

A video of the events arising from Respondent's arrest and beating which serves as the basis of the complaint is already in the public domain, was attached as an exhibit to a previously filed opposition to a motion to dismiss, and is otherwise part of the record in this matter. (App. 72, and otherwise listed at the end of the appendix).

As to qualified immunity, Petitioner cites Hutchison v. City of Huntington, 479 SE 2d 649 (WV 1996) for the proposition that heightened pleading is required in a complaint where immunities are implicated, but never explains what heightened pleading means in the context of this case.

Indeed, Justice Cleckley, in authoring the *Hutchison* opinion notes: " 'heightened pleading' ...has always been a misnomer. A plaintiff is not required to anticipate the defense of immunity in his complaint." *Hutchison* at 660, citing *Gomez v. Toledo,* 446 U.S. 635, 640, 100 S.C. 1920, 1923-24, 64 L.Ed. 2d 572 (1980).

Justice Cleckley goes on to opine that "we believe, 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." *Hutchison* at 660.

Notably, despite relying heavily on *Hutchison* in its appeal, Petitioner never filed a Rule 12(e) motion for more definite statement.[8] Had Petitioner filed such a motion, the issue would have been squarely brought to a head. Such a motion would "...point out the defects complained of and the details desired." Instead, this court is left with Petitioner's vague claims that heightened pleading is required when immunities are implicated in a case without any guidance or suggestion from Petitioner of what that means. It is not the court's job to

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[8] WV R.Civ.P. Rule 12(e): Motion for more definite statement. - "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired."

guess at what Petitioner is trying to say, nor to do Petitioner's job.

Further, as the Circuit Court pointed out in its orders denying the motions to dismiss filed by Defendants Kennedy and Walker, qualified immunity is not a circumstance under which Rule 9, WV R.Civ.P., requires specific pleading. The Circuit Court has ruled that discovery will assist this court in ultimately ruling on the issue of qualified immunity and in ruling on dispositive motions that may be filed in the future. (App 62 and 77, respectively)

The preference for Rule 12(e) motions for more definite statement stated in Hutchison goes hand in hand with the circuit court's preference in this case for additional discovery. Clarification and/or development of factual issues through Rule 12(e) motions and discovery benefit both the trial court and appellate court; this encourages well reasoned rulings based on as much available information as possible. In fact, Petitioner can cite to no authority for the immediate dismissal of well pleaded complaints that survive initial Rule 12(b)(6) scrutiny. Nor can Petitioner cite to authority which prohibits Rule 12(e) motions and additional discovery to aid rulings on the issue of qualified immunity by both trial and appellate courts. Such a hard and fast rule would only encourage erroneous rulings made in a vacuum lacking clarifying factual development.[9]

3. Respondent has alleged sufficient facts in its First Amended Complaint to survive Petitioner's Rule 12(b)(6) motion to dismiss Respondent's claims of negligent and/or reckless training and supervision against Petitioner.

Petitioner concedes the July 26, 2019 circuit court order never specifically addressed the issue of negligent training and supervision when the Circuit Court denied in part Petitioner's Motion to Dismiss and

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[9] This Court has previously approved the practice of allowing discovery to assist the circuit court in determining whether it has jurisdiction over a matter. Bowers v. Wurzburg, 501 SE2d 479 (WV 1998). Permitting discovery to assist both the circuit court and appellate court to determining the viability of qualified immunity claims should also be viewed with favor. The practice of both allowing limited discovery and when to allow limited discovery to aid the court in ruling on the existence of qualified immunity appear to be issues of first impression before this court.

deferred ruling on the issue of qualified immunity in favor of additional discovery. (see pg. 13 of Petitioner's brief). This begs the question: "if the issues were not addressed, how is such an interlocutory non-ruling appealable?" Further, why hasn't Petitioner sought relief from the Circuit Court through a Rule 60, WV R. Civ. P. motion to correct the alleged "error?"

Nevertheless, the First Amended Complaint sets forth sufficient facts in support of its various claims against the defendant to meet the Rule 12(b)(6) standard. The immutable, real time video of the facts presented in the complaint substantiates the written factual allegations. Once the claims for relief and the facts supporting those claims are sufficiently presented, the burden shifts to Petitioner to demonstrate that Plaintiff has failed to set forth a claim for relief to satisfy Rule 12(b)(b). Petitioner has not and cannot meet this burden.

Petitioner's argument that it isn't responsible for the acts and omissions of former employees trained by Petitioner appears to ignore the vicarious liability claims against Petitioner. See paragraphs 8 and 9 of First Amended Complaint at App. 74. Further, Plaintiff sought discovery on this issue. See paragraph 10(b) of First Amended Complaint at App. 74. Additionally, if Petitioner has violated the law either directly, or indirectly through its employees, acting within the scope of their duties as alleged in paragraphs 12 of First Amended Complaint (App. 74-75) it is stripped of qualified immunity. WV Regional Jail & Correctional Facility Authority v. A.B. 766 SE2d 751, 765-767 (WV 2014).

VI CONCLUSION

Wherefore, for the foregoing reasons, Respondent prays this Court grant the following relief:

1) affirm the July 26, 2019 order of the Circuit Court of Berkeley County;

2) approve the deferral by a Circuit Court of a ruling on the applicability of qualified immunity in favor of additional factual development through discovery;

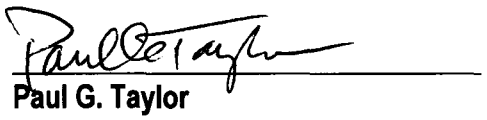
3) set standards and guidelines for factual development through discovery concerning cases where

qualified immunity is raised as a defense;

4) set standards and guidelines as to when the issue of qualified immunity is ripe for appeal, if additional discovery is deemed necessary to place the circuit court in a position to make a fully informed ruling on the issue; and

5) remand this matter for further proceedings and jury trial.

J.H., a minor, by and through
his parent and next friend, L.D.,
Respondent, By Counsel



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CERTIFICATE OF SERVICE

I, Paul G. Taylor, counsel for the Respondent, do hereby certify that I have served a true copy of the attached **RESPONDENT'S BRIEF** was filed with the Clerk of the Supreme Court of Appeals of West Virginia, this 8th day of January, 2020. A copy of this document has been mailed, via U.S. Mail, postage prepaid, first class to the following counsel of record:

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