/s/ Debra McLaughlin
Circuit Court Judge
Ref. Code: 22IHD9WJX

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CC-19-2021-C-136
Jefferson County Circuit Clerk
Laura Storm

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

CHRISTOPHER SULLIVAN,
Plaintiff,
v. **CIVIL ACTION NO.: 21-C-136**

BRADLEY MEACHAM,
Individually, and in his capacity as
an employee of the City of Ranson,

GLENNA HOSBY-BROWN,
Individually, and in her capacity as
an employee of the City of Ranson,

TODD KENT, Individually, and in his capacity as
an employee of the City of Charles Town,

WILLIAM ROPER, Individually, and in his capacity as
an employee of the City of Ranson,

CHRISTOPHER KUCHER, Individually, and in his capacity as
an employee of the City of Charles Town,

MARK SPESSERT, Individually, and in his capacity as
an employee of the City of Charles Town,

CITY OF RANSON POLICE DEPARTMENT,

CITY OF CHARLES TOWN POLICE DEPARTMENT,

CITY OF RANSON, and

CITY OF CHARLES TOWN,

Defendants.

Order Partially Granting Defendants' Motions to Dismiss

This matter comes before the Court on this 3rd day of May 2022 upon the Motions to Dismiss of Officer Todd Kent, Chief Christopher Kutcher, Sgt. Mark

Spessert, the City of Charles Town, and the City of Charles Town Police Department ("The Charles Town Defendants") and City of Ranson, City of Ranson Police Department, Officer Bradley Meacham, Officer Glenna Hosby-Brown, and Chief William Roper ("Ranson Defendants") (collectively "Defendants").

After reviewing the pleadings, this Court PARTIALLY GRANTS the Motions to Dismiss.

FACTS

The September 28, 2019, Arrest (According to Plaintiff's Complaint)

1. On September 28, 2019, Sullivan was driving on an apartment community road. Pl.'s Am. Compl. at ¶28.
2. Officers Meacham and Sgt. Spessert were responding to a breaking and entering in the apartment community and had parked their vehicles (but not in parking spots). *Id.* at ¶¶29-30.
3. Sullivan, while driving past their vehicles, made a comment about their parking. *Id.* at ¶31.
4. When Sullivan drove by, Officer Meacham was on the third floor of the apartment. *Id.* at ¶32.
5. Sgt. Spessert then radioed Meacham and informed him of the comment. *Id.* at ¶32.
6. After Sullivan parked, Meacham confronted Sullivan but did not have reasonable suspicion that any crime had occurred nor was there an arrest warrant for Sullivan. *Id.* at ¶¶33-36.

7. The two conversed for 3-4 minutes. *Id.* at ¶37
8. Meacham said, "around here you keep running your fucking mouth like that, its not going to end well for you." Sullivan asked what Meacham was going to do about it. Meacham said, "you're going to fucking jail and the hospital first." *Id.* at ¶39.
9. Meacham also told Sullivan that if he didn't stop cursing, he would be arrested for disorderly conduct. *Id.* at ¶40.
10. Sullivan then began walking away but continued to curse. *Id.* at ¶40.
11. Meacham then followed Sullivan and told him to put his hands behind his back and pointed his taser at him because—according to Meacham—"he wasn't being combative so he could not zap him"). *Id.* at ¶41.
12. Sullivan stopped and put his hands up. *Id.* at ¶42.
13. Meacham—with Sgt. Spessert's assistance—handcuffed Sullivan. *Id.* at ¶¶43-44.
14. While handcuffing him, the officers pushed Sullivan's shoulders together and used two sets of handcuffs. *Id.* at ¶¶43-44.
15. Sullivan did not resist the officers during the handcuffing. *Id.* at ¶¶43-44.
16. The officers then took Sullivan to Meacham's vehicle where—Officers Kent and Hosby-Brown were waiting—and Sullivan requested that his belongings be picked up from the ground. *Id.* at ¶¶45, 62-63.
17. Meacham responded to Sullivan's request by using a leg sweep, causing Sullivan to fall backward on the pavement. *Id.* at ¶¶45-46.

18. Meacham then yelled:

> stop fucking around. I'm not fucking with you. I am fucking done with you, do you understand? I am not picking up your shit and if you don't walk over to my fucking cruiser, I'm going to drag your ass and throw you in the back, do you understand? I'm fucking done with you.

