IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0428

BRADLEY MEACHAM, ET AL,

Defendants Below, Petitioners,

v.

CHRISTOPHER SULLIVAN,

Plaintiff Below, Respondent.

(On Appeal From an Order of the Honorable Debra McLaughlin; Circuit Court of Jefferson County, West Virginia; Case No. CC-19-2021-C-136)

PETITIONERS' BRIEF

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STATEMENT OF THE CASE

The Respondent Christopher Sullivan (hereinafter called the "Respondent," or "Respondent Sullivan"), filed his *Amended Complaint* against a vast array of Defendants on September 27, 2021. The *Amended Complaint* alleges on the night of September 28, 2019, the Respondent observed the police vehicles of officers Bradley Meacham (a police officer with the

City of Ranson) and Sergeant Mark Spessert (an officer with the City of Charles Town) parked in parking spots, but not in parking spaces, while the officers were responding to a vehicle break-in call at Plaintiff's apartment complex. *Appx. P. 24.* The Amended Complaint maintains, while Respondent was driving past the officers, Respondent made remarks out his window to the officers about their parking while at the location. *Id.* Following these events, Respondent alleges a verbal altercation proceeded to occur between the Respondent and Officer Meacham. *Appx. P. 24-25.*

During the verbal exchange, Respondent Sullivan was warned by Officer Meacham to stop loudly cursing at the officers, or else Respondent would be arrested for Disorderly Conduct. *Appx. P.* 25. Respondent Sullivan started to walk away while continuing to argue with Officer Meacham using profane language. *Id..* The Respondent was at this point placed under arrest by Officer Meacham. *Appx. P.* 25. Respondent Sullivan asserts that two sets of handcuffs were used to restrain him, one of the sets coming from Officer Spessert. *Appx. P.* 26. Respondent asserts, while being transported to the police vehicle, Officer Meacham used a leg sweep to take him to the ground after he asked the officers to pick up his belongings. Respondent further alleges, despite his requests, the officers did not contact or seek medical assistance for him. *Id.*

Respondent Sullivan was arrested for Disorderly Conduct. During his arrest the officers detected an odor of alcohol on Respondent prompting them to reasonably suspect a possible DUI. Respondent rejected the request for a field sobriety test, and the officers understood this as a refusal of the preliminary breathalyzer test. *Appx. P.* 27. Respondent argues he was not lawfully arrested because he did not affirmatively refuse the preliminary or secondary chemical breath tests, and he was not given paperwork to explain the penalties for refusing a breath test. *Id.* The Respondent claims he was further harassed and verbally abused by Officers Kent (employed by the City of Charles Town) and Hosby-Brown (employed by the City of Ranson). *Appx. P.* 29. Respondent

Sullivan was eventually cleared of all charges against him arising from the September 28, 2019 incident.

The Respondent's *Amended Complaint* named ten separate Defendants: Meacham, Hosby-Brown, Ranson Police Chief William Roper, the City of Ranson, and the Ranson Police Department (the "Ranson Defendants"), as well as Kent, Spessert, Charles Town Police Chief Christopher Kutcher, the City of Charles Town, and the Charles Town Police Department (the "Charles Town Defendants"). For the purposes of succinctly briefing this joint appeal, the police officer Petitioners (namely Defendants Meacham, Hosby-Brown, Kent and Spessert) of both departments will be collectively called the "Officer Defendants" and the Petitioner cities of Ranson and Charles Town will be collectively called the "City Defendants." The Officer Defendants and the City Defendants will thus collectively be referred to as the "Petitioners."

The Amended Complaint brought causes of action against the Petitioners for the torts of:

-**Common-Law Assault:** (Meacham, City of Ranson),

-**Common-Law Battery:** (Meacham, Roper, City of Ranson, Spessert, Kutcher, City of Charles Town);

-**Outrageous Conduct:** (Meacham, Roper, City of Ranson);

-**Intentional Infliction of Emotional Distress:** (Meacham, Hosby-Brown, Roper, City of Ranson, Kent);

-**Negligent Infliction of Emotional Distress:** (Meacham, Hosby-Brown, Roper, City of Ranson, Kent);

-**Malicious Prosecution:** (Meacham, City of Ranson, Ranson Police Department);

-**General Negligence:** (Meacham, Roper, City of Ranson, Spessert, Kutcher, City of Charles Town);

-**Gross Negligence:** (Meacham, Roper, City of Ranson);

-**Negligence in Employment:** (Roper, City of Ranson, Ranson Police Department, Kutcher, City of Charles Town); and

-**Failure to Intervene:** (Hosby-Brown, City of Ranson, Ranson Police Department, Spessert, Kent, City of Charles Town, Charles Town Police Department).

In addition to the above causes of action, the Respondent's *Amended Complaint* also asserted various *Respondeat Superior* claims against the City of Ranson, the City of Charles Town, the Ranson Police Department, and the Charles Town Police Department related to the allegations towards the Officer Defendants.

The Charles Town Defendants and the Ranson Defendants filed separate *Motions to Dismiss* on November 2, 2021 and November 23, 2021, respectively. After these matters were fully briefed, the Circuit Court partially granted and partially denied the Petitioners' respective Motions to Dismiss on May 3, 2022. The Circuit Court's *Order* dismissed Defendants Ranson Police Department and Charles Town Police Department. The Circuit Court *Order* also dismissed the Respondent's claims for punitive damages. The Circuit Court *Order* did not dismiss any other named parties; leaving Officer Defendants (Meacham, Hosby-Brown, Kent, Spessert, Chief Roper, Chief Kutcher), and both of the City Defendants (City of Ranson and City of Charles Town), thus the joint Petitioners in this appeal. The Circuit Court held in its Order that

> 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.

