IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRADLEY MEACHAM, ET AL,
Defendants Below, Petitioners,

v.

DOCKET NO: 22-0428

CHRISTOPHER SULLIVAN,
Plaintiff Below, Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The Petitioners appeal from an Order issued by the Honorable Debra McLaughlin of the Circuit Court of Jefferson County, West Virginia, partially granting Defendants' Motions to Dismiss. App. at 258, 277.

Amended Complaint. On September 27, 2021, Christopher Sullivan ("Respondent") filed his *Amended Complaint* to obtain relief based on the actions of the Defendant Officers. *Id.* at 129-49.

Charles Town Defendants. On November 2, 2021, Defendants Todd Kent ("Officer Kent"), Christopher Kutcher ("Chief Kutcher"), Mark Spessert ("Sergeant Spessert"), City of Charles Town ("Charles Town"), and City of Charles Town Police Department (hereinafter collectively "Charles Town Defendants") filed a Motion to Dismiss claiming Respondent failed to plead facts suggestive of a claim for relief and Charles Town Defendants were protected by qualified immunity under the West Virginia Tort Claim and Insurance Reform Act ("Torts Claim Act"), West Virginia Code § 29-12A-1, *et. seq.* *Id.* at 106-07. On November 17, 2021, Respondent responded, stating he sufficiently plead facts to survive a motion to dismiss and Charles Town Defendants were not immune based on their negligence and malicious acts. *Id.* 169-90. On November 29, 2021, Charles Town Defendants replied that Respondent's response failed to

sufficiently oppose the motion to dismiss. *Id.* at 203, 213.

Ranson Defendants. On November 23, 2021, Defendants Bradley Meacham ("Officer Meacham"), Glenna Hosby-Brown ("Officer Hosby-Brown"), William Roper ("Chief Roper"), City of Ranson ("Ranson"), and City of Ranson Police Department (hereinafter collectively "Ranson Defendants") filed a Motion to Dismiss claiming Respondent failed to plead facts in support of his claim for relief and asserting immunity defenses for all Ranson Defendants pursuant to the Torts Claim Act. *Id.* at 75, 85. On December 9, 2021, Respondent responded, stating his complaint was sufficient to survive a motion to dismiss as Ranson Defendants failed to demonstrate no legally cognizable claim for relief existed and were not immunized by the Torts Claim Act. *Id.* at 151-68. On December 20, 2021, Ranson Defendants replied that Respondent's response was deficient to rebut the Motion to Dismiss. *Id.* at 191, 200.

Defendant Officers. The Defendant Officers include Officer Kent, Sergeant Spessert, Officer Meacham, and Officer Hosby-Brown (hereinafter collectively "Defendant Officers").

Circuit Court Order. On May 3, 2022, Judge Debra McLaughlin issued an Order partially granting and partially denying Defendants' Motions to Dismiss. *Id.* at 257-58.

SUMMARY OF THE ARGUMENT

This Court should uphold the Circuit Court's decision to

partially grant and partially deny Petitioners' Motions to Dismiss. West Virginia's immunity laws shield officials when they perform their duties reasonably. However, this shield is not so impenetrable as to require tolerance of fraudulent, malicious, and intentional wrongdoing. It protects officials performing their duties reasonably and holds accountable those abusing power.

The first issue on appeal is whether Respondent sufficiently alleged that Officer Defendants were not entitled to qualified immunity. In every immunity case involving a motion to dismiss, the defendant must demonstrate that the plaintiff failed to meet the requisite heightened pleading standard, i.e., that a government official engaged in fraudulent, malicious, or intentional wrongdoing or violated an established statutory or constitutional right. The Circuit Court correctly determined that Petitioners failed to demonstrate that no legally cognizable claim for relief exists.

The second issue on appeal is whether Charles Town and Ranson are liable for the individual, negligent acts of their employees. Petitioners make two incorrect claims to justify their argument. First, Petitioners claim that political subdivisions are not liable for the intentional or negligent acts of their employees. *See* Pet'rs' Br. at 11. Second, Petitioners claim that Respondent may not separately allege negligence and intentional torts based on the

same conduct. *See* Pet'rs' Br. at 11, 12.

These contentions misstate the application of the Torts Claim Act and ignore the basic pleading standards for mental states. The Torts Claim Act states that political subdivisions are liable for their employees' negligent acts unless they were implementing and acting in furtherance of a method of providing police or law enforcement protection. Furthermore, this Court allows plaintiffs who have asserted negligence claims against a law enforcement officer to pursue independent claims for assault, battery, or other common law intentional torts even if the claims arise from the same facts as the negligence claims. *Neiswonger v. Hennessey*, 215 W. Va. 749, 753, 601 S.E.2d 69 (2004).