Id. at ¶¶45-46.

19. After hitting his head on the pavement, Sullivan began bleeding from his head. *Id.* at ¶47.
20. Sullivan requested an ambulance but none of the officers called for any medical support. *Id.* at ¶47.
21. Meacham then arrested Sullivan for Disorderly Conduct. *Id.* at ¶48.
22. After placing Sullivan in the cruiser, Meacham said "so I really just want to add DUI now because he's just running his mouth." *Id.* at ¶¶49, 52-54.
23. Sullivan refused to submit to any field sobriety tests but did not refuse a preliminary breath test (although Meacham did not offer a preliminary breath test because in his opinion, refusing the field sobriety test included the breath test). *Id.* at ¶¶49, 52-54.
24. Meacham did not provide Sullivan with a written statement informing him of the penalties for refusal to submit to a secondary chemical test, required by law[1], and the time limit for refusal. Meacham marked on the DUI sheet that Sullivan refused to submit both tests. *Id.* at ¶¶55-56

[1] Whether this is required by law is not at issue on either motion to dismiss. Plaintiff's Complaint alleges that this is legally required. However, West Virginia Code § 17C-5-4(b) says that a preliminary breath analysis <u>may</u> be administered and under § 17C-5-7(b) if a person is requested to submit to a secondary test, then they shall be given the written and verbal warnings.

25. While handcuffed, the officers continued to antagonize Sullivan—who again requested medical attention—but Officer Kent responded that he would be hit again if he didn't shut up and Officer Hosby-Brown said "you're an asshole, you know that? Fuck you. Since you doing all that, fuck you. Shut the fuck up. You the bitch." *Id.* at ¶¶61-63.
26. Plaintiff alleges that the Officers used excessive, unlawful, malicious, oppressive, and with deliberate indifference to Sullivan's rights—or alternatively—were negligent and without due care for Sullivan's rights and safety. *Id.* at ¶¶59, 61.
27. Officer Meacham charged Sullivan with Disorderly Conduct, DUI, Battery on an Officer, Obstructing an Officer, Resisting Arrest, Fingerprint refusal, and Destruction of Property. *Id.* at ¶67.
28. The State dismissed charges for fingerprint refusal, driving while impaired, and destruction of property. *Id.* at ¶68.
29. The jury found Sullivan not guilty on charges of obstructing an officer and disorderly conduct. *Id.* at ¶69.
30. The Magistrate entered acquittal on battery on an officer. *Id.* at ¶69.

Procedural Facts

1. Plaintiff filed his Amended Complaint on September 27, 2021. Pl.'s Am. Compl.

2. Plaintiff alleged 23 Counts against the officers (as officers and individually) involved in the arrest, the police chiefs of both Charles Town and Ranson, West Virginia, both police departments, and both cities. *Id.*
3. On November 2, 2021 The Charles Town Defendants moved for the Court to dismiss the Amended Complaint for failure to state a claim upon which relief could be granted under West Virginia Rule of Civil Procedure 12(b)(6). Charles Town Def.'s Mot. to Dismiss.
4. On November 23, 2021 The City of Ranson Defendants also moved for the Court to dismiss the complaint for failure to state a claim upon which relief could be granted under West Virginia Rule of Civil Procedure 12(b)(6). Ranson Def.'s Mot. to Dismiss.
5. Plaintiff has since timely responded to both motions and the motions are ripe for decision. Pl.'s Resp.'s.

STANDARD OF REVIEW

West Virginia Rule of Civil Procedure 12(b)(6) allows defending parties to move for dismissal of complaints that fail to state a claim upon which relief can be granted. The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint. *See, e.g., CoDimon v. Mansy*, 98 W.Va. 40, 48 n.5, 479 S.E.2d 339, 347 n.5 (1996); *Collia v. McJunkin*, 178 W.Va. 158, 159, 358 S.E.2d 242, 243 (1987). "Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with

the allegations." *Hough v. Hough*, 205 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996). But plaintiffs are entitled to have all factual allegations and inferences arising from those facts resolved in their favor. *Mountaineer Fire & Rescue Equip., LLC v. City of Nat'l Bank of W.Va.*, 244 W.Va. 508, 520, 854 S.E.2d 870, 882 (2020).