Appx. P. 269. This was because the Circuit Court found that:

> 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 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.
>
> 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." (Citation omitted) Accordingly, the Governmental Tort Claims Acts does not apply.

Appx. P. 269-270.

The Circuit Court's Order also held, while the Plaintiff's Complaint did allege that the Officer Defendants' decision were discretionary, the Complaint also alleged 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.

Appx. P. 270. On this finding, the Circuit Court declined to dismiss the charges against any of the Officer Defendants on qualified immunity grounds.

Pertaining to the Assault and Battery allegations, the Circuit Court Order further stated that:

> 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.
>
> 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.

Appx. P. 273. While the Circuit Court Order on page 15 granted the Motion to Dismiss to the Cities of Ranson and Charles Town and the police chiefs on qualified immunity grounds pertaining to the respondent superior allegations, the Circuit Court *Order* continues on to reassert claims against the same parties:

> 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, calculates of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstance 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.2nd 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.

Appx. P. 273-274.

Concerning all grounds raised by the City of Ranson Defendants in their Motion to Dismiss, the Circuit Court *Order* held that

> 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. Hennessy*, 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 Motion to Dismiss are DENIED.

Appx. P. 274.

Respondent Sullivan filed a *Motion for Default Judgment* in the Circuit Court on May 27, 2022, to which the Petitioners jointly responded in opposition on June 10, 2022. The Petitioners timely filed their joint *Notice of Appeal* to this Supreme Court on June 3, 2022. The Petitioners also timely filed their joint *Motion to Stay Proceedings Pending Appeal to the West Virginia Supreme Court of Appeals* in the Circuit Court on June 3, 2022. The Respondent's *Motion for Default Judgment* and the Petitioners' *Motion to Stay Proceedings* have both been fully briefed, and the Circuit Court has granted the Motion to Stay in an order dated July 6, 2022.

SUMMARY OF ARGUMENT

First, the Circuit Court erred by failing to dismiss the Officer Defendants on the grounds of qualified immunity. The allegations contained in the *Amended Complaint* clearly arise from the discretionary acts in the performance of their duties as police officers. According to the West Virginia qualified immunity doctrine, government officials, including police officers, performing discretionary functions are shielded from liability for civil damages insofar as their conduct does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)). If an officer is required to make decisions in their job that require them to exercise their judgment and discretion through actions, and if the decision and actions are within the scope of their duty, authority, and jurisdiction, then the official is entitled to qualified immunity. Syl. pt. 4, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). As the Circuit Court failed to properly apply the legal standards for qualified immunity under the requite heightened pleading standard under *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996), the Plaintiff's Amended Complaint was not dismissed as to the Officer Defendants.

Second, while the Court did find the City of Ranson and City of Charles Town are immune from the *respondeat superior* claims alleged in the *Amended Complaint* because the City Defendants are immune from vicarious liability for the acts and omissions of their employees pursuant to W.Va. Code §29-12A-1, *et seq.*, the Order then still maintains all theories of liability against them under Common Law Battery. The Tort Claims Act confers absolute immunity to political subdivisions in particular for the intentional torts of their employees pursuant to §29-12A-4(b)(1). *Zirkle v. Elkins Rd. Pub. Serv. Dist.*, 221 W.Va. 409, 414 655 S.E.2d 155, 160 (2007). Furthermore, federal courts have held in their interpretation of West Virginia law, the grant of immunity to political subdivisions for the negligent acts of their employees from *Albert v. City of Wheeling*, 238 W.Va. 129, 132, 792 S.E.2d 628, 631 (2016) applies to law enforcement employees in addition to fire personnel. *Taylor v. Clay County Sheriff's Dept.*, 2020 U.S. Dist. LEXIS 30577, *15-16 (S.D.W.Va. 2020). The Respondent's *Amended Complaint* couches only intentional torts, attempting to disguise the same as negligence claims despite Respondent stating they all derived

from the supposed willful and malicious conduct of the Officer Defendants. However, a "mere allegation of negligence does not turn an intentional tort into negligent conduct." *Weigle v. Pifer*, 139 F. Supp. 3d 760, 781 (S.D.W.VA. 2015). "An action for a willful injury is not supported by a finding that the injury was the result of gross negligence." *Turk v. Norfolk & W. Ry. Co.*, 75 W.Va. 623, 624, 84 S.E. 569, 570 (1915). As the Circuit Court's *Order* failed to properly apply the Tort Claims Act in conferring immunity to the City Defendants as political subdivisions, the *Order* was mistaken and should be overturned.

Third, the Circuit Court erred by not dismissing the Officer Defendants as to the assault and battery claims of the *Amended Complaint*. The *Order* of May 5, 2022 correctly found, as the Respondent was placed under arrest at an active crime scene, the Officer Defendants had the liberty of making contact with the Respondent to safely and properly effectuate the arrest. However, despite this finding the Circuit Court failed to dismiss the assault and battery claims against the individual Officer Defendants. Additionally, as previously stated, all of Respondents' various claims are essentially intentional tort claims for which they are absolutely immune under the Tort Claims Act. Because of the ruling that the contact was privileged, because of the previously explained qualified immunity of the Officer Defendants, and because of the immunity granted by the Tort Claims Act, the Circuit Court's *Order* should be overruled, and the assault and battery claims against the Officer Defendants be properly dismissed.

