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' REPLY BRIEF

Matthew R. Whitler, Esq. (WV State Bar No. 7628)
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
261 Aikens Center, Suite 301
Martinsburg, West Virginia 25404
Telephone: 304.260.1200
Counsel for Todd Kent, Mark Spessert, Christopher Kutcher, and the City of Charles Town

Keith C. Gamble, Esq. (WV State Bar No. 7971)
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, West Virginia 26508
Telephone: (304) 225-2200
Counsel for City of Ranson, Officer Bradley Meachem, Officer Gleena Hosby-Brown, and Chief William Roper

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REPLY BRIEF OF PETITIONERS

NOW COMES the Petitioners Officer Todd Kent, Officer Mark Spessert, Chief Christopher Kutcher, and the City of Charles Town (hereinafter collectively referred to as "Charles Town Defendants"), by and through their counsel of record, Matthew R. Whitler and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and the City of Ranson, Officer Bradley Meachem, Officer Gleena Hosby-Brown, and Chief William Roper, by and through their counsel of record, Keith C. Gamble and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and files the following Reply Brief in support of their appeal and addressing the Response Brief from the Respondent Christopher Sullivan:

ARGUMENT

1. Respondent failed to identity any acts of the Officer Defendants that were for "malicious purpose, in bad faith, or for a wanton or reckless matter" that would defeat the qualified immunity granted to police officers under W.Va. Code § 29-12A-5(b).

The Response Brief sets forth two points of contention against the Petitioners' First Assignment of Error related to the qualified immunity claims of the Officer Defendants under the Tort Claim Act. However, as both subparts (A) and (B) substantially set forth the same argument, that qualified immunity should be granted to the Defendant Officers as their actions at the time of the Respondent's arrest constituted malicious purpose (i.e. malicious), bad faith (i.e. fraudulent), or in a wanton or reckless matter (i.e. oppressive), this Reply shall address both simultaneously. Pertaining to the Defendant Officers, outside of Officer Meacham, the Respondent can only point to statements made to him in the course of his arrest as purported evidence of "sinister or improper motives" sufficient to meet the pleading requirements mandated by heightened pleading and the Tort Claims

Act. Response Brief pp. 12-13. It should be noted that the Respondent did not even supply any purported statements or allegations against Officer Spessert, one of the Charles Town police officers not granted immunity by the Circuit Court. Concerning Officer Meacham, the Respondent also uses statements from Officer Meacham and an unsupported allegation of excessive force to argue that the Circuit Court was correct in not granting qualified immunity. Response Brief pp. 11-12.

Although cited to in their respective filings, the Respondent and the Circuit Court both failed to properly apply the qualified immunity analysis for employees of political subdivisions as supplied in W.Va. Code § 29-12A-5(b):

> (b) 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.

The Circuit Court erred by finding that this qualified immunity under subpart 5(b) did not apply to the Officer Defendants. In its Order, the Circuit Court held:

> ...the alleged actions of the officer defendants set forth sufficient details ... to show that the Governmental Tort Claims Act ... 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.

Petitioners' Appendix 269-270. However, the Circuit Court went on to find that while these allegations constituted actions "outside of providing 'law enforcement protection' and is instead

committing 'individual acts of negligence'" (Citation omitted). *Petitioners' Appendix 270.* Yet, the Circuit Court continues on to note on the same page of the Order that the allegations of the Respondent that the officers' conduct was "fraudulent, malicious, or oppressive", and further that the arrest exceed Fourth Amendment standards, even though the Complaint never raised any United States constitutional causes of action. *Id.*

As is clearly stated in § 29-12A-5(b), the actions of the Defendant Officers must have been **manifestly** outside of the scope of employment or official responsibilities to prevent qualified immunity from applying. "Scope of employment" is defined as "performance by an employee acting in good faith within the duties of his or her office or employment or tasks lawfully assigned by a competent authority but does not include corruption or fraud." W.Va. Code § 29-12A-3(d); see also *Randall v. Fairmont City Police Dep't*, 186 W.Va. 336, 340 n.1, 412 S.E.2d 737, 741 (1991). None of the allegations cited by the Circuit Court as being outside law enforcement protection could be deemed acts of corruption or fraud. Each and every cited allegation was purported conducted by the Defendant Officers and stems directly from their official duties as police officers, and therefore, the Tort Claims Act should apply and the Circuit Court's Order to the contrary must be held as an error in law.