CONCLUSIONS OF LAW

I. Parties That May be Sued

The Ranson Defendants moved for the Court to Dismiss the Ranson Police Department because it is not a proper entity that may be sued. Courts will grant a motion to dismiss when a police department "is not an independent suable entity, but rather is a subdivision of the City." *Harrison v. Burford*, No. 2:11-CV-00700, 2012 WL 2064499, at *4 (S.D.W. Va. June 7, 2012), *quoting Tofi v. Napier*, 2011 WL 38862118 at *4 (S.D.W.Va. Aug. 31, 2011). The Southern District of West Virginia also noted that "even if the Charleston Police Department were a separate suable entity, it would be in privity with the City of Charleston and the claims against it would be barred by res judicata." *Id.* Plaintiff has never responded to this issue.

This Court FINDS that W. VA. CODE §8-14-1 (2019) provides that West Virginia police departments are "subject to the authority, control and discipline of the administrative authority." Furthermore, the ordinances of each city provides that the powers of the police departments are consistent with W. VA. CODE §8-14-1 (2019) and are subject to the control of the city. *Charles Town Cod. Ord. Charter Section 32; 43; Ranson Ord. Ch. 2 Art. 1 Section 2.1.*

ACCORDINGLY, the City of Ranson Police Department and the Charles Town Police Department are DISMISSED because it is not a distinct entity from the City of Ranson and the City of Charles Town Police Department is Dismissed because it is not a distinct entity from the City of Charles Town.

II. Qualified Immunity

Circuit courts must resolve issues of immunities raised in a motion to dismiss before allowing the parties to proceed with discovery because the immunity is intended to shield certain defendants from the burden of the entire trial process. *W.Va. State Police v. J.H.*, 244 W.Va. 720, 856 S.E.2d 679 (2021) (hereinafter "*J.H.*").[2]

West Virginia law imposes a "heightened pleading standard" on Plaintiff for cases involving qualified immunity to create "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." *W.Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W.Va. 273, 852 S.E.2d 773, 782 (2020) (hereinafter "*Grove*"); see also *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992); Syl. Pt. 11 *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014) (hereinafter "*A.B.*").

[2] In fact, earlier this year, this Circuit dismissed a complaint where the Plaintiff—after multiple amended complaints and responses to motions to dismiss—failed "to address the specific factors as to whether a cause [of] action exists that would initially defeat a claim of qualified immunity." Order Granting Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint *W. Va. Reg'l Jail & Corr. Facility Auth. v. J.H.*, No. CC-02-2019-C-161 *11 (Jan. 7, 2022).

The Court has advised Circuit Courts to apply six steps on a "case-by-case basis" and to do so separately for each defendant. *Grove*, at 783.[3] These steps are:

1. If the Defendant is a state actor,
2. If there is an insurance contract waiving the defense of qualified immunity,
3. If the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 *et seq.* applies,
4. If the action involves discretionary judgments,
5. If the 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, and
6. If the State employee was acting within their scope of employment.

Step one: a defendant is a state actor if the defendant is a state agency or employee acting under the color of state law. Syl. 24, *Hutchison v. Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

Step two: the existence of an insurance contract can—but does not always—link the employee's liability with the state, making their liability "coterminous." *A.B.* Syl. 5; Restatement (Second) of Torts § 895B.

[3] See also, *A.B.*, at 761 *quoting* Restatement (Second) of Torts § 895B cmt. h (1979) ("The existence of immunity on the part of the State or its agencies does not necessarily imply immunity on the part of its public officers, or vice versa.").

Step three: the Court determines if the Governmental Tort Claims Act protects the public employee's negligence. *A.B.*, at Syl. 9. Under W.VA. CODE §29-12A-5 (2002),

> (a) A political subdivision is immune from liability if a loss or claim results from:
>
> > (5) Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.

The Court has interpreted this provision to apply to allegations of negligence resulting "from the manner in which a formulated policy ... was implemented..." but not "specific individual act[s] of alleged negligence." *Westfall v. City of Dunbar*, 205 W.Va. 246, 517 S.E.2d 479, 484 (1999)[4] *quoting Beckley v. Crabtree*, 189 W.Va. 94, 428 S.E.2d 317, 321 (1993). For instance, an officer could not be held liable for a county policy requiring him to unholster his firearm when observing a rifle in a suspect's home but could be liable for negligence while discharging his weapon. *Mallamo v. Rivesville*, 197 W.Va. 616, 477 S.E.2d 525, 535 (1996).