Fourth, the circuit court erred by not dismissing the Respondent's *respondeat superior* claims for battery against Chief Roper and Chief Kutcher. Since the Respondent has alleged that the Officer Defendants' actions and omissions were intentional, and since the negligence claims derive from alleged intentional acts, the Chiefs cannot be held liable pursuant to W.Va. Code § 29-12A-5(a)(5) as well as the holdings of *Brooks v. Weirton*, 202 W.Va. 246, 503 S.E.2d 814

(1998), *Albert v. City of Wheeling,* supra, and *C.C. v. Harrison Cty. Bd. of Educ.*, 245 W.Va. 594, 606, 859 S.E.2d 762, 774 (2021). The Circuit Court Order goes into scant detail about why the Respondent's claims of vicarious liability for battery against the police chiefs were preserved in the absence of the Respondent showing any clear evidence of statutory or constitutional rights violations. Respondent's *Amended Complaint* does not adequately plead grounds sufficient for imposing vicarious liability against the police chiefs. Therefore, the Circuit Court's order should be overturned and all the vicarious liability claims against Chief Roper and Chief Kutcher be properly dismissed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, Petitioners submit that oral argument is unnecessary as the record below is clear, the questions presented have been authoritatively decided by this Honorable Court, and the facts and legal arguments on behalf of the Petitioners to overrule the Circuit Court's rulings have been adequately presented in the Petitioners' Brief and the record below. Furthermore, affirmance by memorandum decision pursuant to *West Virginia R.A.P.* 21(c) would be appropriate. If the Court in its discretion determines that oral argument would be appropriate and will be held, however, Petitioners would suggest that this case would be suitable for Rule 19 argument, as a case involving a claim of unsustainable exercise of discretion where the law governing that discretion is settled. *West Virginia R.A.P.* 19(a)(1)-(2).

STANDARD OF REVIEW

1. *De Novo* Standard

A "circuit court's denial 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." *W. Virginia Bd. of Educ. v. Marple*, 236 W.Va. 654, 660, 783 S.E.2d 75, 81 (2015). This Court reviews such a denial of a motion to dismiss *de novo*. Syl. Pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998).

2. Rule 12(b)(6) Standard

Under Rule 12(b)(6), a party may move for dismissal of a complaint for "failure to state a claim upon which relief can be granted." W.Va. R. Civ. P. 12(b)(6). "[T]he purpose of a motion to dismiss is to test the formal sufficiency of the complaint." Footnote 11, *Davis v. Eagle Coal and Dock Co.*, 220 W.Va. 18, 21, 640 S.E.2d 81, 84 (2006). 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 in the complaint. Syl. Pt. 3, *Chapman v. Kane Transfer Co. Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). The singular purpose of a motion to dismiss for failure to state a claim is to seek a determination as to whether the plaintiff is entitled to offer evidence to support claims made in the complaint. *Dimon v. Mansy*, 198 W.Va. 40, 47, 479 S.E.2d 339, 346 (1996).

"For purposes of the motion to dismiss, 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). However, to survive a motion to dismiss, a plaintiff's complaint must "at a minimum . . . set forth sufficient information to outline the elements of his claim." *Price v. Halstead*, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987).

3. Heightened Pleading Standard

Although Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is broad and Rule 8 only requires mere notice pleading for most civil pleading in West Virginia, "a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint . . . .'" *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995).

Moreover, "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Hutchison*, supra, 198 W.Va. at 149, 479 S.E.2d at 659. The determination of claims of immunity is a question of law for courts to decide:

> Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.

Id., 198 W.Va. at 148, 479 S.E.2d at 658 (internal citations omitted). The denial of a Motion to Dismiss by a lower court where a qualified immunity defense was asserted is, in particular, an interlocutory ruling subject to the "collateral order doctrine" and immediate Supreme Court review. See *West Virginia Board of Education v. Marple*, 236 W.Va. 654, 783 S.E.2d 75 (2015). Here, the Petitioners have assert multiple immunity defenses. Accordingly, heightened pleading is required to determine whether the Petitioners are immune from suit for the alleged wrongful conduct.

ARGUMENT

1. The Circuit Court erred by failing to dismiss the Officer Defendants on the grounds of qualified immunity.

The individual police officer defendants with the Charles Town Police Department, namely

Officer Kent and Sergeant Spessert ("Charles Town Officer Defendants"), asserted qualified immunity in their Motion to Dismiss due to the Respondent's unsupported claims for alleged violation of unspecified state constitutional rights. Although neither Officer Meacham nor Officer Hosby-Brown with the Ranson Police Department ("Ranson Officer Defendants") asserted qualified immunity in their respective Motion to Dismiss, the Circuit Court analyzed in its Order the Plaintiff's claims against said defendants under a qualified immunity standard. Therefore, it is proper for this Court to review the Circuit Court's rulings on this issue pertaining to the Ranson Officer Defendants as well as the Charles Town Officer Defendants.

As to the Officer Defendants collectively, the allegations contained in the Amended Complaint clearly arise from the discretionary acts in the performance of their duties as police officers. Under federal and West Virginia immunity law, qualified immunity shields public officers such as the Officer Defendants from civil liability for discretionary functions and acts made within the scope of their duties and authority. The Respondent in his *Amended Complaint* failed to make the required showing of affirmatively proving his rights were violated in a malicious or oppressive manner. The Circuit Court's *Order* did not take this lack of affirmative showing into account when the Circuit Court denied qualified immunity for the Officer Defendants, and therefore the *Order* was erroneous and should be reversed.

West Virginia law is generally interpreted to be in conformity with federal law on the subject. *State v. Chase Sec.*, 188 W.Va. 356, 360, 424 S.E.2d 591, 595 (1992)("[I]t would seem appropriate to construct, if possible, an immunity standard that would not conflict with the federal standard."); *Robinson v. Pack*, 223 W.Va. 828, 834, 679 S.E.2d 660, 666 (2009)("In reviewing the development of immunity law with regard to public officials in Chase Securities, Justice Miller discussed the need for our state law in this area to conform with federal law.").