The third issue is whether the Charles Town Defendants should be liable under the theory of Common Law Battery. It should be noted that the Ranson Defendants did not move for dismissal for the allegations of battery and assault against Officer Meacham and Officer Hosby-Brown. The Charles Town Defendants fail to address liability for Sergeant Spessert's omission - failing to intervene while Respondent was subject to unnecessary and excessive force.

The last issue on appeal is whether Charles Town and Ranson are vicariously liable for the actions or omissions of Chief Roper and Chief Kutcher. Considering the heightened duty which applies law enforcement and the factual allegations in the *Amended*

Complaint, it is reasonable to infer that Chief Roper and Chief Kutcher were negligent in the training or supervision of the Defendant Officers.

Petitioners' conclusory statements regarding intentional acts, liability for negligence, and *respondeat superior* are insufficient to meet their burden of proving Respondent cannot recover under any legally cognizable claim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, Respondent submits that oral argument is unnecessary as both parties waive oral argument, the dispositive issues have been authoritatively decided by this Honorable Court, and the facts and legal arguments are adequately presented in the briefs and record on appeal. If the Court, in its discretion, determines that oral argument would be appropriate, Respondent believes that this case would be suitable for Rule 19 argument as a case involving assignments of error in the application of settled law. *West Virginia R.A.P.* 19(a)(1). Additionally, Respondent suggests that affirmance of the Circuit Court by memorandum decision would be appropriate. *West Virginia R.A.P.* 21(a).

STANDARD OF REVIEW

A. *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" and reviewed *de novo*. *W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015) (citing Syl. Pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998)).

B. Rule 12(b)(6) Standard.

To survive a motion to dismiss, Respondent's complaint "must do nothing more than … contain[] a short and plain statement of a claim showing that the plaintiff is entitled to relief." *Gable v. Gable*, 245 W. Va. 213, 213, 858 S.E.2d 838, 846 (2021). Petitioners bear the burden of showing that no legally cognizable claim for relief exists. *Gable*, 245 W. Va. at 213, 858 S.E.2d at 846.

The Court "should view the motion to dismiss with disfavor, should presume that all of the plaintiff's factual allegations are true, and should construe those facts and the inferences arising from those facts in the light most favorable to the plaintiff." *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 538, 236 S.E.2d 207, 212 (1977). "[D]ismissal for failure to state a claim is only 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." *Marple*, 236 W. Va. at 660, 783 S.E.2d at 81.

C. Pleading Standard.

Generally, "heightened pleading" is required in actions implicating immunities. *Hutchinson v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996). However, this standard is not absolute as "[a] plaintiff is not required to anticipate the defense of immunity in his complaint[.]" *Hutchinson*, 198 W. Va. at 150, 479 S.E.2d at 660 (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923-24 (1980)). "*Hutchinson* makes clear that there is a panoply of procedural tools available to trial courts … tools far gentler than the punitive act of dismissal." *Gable*, 245 W. Va. at 213, 858 S.E.2d at 848 n. 6 (2021). "[I]nstead of mandating dismissal, the Court in *Hutchinson* offered remedies for situations where a public entity or official asserts immunity in an answer but the plaintiff has failed to file a 'heightened pleading[.]'" *Doe v. Logan County Board of Education*, 242 W. Va. 45, 50, 829 S.E.2d 45, 50.

Hutchinson set forth the requirement that a plaintiff be provided an opportunity to address an assertion of immunity. *C.C. v. Harrison Cnty. Bd. of Educ.*, 859 S.E.2d 762, 782 n.1 (W. Va. 2021) (Armstead, J., concurring in part and dissenting in part). However, if the information within the pleadings is sufficient to survive a motion to dismiss, the motion should be denied. *Hutchinson*, 198 W. Va. at 150, 479 S.E.2d at 660.

LEGAL ARGUMENT

Whenever a defendant asserts the defense of qualified immunity in a motion to dismiss, steps have been outlined for determining whether qualified immunity applies to the specific circumstances of that particular case. *W. Virginia Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W. Va. 273, 852 S.E.2d 773, 783 (2020). The steps include, whether:

(1) a state agency or employee is involved;
(2) there is an insurance contract waiving the defense of qualified immunity;
(3) the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 et seq. 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 State employee was acting within his/her scope of employment.

Estate of Grove, 244 W. Va. 273, 852 S.E.2d at 783 (citing *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014)).