Step four: the Court decides if the allegedly tortious action was discretionary.[5] This means that the "public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform

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[4] This holding was modified by *Smith v. Burdette*, 211 W.Va. 477, 566 S.E.2d 614, 617 (2002):

> "Phrase 'the method of providing police, law enforcement or fire protection' in statute providing immunity from liability if loss or claim results from provision of such services refers to the formulation and implementation of policy related to how police, law enforcement, or fire protection is to be provided." Code, § 29–12A–5(a)(5)."

[5] A discretionary act can be compared with a "ministerial act" that the public official is required to perform without individual decision-making and is merely clerical. *Prosser & Keeton on Torts* § 132 at 1062 (5th ed. 1984). However, the Court finds "the discretionary-ministerial act distinction highly arbitrary and difficult to apply" and West Virginia Courts do not follow their federal and state counterparts on this issue. *State v. Case Securities, Inc.*, 188 W.Va. 356, 364, 424 S.E.2d 591, 599 (1992).

acts in the making of that decision..." *A.B.*, at Syl. 11, 31 (finding that training corrections officers was a discretionary function for a jail). The Court has indicated—although in dicta in reference to another jurisdiction's case—"that arresting or attempting to arrest an individual is a discretionary function." *J.H.* at 697, citing *Hollis v. City of Brighton*, 950 So.2d 300, 309 (Ala. 2006). If the Court determines that the alleged governmental acts or omissions are discretionary, then the Court shall proceed to the fifth step. *See Grove*, at 783.

Step five: the plaintiff must establish either that 1) the acts or omissions are in violation of clearly established statutory or constitutional rights or 2) laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive. *Grove*, at 783. Indeed, most of the cases involving qualified immunity involve statutory or constitutional rights. *See e.g. Huchison v. City of Huntington*, 479 S.E.2d 649, 659 (W.Va. 1996). But the Court has previously used the third "or" to provide two separate routes for Plaintiff to satisfy the fifth step. For instance, in *City of Huntington* the Court said,

> If the plaintiff identifies a clearly established right or law which has been violated by the acts or omissions of the State, its agencies, officials, or employees, <u>or</u> can otherwise identify fraudulent, malicious, or oppressive acts committed by such official or employee, the court, in determining whether the State is entitled to immunity from suit for the alleged wrongful acts or omissions, must determine whether such acts or omissions were within the scope of the public official or employee's duties, authority, or employment.

479 S.E.2d at 659 (emphasis added).

If the official is not protected under the Governmental Tort Claims and Insurance Reform Act, then they are only entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly

established laws of which a reasonable official would have known. *A.B.*, at 762. But there is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. *Id.*

Step six: the Court must determine the extent of liability that flows from the employee's conduct. If the "employee's conduct ... is found to be within the scope of his authority ... the State may therefore be liable under the principles of *respondeat superior*. *A.B.* Syl. 16. Additionally, the sixth step—when there is a genuine dispute of material fact—may be submitted to the jury because it is a question of fact. *Id.*

a. The Officer Defendants are not entitled to qualified immunity and the Cities are subject to liability under respondeat superior because the conduct was within the scope of the officers' official duties.

First, the Complaint alleges that the officers were employees of Charles Town or Ranson and were acting under the color of state law when the alleged torts occurred.

Second, neither Defendant raised issues of insurance contracts resulting in a waiver of the privilege.

Third, the alleged actions of the officer defendants set forth sufficient details for the third step to show that the Governmental Tort Claims Act under W.VA. CODE §29-12A-5 (2002) does not apply. Specifically, Plaintiff alleged that

- Officer Meacham initiated the confrontation resulting in the arrest,
- Officers Meacham, Kent, and Hosby-Brown made threats of physical force against Sullivan,

- All of the officers used excessive force against Sullivan (who was not resisting arrest or attempting to flee),
- All the officers refused to provide medical care when Plaintiff was bleeding from his head, and
- that Officer Meacham filed a DMV report without sufficient cause.[6]

These allegations each describe situations where an officer is acting outside of providing "law enforcement protection" and is instead committing "individual act[s] of ... negligence." *Beckley*, 428 S.E.2d at 321. Accordingly, the Governmental Tort Claims Act does not apply.