Furthermore, the utilization of a negligence standard to keep the Defendant Officers in the litigation was misplaced by the Circuit Court, as allegations of negligence would immunize the officers from any personal liability in this matter under the Tort Claims Act. As the Defendant Officers are all admittedly employees of political subdivisions, liability can only be applied for actions or omissions having "malicious purpose, in bad faith, or in a wanton or reckless manner." W.Va. Code § 29-12A-5(b)(2). Clearly, the standard set in the Tort Claims Act was far above a negligence burden of pleading as set forth by the Circuit Court. The Respondent's Brief is in

apparent agreement with this analysis, as the entirety of the qualified immunity section pertaining to the Defendant Officers attempts to utilize allegations from the Complaint to show that the "malicious purpose, in bad faith, or in a wanton or reckless manner" has been met. However, these alleged examples fail to meet the standards set forth by this Court concerning the actions of police officers.

West Virginia uses a "reasonable officer" standard in determining qualified immunity; the subjective motivations of the officer are not considered. *Robinson v. Pack*, 223 W.Va. 828, 833, 679 S.E.2d 660, 665 (2009); see also *Hutchison v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996). Furthermore, as the *Robinson* Court stated:

> Federal law leaves no question that the subjective motivations of a police officer are immaterial to a determination of whether qualified immunity exists in connection with allegations of unreasonable search and seizure, unlawful detention, and excessive force. *See Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (holding that officer's subjective beliefs are irrelevant when evaluating the reasonableness of his actions). As the United States Supreme Court reasoned in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989):
>
> [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Robinson, 223 W.Va. at 834, 679 S.E.2d at 666. See also *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (finding that "officer's subjective state of mind is not relevant to the qualified immunity inquiry").

The proper applicable test for determination of qualified immunity for performance of discretionary functions is set forth in Syllabus Point 6 of *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011), which is separated into two inquiries:

> (1) a trial court finds the alleged facts, taken in the light most favorable to the party asserting injury, do not demonstrate that the officer's conduct violated a constitutional right; or (2) a

> trial court finds that the submissions of the parties could establish the officer's conduct violated a constitutional right but further finds that it would be clear to any reasonable officer that such conduct was lawful in the situation confronted.

Federal law from the Fourth Circuit has held that once qualified immunity is asserted by a defendant, 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). Even if this Court does not adopt this standard, the record is absent of any constitutional violations outside of a mention of the Fourth Amendment by the Circuit Court that is not provided any analysis or conclusions supporting the application of this Amendment. Therefore, the evaluation under *Botkins* must shift to whether a reasonable officer would find the actions alleged by the Plaintiff to be lawful.

In consideration of Officer Meacham, the record is clear that while he utilized his discretionary function in deciding to arrest the Respondent, there is no pleading supporting the Circuit Court findings that the arrest was "fraudulent, malicious, or oppressive". The Respondent did not cite any case law in which this Court found that the specific factual allegations made in the Complaint have been found unlawful against police officers. In contrast, the *Botkins* Court found qualified immunity for the arresting officer in that matter when said officer ordered a group of men to get down on the ground and all but Mr. Botkins complied fully with the order. The evidence in that case indicated that when the officer saw Mr. Botkins on his knees the officer ran up to him and threw his hands up behind his back while kneeing him in the back. Mr. Botkins alleged that the Officer then hit him in the head with the butt of his drawn gun. He further said that while the officer proceeded to hit him twice more with the butt of the gun he repeatedly kicked him. *Botkins*, supra, 228 W.Va. at 396, 719 S.E.2d at 866. The allegations against Officer Meacham, even when viewed

in the most favorable light to the Respondent, fail to qualify under § 29-12A-5(b)(2) as malicious purpose, in bad faith, or in a wanton or reckless manner in light of the *Botkins* case.