Here, steps one, two, and six are undisputed. There is no insurance contract waiving the defense of qualified immunity and the Officer Defendants were acting within the scope of their employment as employees of Ranson and Charles Town. *See* Pet'rs' Br. at 27. The rest of Respondent's brief will address Petitioners' four assignments of error.

1. The Circuit Court correctly concluded that the Officer Defendants were not entitled to qualified immunity.

The Circuit Court correctly determined that the Defendant Officers are not entitled to qualified immunity. The Circuit Court reasoned that the *Amended Complaint* sufficiently alleged that the Defendant officers were fraudulent, malicious, or oppressive during the arrest and that the arrest exceeded Fourth Amendment standards. West Virginia's immunity standards require allegations that a public official, who is acting within the scope of his authority, is not covered by the provisions of the Torts Claim Act or entitled to qualified immunity. *State v. Chase Sec.*, 188 W. Va. 356, 364, 365, 424 S.E.2d 591, 599, 600 (1992).

A. Respondent sufficiently alleged that the Officer Defendants' actions were fraudulent, malicious, or otherwise oppressive.

West Virginia's qualified immunity standard requires allegations that the Petitioners either (1) "engaged in fraudulent, malicious, or intentional wrongdoing" or, alternatively, (2) "committed discretionary governmental acts or omissions in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known." *Estate of Grove*, 244 W. Va. at 273, 852 S.E.2d at 783.

Petitioners misstate the applicable immunity standard by

claiming Respondent "failed to make the required showing of affirmatively proving his rights were violated in malicious or oppressive manner." *See* Pet'rs' Br. at 16. The Circuit Court applied the correct standard, i.e., "whether [Respondent] sufficiently alleged the [Petitioners] had … engaged in conduct that was otherwise fraudulent, malicious, or oppressive." *Estate of Grove*, 244 W. Va. at 273, 852 S.E.2d at 783.

Here, Respondent sufficiently alleged that the Petitioners' actions were "fraudulent, malicious, or oppressive." App. at 136.

B. Respondent sufficiently alleged that the Defendant Officers' acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.

The Officer Defendants cannot be liable for their actions unless one of the conditions provided by the Torts Claim Act 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) (2022).

West Virginia Code § 29-12A-5(b) requires the pleading of malicious intent or wanton or reckless acts.

Here, it is undisputed that the acts of the Officer Defendants were not manifestly outside the scope of their employment. However, Petitioners incorrectly claim "[t]here are no factual allegations contained in the *Amended Complaint* to support a finding that the Officer Defendants … performed acts or omissions which were with malicious purpose, in bad faith, or in a wanton or reckless manner." *See* Pet'rs' Br. at 31.

Regarding Officer Meacham, it cannot be claimed that Officer Meacham acted in good faith. Prior to warning Respondent for cursing, Officer Meacham stated, "around here, you keep running your fucking mouth like that, it's not going to end well for you." App. at 135. Officer Meacham further stated, "You're going to fucking jail. And the hospital first." *Id.* Following the arrest, Officer Meacham yelled the following:

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

Officer Meacham arrested Respondent for the exact same conduct he was engaging in himself. Furthermore, after the arrest, Officer Meacham continued to engage in the same conduct and "add[ed] DUI … because he[was] running his mouth." *Id.* at 136. In no way can it

plausibly be claimed that Officer Meacham acted in good faith.

Additionally, it cannot be claimed that Officer Meacham acted in good faith when he used excessive force against an individual that was "not combative." *Id.* Allowing a claim of good faith when no force was warranted would permit the use of excessive force by law enforcement without justification.

Furthermore, this Court has defined "malicious" as "[c]haracterized by, or involving, malice; having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will." *State v. Burgess*, 205 W.Va. 87, 89, 516 S.E.2d 491, 493 (1999) (quoting Black's Law Dictionary 958 (6th ed.1990)).

The definition of malice renders Petitioners' claims regarding Officer Meacham Officer Hosby-Brown, Sergeant Spessert, and Officer Kent without merit. Officer Meacham admitted to charging Respondent for DUI without just cause. While Respondent was handcuffed in the back of the cruiser, asking for medical assistance, Officer Hosby-Brown stated the following:

> You're an asshole, you know that? Fuck you. Since you doing all that, fuck you. Shut the fuck up. You the bitch.

App. at 136.

When Respondent requested medical assistance for his injuries,

Officer Kent responded by threatening to slam him on the ground again, stating:

"You're going to go again if you don't shut up."

Id.

On their face, these Defendant Officers' actions were performed with sinister or improper motives. Respondent has sufficiently plead facts to show that they are not entitled to immunity pursuant to W. Va. Code § 29-12A-5(b).