Fourth, the Complaint alleges that the Officers' decisions were discretionary.

Fifth, the Complaint alleges that the officers were fraudulent, malicious, or oppressive during the arrest and that the arrest exceeded Fourth Amendment standards. Furthermore, the Complaint alleges that a reasonable person would have known that the officers' conduct was fraudulent, malicious, or oppressive. Pl.'s Am. Compl. at ¶59.

Sixth, the Complaint alleges that the Officers' were acting within the scope of their employment when the events in the Complaint occurred. Therefore, each of the City Defendants can be subject to liability under the theory of *respondeat superior*.

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[6] Plaintiff supports each of these actions with references to line numbers in a bodycam transcript, (which the Court has not viewed). *See e.g., J.H.*, 856 S.E.2d at 702 (Wooton, J. Dissenting) ("...ten pages of dicta will certainly alert West Virginia attorneys of the need to load down their complaints with references to any known physical evidence, lest their descriptive words and phrases be deemed insufficient to overcome defenses that haven't even been raised yet.")

b. Qualified Immunity shields the Police Chiefs and the Cities of Ranson and Charles Town from Plaintiff's claims regarding negligent supervision because supervision falls under the definition of "method of policing" under W.VA. CODE §29-12A-5 (2002).

Throughout the Complaint, Plaintiff includes numerous claims for liability against the city and police chief Defendants for supervisory liability in addition to a negligence claim for supervisory liability. *See e.g. Pl.'s Compl.* ¶76. In West Virginia, the Court has previously dismissed claims against state agencies for training, supervision, and retention of corrections officers because such functions are "discretionary functions for which [the agency] was immune from suit..." *A.B.* at 772. However, the United States Supreme Court has held "that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to rights of persons with whom police come into contact." *Hutchison*, 731 F. Supp.2d at 550-51 *citing City of Canton v. Harris*, 489 U.S. 378, 388 (1989).[7] Based on the allegations in the Complaint, there is no claim that either the cities or the respective police chiefs were not also performing discretionary functions when they were supervising the officer defendants. But Plaintiff has also pled that the cities' training programs were so inadequate as to amount to a deliberate indifference toward the rights of others. *Pl.'s Compl.* ¶200a. Because Plaintiff did not include a §1983 claim in the Complaint, the Court must

[7] The West Virginia Supreme Court of Appeals has also observed that "'the government through taxation can more easily distribute such losses among all who benefit from its services.' George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1194 (1977). Further, '[b]y encouraging higher standards of care in the selection, training, equipment, and supervision of personnel, such a system can have at least as positive an effect on governmental performance as one based upon liability of the individual official.' *Id.* at 1195. We find that such policy considerations well-justify extension of liability to the State in such instances."

evaluate the negligence claim under the framework under this state's jurisprudence. *See A.B.* at fn. 13.[8]

Thus, applying the *Grove* framework, the first and second steps are satisfied because the City and Chief Defendants are state actors and there is not an insurance contract that waives the immunity. However, the Court finds that W.VA. CODE §29-12A-5 (2002) would apply to these Defendants because—unlike the officer Defendants—failing to sufficiently train officers is a form of policy implementation that is included in the "manner in which a formulated policy ... was implemented [rather than] specific individual act[s] of alleged negligence." *Westfall*, 517 S.E.2d at 484. Accordingly, the City of Charles Town, the City of Ranson, and each city's respective police department and police chief, are all entitled to qualified immunity from the Plaintiff's negligence claims, including separate claims for liability under theories of supervisory liability throughout the Complaint.

III. Assault and Battery

Plaintiff makes the following factual allegations against the Charles Town Defendants under Count II, Battery (Common Law):

- Sgt. Spessert—along with Officer Meacham—used two sets of handcuffs to detain Plaintiff. ⁋44
- Sgt. Spessert did not intervene when Officers Meacham used excessive force against the Plaintiff. Pl.'s Compl. ⁋⁋99, 101
- Chief Kutcher failed to train, supervise, and control the conduct. ⁋110
- The City of Charles Town failed to train, supervise, and control the conduct. ⁋113
- The City of Charles Town is liable for the actions of its employees under the doctrine of *respondeat superior*. ⁋114

[8] Federal case law applying §1983 does not assist in interpreting state actions because state officials acting within their official capacities are not "persons" under §1983. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).