The qualified immunity analysis involves two inquiries: (1) whether the Plaintiff has established the violation of a constitutional right; and (2) whether that right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201-202, 150 L.Ed.2d 272 (2001); *West v. Murphy*, 771 F.3d 209, 213 (4th Cir. 2014). Once the qualified immunity defense is asserted, the burden then shifts to the plaintiff to prove that the alleged conduct violated the law and that such law was clearly established when the alleged violation occurred. *Bryant v. Muth*, 994 F.2d 1082, 1086 (4th Cir. 1993). Thus, qualified immunity is governed by an objective reasonableness standard that "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

According to the West Virginia qualified immunity doctrine, government officials, including police officers, performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)). As stated by this Court previously, "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Crouch v. Gillispie*, 240 W.Va. 229, 236-237, 809 S.E.2d 699, 706-707 (2018). The policy purpose of the qualified immunity doctrine is to allow public officials to carry out their duties without their performance being affected by constant fears of "vexatious and often frivolous damages suit." *Westfall v. Erwin*, 484 U.S. 292, 295 (1988).

In *State v. Chase Sec., Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992), West Virginia's "modern immunity law began to take a more clearly identifiable form" by providing for qualified immunity of public officials "acting with the scope of his authority." *W.Va. Reg'l Jail & Corr.*

Facility Auth. v. A. B., 234 W.Va. 492, 503, 766 S.E.2d 751, 762 (2014). The West Virginia Supreme Court has held:

> A public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va. Code, 29-12A-1, *et seq.*, is 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. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive."

Syl., *State v. Chase Sec., Inc.*, supra. An insurance contract may waive the defense of qualified immunity:

> In the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.*, and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.

Syl. pt. 6, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995).

The West Virginia Supreme Court views immunity defenses, including qualified immunity, as an "immunity from suit rather than a mere defense to liability" that is "effectively lost if a case is erroneously permitted to go to trial." *City of St. Albans v. Botkins*, 228 W.Va. 393, 398, 719 S.E.2d 863, 868 (2011) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Application of qualified immunity is a question of law, not of fact, for the court itself to determine. Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). Importantly, when considering application of qualified immunity, the subjective motivations of the police officer defendants are immaterial to a court's determination of qualified immunity in a given case. *Robinson v. Pack*, 223 W.Va. 488, 501, 781 S.E. 2d 660, 666 (2009).

Qualified immunity is broad and protects all but the plainly incompetent or those who knowingly violate the law. Further, a public officer is entitled to qualified immunity for discretionary acts, even if committed negligently. If the officer is required to make decisions in their job that require them to exercise their judgment and discretion through actions and if the decision and actions are within the scope of their duty, authority, and jurisdiction, then the official is entitled to qualified immunity. Syl. pt. 4, *Clark v. Dunn*, 195 W.Va. at 273, 465 S.E.2d at 375. Simply explained, "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all." *Hutchinson,* supra, 198 W.Va. at 148, 479 S.E.2d at 658. The "heart" of the qualified immunity defense is that it proactively spares the defendant the time and expense of going to trial. *Id.* In light of these standards, qualified immunity determinations often center upon whether a decision was discretionary or nondiscretionary. *Crouch v. Gillispie*, 240 W.Va. 229, 230, 809 (2018).

The heightened pleading standard mandated by qualified immunity requires the plaintiff to "plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm alleged and that defeat a qualified immunity defense with equal specificity." *W. Va. State Police v. J.H.,* 244 W.Va. 720, 730, 856 S.E.2d 679, 689 (2021). To prove the violation of a clearly established right in the qualified immunity context, the plaintiff must do more than simply allege that an unspecified right was violated; the plaintiff must instead make a particularized showing that the unlawfulness of the action was apparent or that the defendant reasonably understood they were violating the right. *City of St. Albans v. Botkins*, 228 W.Va. 393, 399, 719 S.E.2d 863, 869 (2011).

The *Amended Complaint*, rather than presenting detailed factual claims of specific constitutional rights violations, simply alleges the Officer Defendants caused unspecified "violations of (Respondent's) rights under the Constitution and laws of West Virginia." The Officer Defendants arrested the Plaintiff for disorderly conduct, during an active investigation scene, after a verbal altercation where Plaintiff used offensive language excessively and failed to comply with lawful orders. The *Amended Complaint* offered no pleadings indicating that the Officer Defendants took any actions besides those which constituted a normal and unavoidable reality of police work in dealing with belligerent members of the public, which as a discretionary function is protected by qualified immunity. Similarly, the *Amended Complaint* at paragraph 59 alleges, without reference to any supporting facts or documentation, the Officer Defendants' claimed actions and omissions were "excessive, unlawful, malicious, oppressive, and with a deliberate indifference to (Respondent's) rights." Such assertions amount to mere formulaic allegations that, absent firm evidence, on their own do not meet the heightened pleading standard.

The *Amended Complaint* fails to satisfy the necessary elements of the heightened pleading standard because it does not sufficiently establish its causes of action against the Petitioners.

The Circuit Court's holding that the alleged acts and omissions of the Officer Defendants were not protected by qualified immunity is contrary to the well-established principles held by this Court's precedent. The Circuit Court never determined in its *Order* if the behavior of the Officer Defendants was actually "discretionary in nature" or "executive or administrative policy-making acts" or not. It only stated, without actually analyzing the Respondent's evidence, that the Respondent asserted the acts were not discretionary or policy-making. The Circuit Court's *Order* is contradictory to the precedent of the *Pearson* case in that the *Amended Complaint* does not name a single provision of the West Virginia or Federal Constitutions that the Officer Defendants

supposedly violated, let alone proving that any right allegedly violated was "clearly established" per the heightened pleading requirements. In sum, the Circuit Court's holding disregards most if not all of this Court's recent case law concerning the heightened pleading requirement and qualified immunity. For this reason, the Circuit Court's holding should be overturned.