2. The Circuit Court did not err in ruling that the City of Ranson and City of Charles Town were subject to liability under *respondeat superior*.

The Circuit Court properly concluded that political subdivisions are liable for the individual, negligent acts of their employees and that Respondent may separately allege negligence and intentional torts from the same conduct. App. at 270, 274. In Petitioners second, third, and fourth assignments of error, they argue political subdivisions are immune against negligence and intentional tort claims and that "Respondents' claims are essentially intentional tort claims" and he is "attempting to disguise the same as negligence claims." *See* Pet'rs' Br. at 11-12. The Circuit Court properly concluded that political subdivisions are liable for the individual, negligent acts of their employees and that Respondent may separately allege negligence and

intentional torts from the same conduct.

Petitioners' argument is incorrect for two reasons. First, political subdivisions are liable for the individual, negligent acts of their employees. Second, Respondent was required to plead and permitted to generally aver negligent and intentional acts or omissions.

A. Charles Town and Ranson are liable for their employees' "negligently-caused dangerous and injurious conditions."

The construction of the Torts Claim Act is "clear and straightforward." Charles Town and Ranson are liable under the liability-creating provisions of W. Va. Code § 29-12A-4(c)(2) for the "negligent acts" of the Defendant Officers. Furthermore, the immunity-creating provision in W. Va. Code § 29-12A-5(a)(5) is narrowly construed, i.e., Charles Town and Ranson are liable for the "negligently-caused dangerous and injurious conditions" created by their respective Officers' negligent acts.

"[T]he general rule of construction in governmental tort legislation cases favors liability, not immunity." *State v. Sanders*, 224 W. Va. 630, 633, 687 S.E.2d 568, 571 (2009). The Torts Claim Act's purpose was to "limit liability of political subdivisions and provide immunity to political subdivisions in certain instances[.]" W. Va. Code § 29-12A-1 (2022). Those "certain instances" are enumerated in W. Va. Code § 29-12-5(a).

Specifically, Petitioners rely on the section providing that municipalities are "immune from liability … [that] results from … the failure to provide, or the method of providing, police [or] law enforcement … protection." W. Va. Code § 29-12A-5(a)(5) (2022).

Generally, the liability-creating provisions of the Torts Claim Act are to be broadly construed and the Act's immunity-creating provisions are to be narrowly construed. *Calabrese v. City of Charleston*, 204 W. Va. 650, 657, 515 S.E.2d 814, 821 (1999). Application of the "negligent act" liability provision of West Virginia Code § 29-12A-4(c)(2) is "clear and straightforward." *Calabrese*, 204 W. Va. at 657, 515 S.E.2d at 821. Broadly reading the immunity provisions of W. Va. Code § 29-12A-5(a) "would effectively nullify most if not all liability arising out of negligently caused dangerous and injurious conditions[.]" *Id.* at 659, 515 S.E.2d at 823. Considering the explicit legislative creation of liability in W. Va. Code § 29-12A-4(c)(2), it is doubtful that "eviscerating such liability was the legislative intent" in W. Va. Code § 29-12A-5(a)(5). *Id.*

B. Charles Town and Ranson are liable for the Defendant Officers' negligent acts unless they were "implementing" and acting "in furtherance of a method of providing [police or law enforcement] protection."

A political subdivision is shielded by immunity against injury caused by "any act or omission of … an employee of the political

subdivision in connection with a governmental … function," unless it was "caused by the negligent performance of acts by their employees while acting within the scope of employment." W. Va. Code §§ 29-12A-4(b)(1), 29-12A-4(c)(2). Thus, Charles Town and Ranson can be held liable for claims of negligence. See *Zirkle v. Elkins Road Public Service Dist.*, 221 W.Va. 409, 414, 655 S.E.2d 155, 160 (2007); W. Va. Code §§ 29-12A-4(b)(1), (c)).

The issue under W. Va. Code § 29-12A-5(a)(5) is "whether the allegedly negligent act resulted from the manner in which a formulated policy … was implemented." *Beckley v. Crabtree*, 189 W. Va. 94, 98, 428 S.E.2d 317, 321 (1993). In *Westfall v. City of Dunbar*, the Court "distinguished between the general formulated method and the more specific act of individual negligence." 205 W. Va. 246, 251, 517 S.E.2d 479, 484 (1999), holding modified by *Smith v. Burdette*, 211 W. Va. 477, 566 S.E.2d 614 (2002).