The Charles Town Defendants also move for dismissal of Plaintiff's claims for assault and battery against Officer Defendants because as a matter of law they were privileged to engage in the conduct alleged in the Complaint. *Charles Town Def.'s Mot. to Dismiss*, 16 *citing* Restatement (Second) of Torts § 18 (1965). Specifically, they argued that the Complaint fails to plead any facts establishing that Defendant Spessert intended and caused harmful or offensive contact, or that Spessert or Kutcher had contact with Plaintiff. Meanwhile, the Ranson Defendants have not moved for dismissal for the allegations of battery and assault against their Officers.

"Stated simply, ... battery is any harmful or offensive contact. Restatement (Second) of Torts §§ 18, 21." *Hutchinson v. W. Va. State Police*, 731 F. Supp. 2d 521 (S.D.W. Va. 2010) Syl. 28, *aff'd sub nom. Hutchinson v. Lemmon*, 436 F. App'x 210 (4th Cir. 2011). However, "[a]n activity that would otherwise subject person to liability in tort under West Virginia law for assault and battery does not constitute tortious conduct if actor is privileged to engage in such conduct. Restatement (Second) of Torts §§ 10, 18, 21." *Id.* at Syl. 29.

The Plaintiff never alleges that Chief Kutcher or the City of Charles Town made any offensive contact with Plaintiff. The only instance where Sgt. Spessert is alleged to have had some form of contact with Plaintiff is when he was placing handcuffs on him. The Court FINDS that the law enforcement privilege extends to the act of placing handcuffs on a person being detained because officers may use reasonable force to effectuate a detention. Furthermore, "[n]ot every push or shove,

even if it may later seem unnecessary in peace of judge's chambers, violates Fourth Amendment; rather, calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about amount of force that is necessary in the situation. Syl. 22 *Hutchison v. Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

ACCORDINGLY, the Charles Town Defendant's Motion to Dismiss is GRANTED only to the extent of a failure to properly train as to Sgt. Spessert, Chief Kutcher, and the City of Charles Town, but not under the other theories of liability under Count II, Common Law Battery.

The Ranson Defendants argue that Plaintiff's allegations are contradictory under the battery claim as to Chief Roper and the City of Ranson because they separately allege negligence and intentional torts from the same conduct. However, the Court has previously allowed Plaintiffs to pursue independent claims for intentional torts and negligence against law enforcement even if the claims arise from the same facts because the elements of the intentional tort and the negligence claim are separate and are therefore not barred under collateral estoppel. *Neiswonger v. Hennessey*, 215 W.Va. 749, 601 S.E.2d 69, 73-74 (2004).

ACCORDINGLY, Plaintiff is entitled to allege claims of negligence and intentional torts from the same facts, and Defendant's Motions to Dismiss are DENIED.

IV. Punitive Damages

Defendants argue that Plaintiff is statutorily barred from requesting punitive damages from any of the Defendants Punitive damages are not available against any of the defendants under W.VA. CODE §29-12A-7 (2002) because the Defendants are "political subdivisions" and employees of a political subdivision. W.VA. CODE §29-12A-7 (2002) states,

> Notwithstanding any other provisions of this code or rules of a court to the contrary, in an action against a political subdivision or its employee to recover damages for injury, death, or loss to persons or property for injury, death, or loss to persons or property caused by an act or omission of such political subdivision or employee:
>
> > (a) In any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited.

(emphasis added).

ACCORDINGLY, Defendant's Motions to Dismiss are GRANTED as to Plaintiff's claims for punitive damages.

CONCLUSION

The Motions to Dismiss are DENIED as to the Officer Defendants in both their personal and professional capacities, and the Cities through the doctrine of respondeat superior. The Motions to Dismiss are GRANTED as to all claims of supervisory negligence by the Cities and Police Chiefs. The Ranson City Police Department and the Charles Town Police Departments are DISMISSED as parties because they are not proper parties to be sued.

The objections and exceptions of either party to any adverse rulings are noted.

Either party may file an appeal of this order within 30 days of the entry of this order.

The Clerk shall enter this order and provide attested copies to all counsel of record.

Judge Debra McLaughlin
Circuit Court Judge