2. The Circuit Court erred by not dismissing the *respondeat superior* claims against the City of Ranson and the City of Charles Town on the basis of qualified immunity, as the City Defendants' immunity is separately derived from both the common law and the West Virginia Tort Claims Act.

The City of Ranson and the City of Charles Town ("City Defendants") are both qualifiedly immune from liability pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.* (the "Tort Claims Act"). The Tort Claims Act was established to "...limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability." W.Va. Code Ann. § 29-12A-1. In this regard, the West Virginia Legislature was keenly aware that litigation against political subdivisions was not only costly to political subdivisions,[1] but also had a negative impact upon their ability to secure insurance coverage.

As part of the Act, the legislature enumerated (17) specific immunities for political subdivisions to further the goal and purpose of § 29-12A-1, *et seq.* *See* W.Va. Code § 29-12A-5. Importantly, this Supreme Court has determined the immunities in § 29-12A-1, *et sec.*, "are more

1 Under W. Va. Code, a political subdivision, has been defined as "any county commission, *municipality* and county board of education; any separate corporation or *instrumentality established by one or more counties or municipalities*, as permitted by law; any instrumentality supported in most part by municipalities; *any public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more counties, cities or towns*;..." *W.Va. Code Ann. § 29-12A-3 (West)* (*emphasis added*). To date, there has been no suggestion that the Cities of Ranson and Charles Town was not a "political subdivision" and/or entitled to the protections and immunities provided by W.Va. Code §29-12A-1, *et sec.*

than a defense to a suit..." but importantly... "grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case." *Hutchison, supra*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (internal citations omitted). See also, *Hutchison* at 198 W.Va. at 147-148, 479 S.E.2d at 657-658 (Public officials and local government units should be entitled to qualified immunity from suit under § 1983, *or statutory immunity under W. Va. Code, 29–12A–5(a), unless it is shown by specific allegations that the immunity does not apply.*) (*emphasis added*).

Upon closer analysis, the City Defendants can only be held liable in a civil action for damages if such a cause of action fits into the framework codified in W.Va. Code § 29-12A-4. Under the general framework established by the Tort Claims Act,

> a political subdivision is ***not*** liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or of an employee of the political subdivision in connection with a government or proprietary function.

W.Va. § 29-12A-4(b)(1) (emphasis added). While the legislature provided five exceptions to the general rule that political subdivisions and their employees cannot be held liable, none apply to this case on appeal.

Under the Act, a political subdivision can only be held liable for specific acts or omissions including the: (1) negligent operation of any vehicle by employees within the scope of their employment; (2) negligent performance of acts by their employees while acting within the scope of employment; (3) negligent maintenance of roads and sidewalks; (4) negligent act by employees on subdivision property; and (5) any other liability established by other sections of the code. West Virginia Code §§ 29-12A-4(c). The Tort Claims Act restricts the liability of a political subdivision

and its employees to limited circumstances of **negligence only**, which are inapplicable to the instant case insofar as the Respondent alleges "willful, malicious, and oppressive" conduct by the Officer Defendants. In sum, a political subdivision is not liable for its employees' intentional malfeasance. *Mallamo v. Town of Rivesville*, 197 W.Va. 616, 624-625 477 S.E.2d 525, 533-34 (1996). "[C]laims of intentional and malicious acts are included in the general grant of immunity in W.Va. Code § 29-12A-4(b)(1). Only claims of negligence specified in W.Va. Code § 29-12A-4(c) can survive immunity from liability under the general grant of immunity in W.Va. Code § 29-12A-4(b)(1)." *Zirkle v. Elkins Rd. Pub. Serv. Dist.*, 655 S.E.2d 155, 160 (2007).

As to the application of the immunities of the Act, the Court has indicated "our traditional principle of statutory analysis requires us to accept the plain meaning of statutes which are clear and unambiguous." *Standard Distrib., Inc. v. City of Charleston*, 218 W.Va. 543, 549, 625 S.E.2d 305, 311 (2005). See also Syl. Pt. 7, *Holsten v. Massey*, 200 W.Va. 775, 778, 490 S.E.2d 864, 867 (1997) (Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Syllabus Point 2, *State v. Elder,* 152 W.Va. 571, 165 S.E.2d 108 (1968).' Syl. pt. 1, *Peyton v. City Council of Lewisburg,* 182 W.Va. 297, 387 S.E.2d 532 (1989)." Syl. pt. 3, *Hose v. Berkeley County Planning Commission,* 194 W.Va. 515, 460 S.E.2d 761 (1995).)

Turning to the immunities at issue in this case, W.Va. Code § 29-12A-5(a)(5) provides in pertinent part:

> (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;

W.Va. Code § 29-12A-5(a)(5) (emphasis added).

Here, the Respondent's allegations arise squarely out of conduct for which the City Defendants would be immune under W.Va. Code § 29-12A-5(a)(5): providing police or law enforcement services. W.Va. Code § 29-12A-5(a)(5) is plainly stated, clear, and unambiguous. A political subdivision, such as the City of Ranson or the City of Charles Town, is immune from suit when claims are made regarding the "method of providing police [or] law enforcement protection." W.Va. Code §29-12A-5(a)(5). There is no bar to the application of this immunity and therefore, the immunity is applicable "unless it is shown by specific allegations that the immunity *does not apply*." *Hutchison*, supra. 198 W.Va. at 147-148, 479 S.E.2d at 657-658 (1996) (emphasis added).