In *Westfall*, the Court held that W. Va. Code § 29-12A-5(a)(5) does not provide immunity to a political subdivision for an officer's negligent decision committed within the scope of employment. *Westfall*, 205 W. Va. at 251, 517 S.E.2d at 483. An officer negligently left his car stopped below the crest of a hill where the vision of approaching traffic was restricted, causing an accident. *Id.* at 249, 517 S.E.2d at 482. The Court noted that the method of providing police protection refers to the decision or

plan for how the act is to be performed. *Id.* at 250, 517 S.E.2d at 482. The Court reasoned that the political subdivision was not shielded against the officer's individual, negligent decision because it was not made pursuant to any specific method, plan, or procedure. *Id.* at 251, 517 S.E.2d at 483.

Similarly, in *Mallamo v. Town of Rivesville*, the Court provided another illustrative example:

> [T]he evidence reveals that the officers acted pursuant to formulated policy when they unholstered their weapons upon observing a high-powered rifle in a bedroom of plaintiff's home. However, the discharge of Van Pelt's weapon was not the result of implementing such policy. Thus, because the injuries plaintiff sustained were not the result of the method of providing police, law enforcement or fire protection, within the meaning of W. Va. Code, 29-12A-5(a)(5), the Town of Rivesville would not have been immune from liability thereunder. Consequently, under W. Va. Code, 29-12A-4(c)(2), the Town of Rivesville would have been liable for the negligence, if any, of its employee, Wilson.

197 W. Va. 616, 626, 477 S.E.2d 525, 535 (1996).

In *Mallamo*, the Court reasoned that unholstering a weapon was part of a formulated policy, but discharging the weapon was "not the result of implementing such a policy." *Mallamo*, 197 W. Va. at 626, 477 S.E.2d at 535.

In *Albert v. City of Wheeling*, 238 W. Va. 129, 792 S.E.2d 628 (2016), the Court held that political subdivisions are immune under W. Va. Code § 29-12A-5(a)(5) against negligent acts performed by employees "in furtherance of a method of providing fire

protection." *Albert*, 238 W. Va. at 134, 792 S.E.2d at 633. *Albert* restated the general consideration under W. Va. Code § 29-12A-5(a)(5), i.e., "whether the allegedly negligent act resulted from the manner in which a formulated policy … was implemented," and clarified previous case law that "distinguished between the general formulated method and the more specific individual act of alleged negligence." *Beckley*, 189 W. Va. at 98, 428 S.E.2d at 321; *Westfall*, 205 W. Va. at 251, 517 S.E.2d at 484, holding modified by *Smith v. Burdette*, 211 W. Va. 477, 566 S.E.2d 614 (2002).

Therefore, Charles Town and Ranson are liable for the negligent acts of their respective Defendant Officers unless the Officers were "implementing" and acting "in furtherance of a method of providing [police or law enforcement] protection."

Here, Respondent has plead sufficient facts to state a claim under W. Va. Code §§ 29-12A-4(c)(2) and 29-12A-5(a)(5). The Defendant Officers were acting within the scope of their employment - all were at the apartment complex as employees of the Charles Town and Ranson Police Departments - and committed individual, negligent acts.

Sergeant Spessert was assisting Officer Meacham of Ranson pursuant to a Charles Town policy. App. at 134. Sergeant Spessert's negligent decision not to intervene when Officer Meacham utilized a leg sweep on an individual that "walked away" and "was not being

combative," did not further any particular purpose or the aforementioned policy. *Id.* at 139. Surely Charles Town does not wish to claim that their policies encourage and direct their employees to assist Officers from Ranson that are, for example, using excessive force, engaging in "do as I say not as I do" law enforcement, or fabricating charges because a citizen is "running his mouth." *Id.* at 135-36.

Charles Town and Ranson seem to also have taken an untenable position regarding the actions of Officer Kent and Officer Hosby-Brown. Officer Kent not only refused to provide medical attention to an individual bleeding from his head – which was caused by Sergeant Spessert's failure to intervene – but he threatened further physical harm. *Id.* at 136. Similarly, while Respondent was handcuffed in the backseat of the cruiser, Officer Hosby-Brown, rather offer medical assistance, antagonized and disparaged Respondent. *Id.* at 136, 141. It is unfathomable to imagine those actions furthered any method of providing police protection.

Additionally, in addition to the previously mentioned allegations against Officer Meacham and the other Officer Defendants, the Circuit Court specifically noted the following allegations describing an officer acting outside of providing law enforcement protection and instead committing individual, negligent acts:

- Officer Meacham initiated the confrontation resulting in the arrest,
- Officers Meacham, Kent, and Hosby-Brown made threats of physical force against [Respondent],
- All of the officers used excessive force against [Respondent] (who was not resisting arrest or attempting to flee),
- All the officers refused to provide medical care when [Respondent] was bleeding from his head, and
- that Officer Meacham filed a DMV report without sufficient cause.