Likewise, while coarse language was alleged to have been directed towards the Respondent by Officers Meacham, Hosby-Brown, and Kent, said communication fails as evidence of unlawful threats of physical force as held by the Circuit Court. As the Respondent admittedly was cursing towards the Officers as noted in *Plaintiff's Complaint* ¶¶ 31-33 and 40, the use of the language by the named Officers did not violate any of the Respondent's constitutional rights or would have been seen by an objective reasonable police officer as unlawful. Therefore, the Circuit Court failed to properly analyze these and the other allegations under § 29-12A-5(b)(2). Finally, as to Officer Spessert, the Circuit Court's findings that he was part of the alleged excessive use of force and refused to provide medical care is without support, as the Plaintiff's Complaint only alleges that "Sergeant Spessert and Officer Meacham utilized two sets of handcuffs to handcuff Mr. Sullivan." *Plaintiff's Complaint* ¶ 44. In conclusion, a proper application of Qualified Immunity for the Officer Defendants under the Tort Claim Act shows that the Circuit Court's Order denying dismissal must be overturned.

2. **Charles Town and Ranson can only be liable for the negligent acts of their employees, not intentional, and therefore the Circuit Court erred in not dismissing the same subject to qualified immunity**

The Respondent in headings 2(A), 2(B), and 2(C) confuses the application of immunities under W.Va. Code § 29-12A-1 *et sec.* with Petitioners' arguments regarding alleged intentional acts. Initially, Petitioners agrees with Respondent that Ranson and/or Charles Town can be held liable for negligent acts of their employees that would fall into any of the provisions provided for in W.Va. Code § 29-12A-4(c)(1-5). However, Petitioners disagree with Respondent as it would relate to

pleading intentional and negligent *acts* based on the same factual allegations. Further, Petitioners disagree with the Respondent's analysis of the immunities provided for under § 29-12A-5(a)(5).

Respondents argue numerous times in his response that Ranson and Charles Town can be held liable for the negligent acts of their officers. Response Brief pp. 16, 18, 19, 20. However, in the same response, Respondent also argues, based on the same arrest and circumstances associated with all asserted claims, that "all of the officers used excessive force against [Respondent] who was not resisting arrest or attempting to flee, all of the officers refused to provide medical care when [Respondent] was bleeding from his head." Response Brief pp. 20. In other parts of the response, Respondent states the Officers' acts were "in bad faith," "performed with sinister or improper motives," and/or "engaged in conduct that was otherwise fraudulent, malicious, or oppressive." Response Brief pp. 10, 11, 13. Simply stated, and why the ruling from the Circuit Court herein should be overruled, is due to the fact Respondent has plead facts alleging the *acts* of the Officers were intentional, yet he tries to claim the same acts are based on negligence so as to avoid the immunities provided in West Virginia Code. To this end, the Respondent cannot claim the officers utilized acts of excessive force against Mr. Sullivan with sinister and improper motives, yet claim the same acts were somehow negligent so he can seek liability against the City Defendants. The lower Court's denial of the Motion to Dismiss the *respondeat superior* claims was in error and should be reversed by this Court. Further, Respondent's analysis regarding the application of § 29-12A-5(a)(5), is not consistent with current rulings from this Court.

Respondent's analysis under *Westfall v. City of Dunbar*, 205 W.Va. 246, 251, 517 S.E.2d 479, 484 (1999) and *Smith v. Burdette*, 211 W.Va. 477, 566 S.E.2d 614 (2002) are somewhat incorrect as both such rulings were modified by this Court's ruling in *Albert v. City of Wheeling*, 238 W.Va. 129, 792 S.E.2d 628 (2016). As was clearly stated in *Albert*,

> Statutory immunity exists for a political subdivision under the provisions of West Virginia Code § 29-12A-5(a)(5) (2013) if a loss or claim results from the failure to provide fire protection or the method of providing fire protection regardless of whether such loss or claim, asserted under West Virginia Code § 29-12A-4(c)(2) (2013), is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment. To the extent that this ruling is inconsistent with syllabus point five of *Smith v. Burdette*, 211 W.Va. 477, 566 S.E.2d 614 (2002), the holding as it pertains to the negligent acts of a political subdivision's employee in furtherance of a method of providing fire protection is hereby overruled.

Albert v. City of Wheeling, Syl. Pt 4, 238 W.Va. 129, 130, 792 S.E.2d 628, 630 (2016). In this regard, *Albert* either modified and/or overruled *Smith* and *Westfall*. To this end, the Respondent's analysis in his response is not accurate and should be rejected by this Court.