This Court also held in *Albert v. City of Wheeling*, 238 W.Va. 129, 132, 792 S.E.2d 628, 631 (2016) that the Tort Claims Act immunizes political subdivisions from vicarious liability for the negligent acts of their employees (immunity extended to law enforcement in the 4th Circuit in *Taylor v. Clay County Sheriff's Dept.*, 2020 U.S. Dist. LEXIS 30577, *15-16 (S.D.W.Va. 2020)). Per the *Albert* decision, liability under any of the provisions contained within West Virginia Code § 29-12A-4(c) are expressly subject to the immunities contained in immunity-granting provisions contained within West Virginia Code §§ 29-12A-5 & 6. *Albert v. City of Wheeling*, 238 W.Va. at 132, 792 S.E.2d at 631 ("instead of sanctioning potentially unlimited liability, subsection 4(c) begins with the disclaimer that the subsequent grants of liability are expressly made '[s]ubject to section five [§ 29-12A-5] and six [§ 29-12A-6].'"). In other words, the liability creating provisions "expressly conditions liability on the absence of any provisions of immunity set forth in section five and six of article twenty-nine." *Id.* Thus, a political subdivision is liable only if (1) it is a negligence-based claim that (2) fits within the liability-creating provisions contained in West

Virginia Code § 29-12A-4(c); and (3) no immunity in West Virginia Code §§ 29-12A-5 or 6 applies.

In order for a plaintiff to defeat qualified immunity for a negligent training or negligent supervision claim, there must be an affirmative showing that the state agency "failed to properly supervise [its employee] and, as a result, [the employee] committed a negligent act which proximately caused the appellant's injury." *C.C. v. Harrison Cty. Board of Education*, 245 W.Va. 594, 606, 859 S.E.2d 762, 774 (2021). Per the *C.C.* ruling, this showing must first (1) make a valid negligence claim as to and employee; then (2) affirmatively demonstrate that the employee was inadequately trained or supervised. The plaintiff is also required, for a negligent hiring/training/supervision claim, to plead sufficient factual allegations that the employer was sufficiently on notice of its officer-employee's propensity for harmful acts but unreasonably failed to take action against the problem. *Westfall v. Osborne*, 2020 U.S. Dist. LEXIS 198606, at *12-15 (S.D.W.Va. 2020). In the absence of these showings, the plaintiff's claims should be dismissed per qualified immunity without letting any other proceedings continue.

Whenever a defendant raises the issue of qualified immunity in a motion to dismiss, the court must look to the expansive body of law and to the steps specifically outlined to determine the result on a case-by-case basis. *W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W.Va. 273, 283, 852 S.E.2d 773, 783 (2020). The factors the court considers under the *Grove* analysis are the following:

> (1) If a state agency or employee is involved;
> (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 would apply;
> (4) The matter involves discretionary judgments, decisions, and/or actions;

> (5) The 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; and
> (6) The employee was acting within his/her scope of employment.

Estate of Grove, supra, (citing *A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014).

The *Grove* court further explained that plaintiffs "should supply in their complaints or other supporting materials greater factual specificity and particularity than is usually required." in heightened pleading situations. *Grove*, supra at 781. This Court has held that "qualified immunity is broad and protects all but the plainly incompetent or those who knowingly violate the law. Further, a public officer is entitled to qualified immunity for discretionary acts, even if committed negligently." *Markham v. W. Va. Dep't of Health & Human Res.*, No. 15-0340, pages 12-13 (W.Va. Supreme Court, May 26, 2020)(memorandum decision). Rulings by this Court further established that ***the burden of proof is on the plaintiff*** to establish such violations as ministerial in nature. *Dotson*, supra, 244 W.Va. at 623, 856 S.E.2d at 215. (Emphasis added). Importantly, *A.B.* and subsequent cases clarified that this Court determines "the broad categories of training, supervision, and employee retention . . . easily fall within the category of 'discretionary' governmental functions." *W. Va. State Police v. J.H.*, supra, 244 W.Va. at 740, 856 S.E.2d at 699.

While the *Amended Complaint* asserts unspecified violations of Respondent's constitutional rights, said claims failed to establish allegations directly against the City of Ranson or the City of Charles Town under the heightened pleading standard constituting the deprivation of rights that was objectively 'sufficiently serious,' and that subjectively the City Defendants acted with a sufficiently culpable state of mind. *Strickler v. Walters*, 989 F.2d 1375, 1379 (4th Cir. 1995). Any potential allegations concerning the alleged constitutional violations are directed

solely at the named individual officers. As such, there is not a direct allegation of such violations against the City Defendants, which thereby eliminates this potential exception to the City Defendants' dismissal under qualified immunity. Therefore, there is no specific statutory violation stated in this Cause of Action against the City Defendants to defeat qualified immunity against the Respondent's charges of failure to train and supervise. The Circuit Court's ruling to the contrary is not supported under controlling law and should therefore be reversed.

The Officer Defendants also remain entitled to a dismissal based on the immunities granted to them under a separate provision of the Tort Claims Act, at W.Va. Code § 29-12A-5(b). As discussed in the defendants' Motion to Dismiss, the Act provides provisions for employee immunities. *See* W.Va. Code § 29-12A-5(b)(1-3). Under this section, W.Va. Code § 29-12A-5(b) provides:

> (a) An employee of a political subdivision is immune from liability unless one of the following applies:
>
> (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
>
> (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
>
> (3) Liability is expressly imposed upon the employee by a provision of this code.

W.Va. Code § 29-12A-5(b)(1-3).