Id. at 302.

Respondent has clearly plead sufficient facts to demonstrate that, as in *Westfall* and *Mallamo*, Sergeant Spessert, Officer Meacham, Officer Hosby-Brown, and Officer Kent committed individual, negligent acts that did not further any particular purpose or decision in implementing methods of providing police protection.

C. The Torts Claim Act does not immunize Charles Town and Ranson against "negligent police" such as Officer Meacham, Officer Hosby-Brown, Sergeant Spessert, and Officer Kent.

In *Mallamo*, the Court explained that the immunity for injury resulting from "the method of providing police or fire protection,"

> is aimed at such basic matters as the type and number of fire trucks and police cars considered necessary for the operation of the respective departments; how many personnel might be required; how many and where police patrol cars are to operate; the placement and supply of fire hydrants; and the selection of equipment options. Accordingly, a city is immunized from such claims as a burglary could have been prevented if additional police cars had been on patrol, or a house could have been saved if more or better fire equipment had been purchased. We

> do not believe [the applicable statute] is so broad as to immunize a city on every aspect of negligent police and fire department operations. Should firemen negligently go to the wrong house and chop a hole in the roof thereof, we do not believe the city has immunity therefor on the basis the negligent act was a part of the method of fire protection.

197 W. Va. at 626, 477 S.E.2d at 535, holding modified by *Smith v. Burdette*, 211 W. Va. 477, 566 S.E.2d 614 (2002).

The "negligent firemen" example is particularly instructive. Chopping a hole in a roof is a method of fire protection presumably to assist in extinguishing a fire. However, negligently implementing that method at the wrong house in no way furthers that method because it does not extinguish a fire. The fire department would not be immunized against the negligently caused and injurious condition, i.e., a hole in the roof of a house that was not on fire.

Here, the Officer Defendants provide multiple illustrative examples of "negligent police." For instance, Officer Meacham did not further any policy by negligently threatening to use serious force, deploying a taser[1], against an unarmed individual that had "walked away" and was "not being combative," resisting arrest, or posing a threat to officers or others. App. at 135.

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[1] "Deploying a taser is a serious use of force." *Estate of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 902 (4th Cir. 2016); *see also Meyers v. Baltimore County, Md.*, 713 F.3d 723 (4th Cir. 2013)(stating that an officer's use of a taser against an arrestee no longer actively resisting violates the arrestee's clearly established constitutional rights).

In another instance, Officer Meacham and Officer Hosby-Brown were trained in de-escalation techniques but chose not to utilize their training. *Id.* at 136, 139. Escalating a situation by threatening and disparaging an individual that explicitly did not want to interact with law enforcement does not further any de-escalation policy. *Id.* at 135. The same logic applies for an individual that had "walked away," "was not being combative," or was handcuffed in the back of a police cruiser. *Id.* at 135-36.

D. Respondent sufficiently plead and averred the requisite mental states to show that he is entitled to relief as a matter of law.

West Virginia permits a plaintiff who has asserted negligence claims against a law enforcement officer to pursue independent claims for assault, battery, or other common law intentional torts even if the claims arise from the same facts as the negligence claims. *Neiswonger*, 215 W. Va. at 753, 601 S.E.2d at 69.

The pleading standards for mental states under the West Virginia Rules of Civil Procedure, West Virginia case law, and the Torts Claim Act are straightforward. Rule 9(b) of the West Virginia Rules of Civil Procedure specifically states that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally. Negligence may also be averred generally." The Torts Claim Act's required Respondent to plead negligent and

intentional conduct. West Virginia Code § 29-12A-4(c)(2) extends vicarious liability to political subdivisions for the individual, negligent acts of their employees. West Virginia Code § 29-12A-5(b) states employees are personally liable for acts or omissions performed with malicious purpose, in bad faith, or in a wanton or reckless manner.

West Virginia law recognizes a "clear and valid" distinction between negligence and willful, wanton, and reckless misconduct. *Kelly v. Checker White Cab*, 131 W. Va. 816, 50 S.E.2d 888, 892 (1948); *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 705, 246 S.E.2d 907, 913 (1978) (superseded by statute on other grounds). Willful, wanton, and reckless misconduct "requires a subjective realization of the risk to bodily injury created by the activity and as such does not constitute any form of negligence." *Mandolidis*, 161 W. Va. at 705, 246 S.E.2d at 913.