Turning to the ruling of the Circuit Court, the same evaluated the *respondeat superior* claims for the Respondent under the ruling of *W.Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W.Va. 273, 852 S.E. 2d 733 (2020). *Appx. 297-301*. Therein, the Circuit Court performed the six step qualified immunity analysis from *Grove* as it related to the individual Officers and the City Defendants. *Id.* at 301-302. As part of that analysis, the Circuit Court in step three only analyzed the *respondeat superior* claims pursuant to W.Va. Code § 29-12A-5(a)(5), without performing the precursor analysis required under W.Va. Code § 29-12A-4(b)(1). As this Court has ruled in *C.C. v. Harrison Cty. Bd. Of Educ.*,

> In creating the general grant of immunity, in *W. Va. Code*, 29-12A-4(b)(1), the Legislature did not distinguish between intentional or unintentional acts, but instead used the term "any" as an adjective modifying "act or omission." To eliminate doubt regarding whether the Legislature intended to include immunity for intentional acts, we need to consider our holding in Syllabus Point 2 of *Thomas v. Firestone Tire & Rubber Co.*, 164 W. Va. 763, 266 S.E.2d 905 (1980). In *Thomas* we held that "[t]he word 'any,' when used in a statute, should be construed to mean any." We therefore conclude that claims 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).*

C.C. v. Harrison Cty. Bd. of Educ., 245 W.Va. 594, 601, 859 S.E.2d 762, 769 (2021) (*emphasis added*)

In its Order, the Circuit Court determined the immunity provided in W.Va. Code § 29-12A-5 did not apply. *Petitioners' Appendix 301*. However, the Circuit Court then went on to determine that alleged acts such as, "threats of physical force, excessive force, failure to provide medical care, filing a DMV report without sufficient cause" were independent acts of "negligence." *Petitioners' Appendix 302*. Simply stated, the alleged acts plead by Respondent, and identified by the Circuit Court, are not alleged acts of negligence, but rather intentional acts. The intentional nature of Respondent's claims is further supported when looking at the Circuit Court's analysis under step five, where the Court found the Respondent plead the officers acts 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." *Petitioners' Appendix 302*. As the claims asserted by Respondent are alleged as intentional acts, and consistent with W.Va. Code § 29-12A-4(b)(1), the Petitioner Cities are immune. As this Court noted in *C.C.*, "only claims of negligence specified in W.Va. Code § 29-12A-4(c) can survive immunity from liability." *C.C.* at 601. In this regard, the Circuit Court's qualified immunity analysis under *Grove* was in error. To this end, the Circuit Court order denying the Petitioners' Motion to Dismiss the asserted *respondeat superior* claims pursuant to qualified immunity was in error and should be reversed.

2(d): Respondent's arguments regarding averred mental states is inaccurate.

Initially, Petitioner does not dispute the ability of a party to plead alternative theories of liability. Similarly, Petitioners do not dispute the proposition that one set of facts could create a circumstance where a party could set forth independent claims for intentional and negligent torts.

What these Petitioners do contest, is Respondent's attempt, and the trial Court's error, in allowing Respondent to assert negligence claims when the stated facts only support intentional acts. In coming to this incorrect conclusion, both the trial Court and Respondent, rely on *Neiswonger v. Hennessey*, 215 W.Va. 749, 601 S.E.2d 69 (2004) to allow 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 negligence claim are separate and are therefore not bared under collateral estoppel." Response Brief pp. 13-14 citing *Petitioners' Appendix 274*. Respectfully, however, *Neiswonger*, as cited, is an analysis of collateral estoppel, and not the "facts" asserted in the pleadings.

In *Neiswonger*, the plaintiff brought suit against a police officer and the City for injuries suffered during an arrest. Neiswonger sued the officer and the City of Morgantown pursuant to 42 U.S.C. § 1983, as well as State law claims. *Id.* at 71. It appears after some discovery, a motion for summary judgment was filed in Federal Court wherein the Federal claims were dismissed with prejudice but the State law claims were dismissed without prejudice. *Id.* Neiswonger refiled his State law claims in Monongalia Circuit Court and the defendants filed a Motion to Dismiss arguing the plaintiff's claims were barred by the previous federal decision. *Id.* at 72. The circuit court granted the Motion to Dismiss on the grounds of collateral estoppel. *Id.* On appeal, this Court reversed the lower court because the dismissal did not meet the elements of collateral estoppel; not because the claims asserted were intentional torts and/or negligent based torts. Respectfully, application of *Neiswonger* to the matter at hand is misplaced, and not applicable.