Here, despite the conclusions made in the Circuit Court *Order*, the acts of the Officer Defendants were not manifestly outside the scope of their employment, or done with malicious purpose, in bad faith, or in a wanton, reckless manner as required by the Tort Claims Act. There are no sufficient, factual allegations contained in the *Amended Complaint* to support a finding that the Officer Defendants did anything which could be seen as manifestly outside the scope of their

employment or official responsibilities, or that they performed acts or omissions which were with malicious purpose, in bad faith, or in a wanton or reckless manner. Thus, all of the Officer Defendants are immune from Plaintiff's claims pursuant to W.Va. Code § 29-12A-5(b).

In analyzing the instant case, the Officer Defendants are not state employees, there is no insurance waiver of qualified immunity, and the Tort Claims Act does apply. Additionally, the actions taken by the Officer Defendants involved discretionary judgments, decisions, and actions taken in good faith to restrain Mr. Sullivan, who was clearly not cooperating with the legal instructions of law enforcement, a fact admitted to in the Respondent's Complaint. Furthermore, the Officer Defendants were not in violation of any clearly established rights or laws and only taken when prior measures to resolve the situation had failed. The actions taken by the Officer Defendants regarding the Respondent were made within the official scope of their employment as police officers responding to an active crime scene in an inter-department cooperation. Therefore, the City Defendants easily satisfy the *Grove* factors when considering qualified immunity. Additionally, the Circuit Court erroneously held that the Respondent had alleged sufficient facts to defeat the qualified immunity conferred by the Tort Claims Act, despite the stringent requirements of the relevant case law. Once again, the conclusion is that the Officer Defendants are entitled to qualified immunity to the preclusion of any vicarious liability claims against their employers, namely the City of Ranson and the City of Charles Town for their respective officers.

3. **The Circuit Court erred by not dismissing the Officer Defendants as to the assault and battery claims.**

The Circuit Court Order of May 3, 2022 incorrectly failed to dismiss the assault and battery claims against all of the Officer Defendants including the official capacity claims. As already shown, the Officer Defendants are entitled to qualified immunity as their actions were discretionary in nature and utilized the minimum force necessary to effectuate the safe arrest of the Respondent. In addition, the Respondent alleges no set of facts in the Amended Complaint sufficient to defeat the Officer Defendants' qualified immunity defenses.

The Respondent fails to sufficiently plead facts to support that the Officer Defendants engaged in specific, unprivileged conduct which constitutes battery. Under West Virginia law, "An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results." *Id.* (citing Restatement (Second) of Torts § 18 (1965); Syl. pt. 1, *Funeral Servs. by Gregory, Inc. v. Bluefield Cmty. Hosp.*, 186 W.Va. 424, 413 S.E.2d 79 (1991) ("In order to be liable for a battery, an actor must act with the intention of causing a harmful or offensive contact with a person"); overruled on other grounds by *Courtney v. Courtney*, 190 W.Va. 126, 437 S.E.2d 436 (1993)). "Stated simply, assault occurs when one person puts another in reasonable fear or apprehension of an imminent battery and battery is any harmful or offensive contact." *Id.*

However, an activity that would otherwise subject a person to liability in tort for battery does not constitute tortious conduct if the actor is privileged to engage in such conduct. *Hutchinson v. W. Va. State Police*, 731 F. Supp. 2d 521, 547 (S.D.W.Va. 2010). Such a privilege may be based upon "(a) the consent of the other affected by the actor's conduct, or (b) the fact that

its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise . . . ." Restatement (Second) of Torts § 10.

As stated in the Ranson Defendants' Motion to Dismiss, and not addressed by the Respondent or the Circuit Court, an official capacity suit states claims against the office which the official represents, not the official personally. This Supreme Court has held, in authority unaddressed by Plaintiff in his response, that ""[o]fficial-capacity suits, [...] generally represent only another way of pleading an action against an entity of which an officer is an agent." *Hansbarger v. Cook*, 177 W.Va. 152, 154, 351 S.E.2d 65, 68 n.4 (1986) (internal citations omitted). Thus, under West Virginia law, a suit against the Officer Defendants in their official capacity as officers of the City of Ranson is essentially a suit against the Defendants and is barred by the Tort Claims Act. See also, *Kowalyk v. Hancock Cty.*, 2009 WL 981848, at *2 (N.D.W.Va. 2009); *See also Ball v. Baker*, 2012 WL 4119127, at *10 (S.D.W.Va. 2012). Thus, a dismissal by this Court in favor of the official capacity claims against the Officer Defendants is appropriate.

In addition to the common-law qualified immunity defenses that should be applied to the Officer Defendants and the immunity to official capacity claims, all of the Officer Defendants remain entitled to dismissal from the assault and battery claims based on the immunities granted to them under W.Va. Code § 29-12A-5(b). As discussed in the *Ranson Defendants' Motion to Dismiss*, and not addressed by the Respondent, the Tort Claims Act provides strong provisions for employee immunities. See W. Va. Code § 29-12A-5(b)(1-3). Under this section, W.Va. Code § 29-12A-5(b) provides:

> (a) An employee of a political subdivision is immune from liability unless one of the following applies:

> (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
>
> (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
>
> (3) Liability is expressly imposed upon the employee by a provision of this code.

Here, despite the Circuit Court's *Order*, the acts of the Officer Defendants were not manifestly outside the scope of their employment, or done with malicious purpose, in bad faith, or in a wanton, reckless manner. The Officer Defendants arrested the Respondent for disorderly conduct after a verbal altercation where Plaintiff used offensive language at the Officer Defendants excessively. There are no factual allegations contained in the *Amended Complaint* to support a finding that the Officer Defendants did anything which could be seen as manifestly outside the scope of their employment or official responsibilities or that they performed acts or omissions which were with malicious purpose, in bad faith, or in a wanton or reckless manner. Thus, the Officer Defendants are also immune from Plaintiff's claims pursuant to W.Va. Code § 29-12A-5(b).