There is also a distinction between "an intentional tort" and "a negligent tort." *Criss v. Criss*, 177 W. Va. 749, 751, 356 S.E.2d 620, 622 (1987). They are "distinguished … by examining the subjective intent of the alleged tortfeasor." *Weigle v. Pifer*, 139 F. Supp. 3d 760, 780 (S.D. W. Va. 2015). Intentional torts "generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'" *Weigle*, 139 F. Supp. 3d at 780 (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998)).

Therefore, Respondent was required to allege negligence and intentional torts based on the same facts. Respondent met the pleading standard under Rule 9(b) by generally averring the pertinent and required mental states to make claims for relief pursuant to W. Va. Code §§ 29-12A-4(c)(2) and 29-12A-5(b). Furthermore, Petitioners' argument that "all of Respondent's various claims are essentially intentional torts" plead the "same as negligence claims" admits that Respondent sufficiently met the required pleading standards to demonstrate he is entitled to relief.

3. The Circuit Court properly decided not to dismiss the Officer Defendants as to the Assault and Battery claims.

Petitioners are correct that West Virginia recognizes the "general principle"[2] that law enforcement officers, acting within the limits of their appointment, are privileged to arrest another and while engaged in an arrest, are afforded a privilege that precludes a battery claim. *See* Restatement (Second) of Torts §§ 118, 121; *Lee v. City of S. Charleston*, 668 F. Supp.2d 763, 779

[2] "Although there is no West Virginia case which directly acknowledges a law enforcement privilege for battery in the course of an arrest, it is evident from *West Virginia Fire & Casualty Co. v. Stanley*, 216 W. Va. 40, 51, 52 (2004), that West Virginia adheres to the definition of battery set forth in the Restatement (Second) of Torts. Section 118 of the Restatement announces the "general principle" that an individual engaged in an arrest is afforded a privilege that precludes a battery claim. *See* Restatement (Second) of Torts at § 118. When that section is read in concert with § 121, which provides law enforcement officers a privilege to engage in arrests within the limit of their jurisdiction, there is no question that the Restatement definition embraced by *Stanley* contains a law enforcement privilege to use force during the course of an arrest." *Weigle v. Pifer*, 139 F. Supp. 3d 760, 777 (S.D. W. Va. 2015).

(S.D.W. Va. 2009). However, the Restatement provides that "[t]he use of force against another for the purpose of effecting the arrest . . . is not privileged if the means employed are in excess of those which the actor reasonably believes to be necessary." Restatement (Second) of Torts § 132.

As the Circuit Court determined, the Ranson Defendants did not move for dismissal of the allegations of battery and assault against Officer Meacham and Officer Hosby-Brown. App. at 273.

Regarding the Charles Town Defendants, Respondent did not allege that Sergeant Spessert committed a battery. Sergeant Spessert's liability regarding Count II is based on his failure to intervene when Officer Meacham was utilizing means in excess of those reasonably necessary to arrest Respondent. Despite having the reasonable opportunity to do so, Sergeant Spessert negligently failed to intervene on Respondent's behalf.

A. An official claim is not another way of asserting a claim against a government entity.

The Torts Claim Act specifically acknowledges separate liability for the employee and the political subdivision. W. Va. Code §§ 29-12A-5(a), (b), (c) recognize liability for a political subdivision and employees of a political subdivision.

Therefore, Defendant's assertion that claims against Officer Meacham, Officer Hosby-Brown, Sergeant Spessert, Chief Kutcher, and

Chief Roper in their official capacities are essentially claims against Charles Town and Ranson are without merit.

4. The Circuit Court properly decided not to dismiss *respondeat superior* claims for assault and battery against Chief Roper, Ranson, Chief Kutcher, and Charles Town.

In addition to demonstrating that Officer Meacham, Officer Hosby-Brown, Sergeant Spessert, and Officer Kent acted negligently, within the scope of employment, and were not implementing and acting in furtherance of any policy, the above and below mentioned examples adequately demonstrate and reasonably infer that Charles Town and Ranson were on notice of any propensity for wrongful acts by the Officer Defendants or that it unreasonably failed to take action, whether through training or disciplinary measures.

In *Westfall v. Osborne*, 2:20-CV-00118, 2020 WL 6276145, (S.D.W. Va. Oct. 26, 2020) the Court held that the Plaintiff was not entitled to "discovery without providing more than conclusory allegations." 2:20-CV-00118, 2020 WL 6276145, at *6 (S.D.W. Va. Oct. 26, 2020). Petitioners' reliance on *Westfall* is misplaced as Respondent has clearly plead sufficient facts for this Court to reasonably infer that the Charles Town and Ranson were on notice of any propensity for wrongful acts by the Officer Defendants or that they unreasonably failed to act, whether through training or disciplinary measures.