While Respondent goes to great lengths to point out the distinctions between negligence and intentional causes of action, they will find no resistance from the Petitioners. In fact, Respondent pointing out there is a "clear and valid distinction between negligence and willful, wanton and

reckless misconduct," is exactly the Petitioners' point. Respondent spends the first half of his response arguing he has "sufficiently alleged that the Petitioners' actions were "fraudulent, malicious or oppressive," yet then proceeds to argue the Petitioners' acts are negligent; the same is not viable. Respondent's Brief pg. 10.

Finally, Respondent's argument that he was "required to allege negligence and intentional torts based on the same facts" is not accurate. (Response Brief pp. 24). Again, while Respondent "may" have a basis to make such an assertion, he is not "required" to do so. Importantly, the Respondent is the master of his own Complaint and chose how the same was plead in this matter. Respondent cannot, under the same factual "acts", claim negligent and intentional torts. Respondent's argument should be rejected by this Court and the Circuit Court's ruling should be overturned.

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

Despite the Respondent's arguments to the contrary, the Circuit Court's Order pertaining to Assault and Battery in Section III contains clear errors of law that provide grounds for reversal. Addressing this cause of action and the Charles Town Defendants' Motion to Dismiss on the grounds of privilege, the Circuit Court noted *Hutchinson v. W.Va. State Police*, 731 F.Supp.2d 521 (S.D.W.Va. 2010), which held that an activity that would otherwise subject a person to liability in tort under West Virginia law for assault and battery does not constitute tortious conduct if the actor is privileged to engage in such conduct. *Petitioners' Appx 273*. The Circuit Court continued on to restate a holding again in the federal *Hutchinson* case, misidentified in the Order as the state case *Hutchison v. City of Huntington*, that

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. (internal citations omitted) Rather, '[t]he 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 the amount of force that is necessary in a particular situation.'

Hutchinson v. W.Va. State Police, 731 F.Supp. 2d at 545. Although the Respondent did not plead Fourth Amendment violations, the holding was properly noted in evaluating allegations against police officers in the course of their official duties in executing law enforcement duties.

The Circuit Court then correctly noted that the Respondent's Complaint did not allege any offensive contact by Chief Kutcher or the City of Charles Town. *Petitioners' Appx 273.* The Circuit Court also found as a matter of law that the law enforcement privilege extended to the act of placing handcuffs on a person being detained because "officers may use reasonable force to effectuate a detention." Id. However, despite having properly analyzed the factual allegations against the Charles Town Defendants and correlating law, the Circuit Court inexplicably only discharged the cause of action for Assault and Battery on the grounds of a failure to train as to Officer Spessert, Chief Kutcher, and the City of Charles Town, but did not dismiss the other theories of liability under the Common-Law Battery count against said parties. This is despite the Order finding as a matter of law that Officer Spessert was privileged in his action of helping place the handcuffs on the Respondent, which has been shown to be the only alleged physical interaction between Respondent and Officer Spessert, and the Order further noting that no offensive contact was alleged to occurred between the Respondent, Chief Kutcher, and the City of Charles Town. The Respondent's contention that Officer Spessert's relationship to the Battery charge was that he had a duty to intervene against Officer Meacham was not supported by the heightened pleading standard and therefore should be rejected. The ruling by the Circuit Court was a clear error of law, and as the Circuit Court has already laid forth the legal grounds for dismissal, this Court is respectfully

requested to grant the full dismissal of all the Charles Town Defendants.

Pertaining to the Ranson Defendants, the Circuit Court rejected their Motion to Dismiss on the grounds that although the Respondent's allegations of Battery against Chief Roper and the City of Ranson were contradictory due to the separate claims of negligence and intentional tort stemming from the same conduct, as previously indicated the holding in *Neiswonger v. Hennessey*, 215 W.Va. 749, 601 S.E.2d 69 (2004) allowed for the pursuit of such independent claims arising from the same fact. *Petitioners' Appx 274.* However, the *Neiswonger* case cited in the Order dealt with the doctrine of collateral estoppel and whether the plaintiff was precluded from asserting their claims against police officers because of a prior ruling from a federal district court. *Neiswonger v. Hennessey*, 215 W.Va. at 752, 601 S.E.2d at 72. Furthermore, on the face of the Order, this holding is contradictory with the Circuit Court's finding of no offensive contact by the identical counterparts with the City of Charles Town. It has long been the stance in West Virginia that the alleged wrongful acts against the Respondent cannot be both negligent and intentional. "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.*, 84 S.E. 569, 570 (W.Va. 1915). Therefore, for all the above reasons, Section III of the Circuit Court's Order should be overturned and dismissed as a matter of law.