The Circuit Court itself goes so far as to imply that the Officer Defendants should be qualifiedly immune from the assault and battery claims, citing the Second Restatement of Torts, same as the Charles Town Defendants did, as controlling authority. The *Order* states that the Officer Defendants had some liberty to make contact with the Respondent to safely arrest him, and that not every offensive contact is a constitutional violation. The Circuit Court also held pursuant to *Hutchison* that leniency should be factored into a reasonableness-of-force determination in light of "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 necessary in the situation."

Hutchison Syl. 22. Between the Tort Claims Act and common-law qualified immunity, the Circuit Court's failure to dismiss the assault and battery claims of the *Amended Complaint* pertaining to all Officer Defendants represents a clear error which warrants reversal by this Court.

4. The Circuit Court erred by not dismissing the *respondeat superior* claims for battery against Chief Roper and Chief Kutcher under qualified immunity.

Respondent's *Amended Complaint* fails to set forth a plausible claim for the assault and battery claims against former Chief Roper and Chief Kutcher (collectively, "the Chiefs") because they cannot be held liable for the alleged intentional acts of their employees; rather, as already stated, the wrongful acts alleged in the *Amended Complaint* are intentional acts from which the Chiefs and the City Defendants are immune. The relevant pleading only makes formulaic and bare-bones allegations in its asserted causes of action that Chiefs Roper and Kutcher failed to adequately train and supervise the Defendant Officers in accordance with the "laws in effect of West Virginia" and other unspecified duties. Respondent offers no proof or evidence was offered alleging the Petitioners did not take reasonable steps to prevent the alleged constitutional rights violations, knew they could have prevented this incident and failed to do so, or that any state or federal constitutional rights violations occurred as a direct result of the Officer Defendants' training and supervision. The *Amended Complaint* at no point makes a direct allegation against the Officer Defendants themselves for violating the Respondent's constitutional rights. Taken together, these allegations do not satisfy the particular showings required to defeat qualified immunity in respect to the Officer Defendants. Because these and the rest of the *Amended Complaint*'s allegations amount to unsupported and recitatory conclusions of law, the Respondent cannot meet the heightened pleading standard warranted by the qualified immunity defense.

Additionally, the Order's inference that the Plaintiff can pursue a negligence claim by naming the Chiefs as individual defendants is barred by the Tort Claims Act. Syl. Pt. 5 of *Brooks v. City of Weirton*, 202 W.Va. 246, 503 S.E.2d 814 (1998) states that "West Virginia Code § 29-12A-13(b) prohibits the naming of an employee of political subdivision acting within the scope of employment as a defendant for the purpose of directly establishing the liability of a political subdivision." As further stated in the Ranson Defendants' Motion to Dismiss and not addressed by the Respondent so far, an action for supervisory liability of a police chief for the actions and conduct of his subordinate officers is not permissible in West Virginia per the ruling in *Robinson v. Pack*, 223 W.Va. 828, 837, 679 S.E.2d 660, 669 (W.Va. 2009).

Here, the Respondent's vicarious liability allegations for battery arise squarely out of conduct for which the Chiefs would be immune under W.Va. Code § 29-12A-5(a)(5): providing police or law enforcement services. W.Va. Code § 29-12A-5(a)(5) is plainly stated, clear, and unambiguous. The allegations in the *Amended Complaint* are based entirely on the events surrounding the Respondent's arrest on September 28, 2019. The Officer Defendants' arrest of Plaintiff falls squarely within the definition of providing police or law enforcement protection. See *Holsten v. Massey*, 200 W.Va. 775, 789-790, 490 S.E.2d 864, 878-79 (1997) (interpreting W.Va. Code § 29-12A-5(a)(5) and finding the "failure" to provide police or law enforcement protection is different from the "method" of providing police and law enforcement protection and that the failure provision is clear and without ambiguity). The Circuit Court Order does not address the Tort Claims Act or the overwhelming case law granting the Chiefs immunity from vicarious liability claims. Therefore, the Chiefs are immune from Plaintiff's claims and the same should be dismissed.

CONCLUSION

The Petitioners jointly and respectfully request that the Circuit Court's Order partially granting and partially denying their respective Motions to Dismiss be overturned, and that this Court direct the Circuit Court below to dismiss with prejudice the Respondent's *Amended Complaint* because 1) the Circuit Court erred by failing to dismiss the Officer Defendants on the grounds of qualified immunity; 2) the Circuit Court erred by not dismissing all the *respondeat superior* claims against the City of Ranson and the City of Charles Town on the basis of qualified immunity; (3) the Circuit Court erred by not dismissing the Officer Defendants as to the assault and battery claims; and (4) the Circuit Court erred by not dismissing the *respondeat superior* claims for battery against Chief Roper and Chief Kutcher City under qualified immunity.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0428

BRADLEY MEACHAM, ET AL,

Defendants Below, Petitioners,

v.

CHRISTOPHER SULLIVAN,

Plaintiff Below, Respondent.

(On Appeal From an Order of the Honorable Debra McLaughlin; Circuit Court of Jefferson County, West Virginia; Case No. CC-19-2021-C-136)

CERTIFICATE OF SERVICE

The undersigned counsel of record does hereby certify on this 6th day of September, 2022, that a true copy of the foregoing Petitioners' Appendix was served to the following counsel of record via the U.S. Postal Service:

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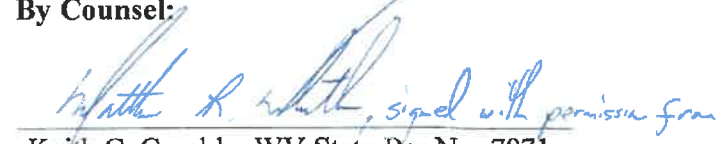

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