Under West Virginia law, to state a claim for negligent supervision or training, a Plaintiff must show that "[a municipal defendant] failed to properly supervise [an employee officer] and, as a result, [the employee officer] proximately caused injury to the [plaintiff]." *Woods v. Town of Danville*, W. V., 712 F.Supp.2d 502, 515 (S.D. W. Va. 2010) (citing *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 538 S.E.2d 719 (W. Va. 2000); see also *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 773 (2014) (finding that although negligent hiring, training and supervision claims against state agencies involve discretionary functions for immunity purposes, no such limitations apply to claims against political subdivisions). A heightened duty applies to police officers because they are "permitted to carry guns, use necessary force to effect arrest, and enter civilian residences in certain circumstances." *Woods*, 712 F.Supp.2d at 514.

The *Amended Complaint* is detailed with instances demonstrating that it is reasonable to infer that Officer Meacham had a propensity for wrongful acts and that Ranson failed to properly train and supervise Officer Meacham. These instances include, but are not limited to, lacking reasonable suspicion, lacking probable cause, effectuating unlawful arrests, failing to implement training, engaging in "do as I say, not as I do" law enforcement,

threatening and using excessive force, directing profanity at alleged suspects, falsifying information, failing to administer tests and follow proper procedure. App. at 132-150.

Officer Meacham approached Respondent and, despite Respondent's adamant request that he neither wanted to file a complaint nor converse with the officers, Officer Meacham continued to engage Respondent. Rather than utilize his de-escalation training, Officer Meacham continuously provoked and challenged Respondent. After Officer Meacham gave Respondent a warning, Respondent walked away towards his home. Officer Meacham's actions led to Respondent's unlawful arrest and the subsequent unnecessary and excessive uses of force. For instance, at no point did Respondent physically resist arrest or Officer Meacham's commands. Yet rather than acknowledge to Respondent that his belongings would be picked up, Officer Meacham utilized a leg sweep, throwing Respondent against the pavement.

The same can be said regarding the other Officers. Officer Hosby-Brown and Officer Kent exhibited deliberate indifference by failing to act on information indicating that Respondent was injured and that his rights had been violated. They directly threatened and antagonized him while he was cuffed in the back of the police cruiser and posed absolutely no threat of harm to officers or anyone else. Sergeant Spessert's failed to intervene

when Officer Meacham exceeded the amount of force necessary to arrest Respondent.

Further, as a direct and proximate result of Officers' acts, Respondent sustained the following injuries:

- A blow to the head that caused headaches and bruising and resulted in Respondent being diagnosed with a mild traumatic brain injury and postconcussive syndrome;
- An injury to Respondent's left hand and wrist that caused bruising and ligament damage and resulted in soft tissue damage around the hand and a sprain;
- Abrasions, lacerations, and bruises on his left shin, right hand, right thumb, lower left back area, and bicep area of his right arm.

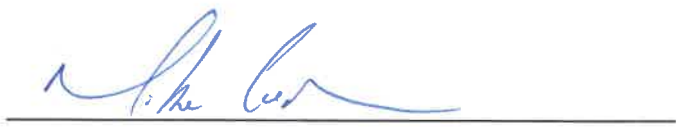
It is obvious that but for the government actions, or inactions, of the Officers present, Respondent would not have been harmed.

It is reasonable, based upon allegations in the Complaint, to infer that Chief Roper and Chief Kutcher failed to properly train, supervise, and/or control their respective Officers.

CONCLUSION

Respondent respectfully requests that the Circuit Court's Order partially granting and partially denying Petitioners' Motions to Dismiss be affirmed.

CHRISTOPHER SULLIVAN, Respondent
By Counsel



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CERTIFICATE OF SERVICE

I, Michael T. Logsdon II, Esquire, do hereby certify that a true copy of the attached *Respondent's Brief* has been filed served upon the following individuals by U.S. Mail, postage prepaid, on this October 19, 2022:

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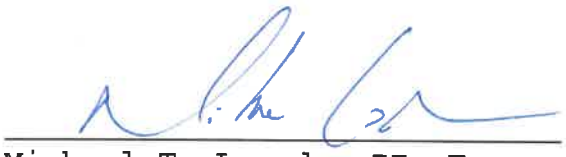

Michael T. Logsdon II, Esq.