4. The Circuit Court erred in not dismissing the *respondeat superior* claims for battery against Chief Roper and Chief Kutcher under qualified immunity as the alleged acts are intentional acts under West Virginia law.

The Circuit Court erred when it failed to dismiss the claims of battery against Chief Roper and Chief Kutcher on the basis of *respondeat superior* as the claims are clearly based on intentional acts, there is no basis for supervisory liability, and Chiefs Roper and Kutcher are entitled to qualified immunity. As the substantive argument on this issue is nearly identical to those presented in the

Petitioners' Reply to sections 2(A), 2(B), 2(C), & 2(D) above, the totality of the argument will not be recreated herein for the sake of avoiding cumulative argument. However, and even more clearly stated than above, Respondent's allegations that Chief Roper and Chief Kutcher are liable for the intentional tort of battery via *respondeat superior* is clearly erroneous pursuant to this Court's ruling in *C.C. v. Harrison Cty. Bd. of Educ.*, 245 W.Va. 594, 601, 859 S.E.2d 762, 769 (2021). In turn, given that battery is an intentional tort and neither Chief Roper nor Chief Kutcher were present for the events, there should be little question the Circuit Court's qualified immunity ruling fails for the same reasons as stated in section 2(A), 2(B), & 2(C) above.

Additionally, and ignored by Respondent in his brief, the law from this Court is clear as it relates to supervisory liability. While a detailed analysis of *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009) could be detailed here, this single statement from this Court is all that is needed: "As it stands today, the issue of supervisory liability in connection with an alleged civil rights violation is clear: there is none." *Pack*, 223 W.Va. at 837. The Circuit Court erred when it failed to dismiss Chief Roper and Chief Kutcher as there is no basis for liability under West Virginia law. Further, and as stated in more detail above, Chiefs Roper and Kutcher cannot be held liable pursuant to *respondeat superior* per this Court's ruling in *Robinson v. Pack*. For the reasons stated above, the Circuit Court's Order denying the Petitioner's Motion to Dismiss should be reversed.

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 specific individual 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,

CITY OF CHARLES TOWN, OFFICER TODD KENT, OFFICER MARK SPESSERT, AND CHIEF CHRISTOPHER KUTCHER
By Counsel:

/s/ Matthew R. Whitler
Matthew R. Whitler, WV State Bar No. 7628

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
261 Aikens Center, Suite 301
Martinsburg, WV 25404
Telephone: (304) 260-1200
Facsimile: (304) 260-1208

CITY OF RANSON, OFFICER BRADLEY MEACHEM, OFFICER GLENNA HOSBY-BROWN, AND CHIEF WILLIAM ROPER
By Counsel:

/s/ Keith C. Gamble
Keith C. Gamble, WV State Bar No. 7971

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508
Telephone: (304) 225-2200
Facsimile: (304) 225-2214

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CERTIFICATE OF SERVICE

The undersigned counsel of record does hereby certify on this 9th day of November, 2022, that a true copy of the foregoing Petitioner's Reply Brief was served to the following counsel of record via the U.S. Postal Service:

Christopher D. Janelle, Esq.
Sutton & Janelle, PLLC
224 West King Street
Martinsburg, WV 25401

Respectfully submitted,

CITY OF CHARLES TOWN, OFFICER TODD KENT, OFFICER MARK SPESSERT, AND CHIEF CHRISTOPHER KUTCHER
By Counsel:

/s/ Matthew R. Whitler
Matthew R. Whitler, WV State Bar No. 7628

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
261 Aikens Center, Suite 301
Martinsburg, WV 25404
Telephone: (304) 260-1200
Facsimile: (304) 260-1208

CITY OF RANSON, OFFICER BRADLEY MEACHEM, OFFICER GLENNA HOSBY-BROWN, AND CHIEF WILLIAM ROPER
By Counsel:

/s/ Keith C. Gamble
Keith C. Gamble, WV State Bar No. 7971

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2414 Cranberry Square
Morgantown, WV 26508
Telephone: (304) 225-2200
Facsimile: (304) 225-2214