IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-781

WEST VIRGINIA ATTORNEY-GENERAL/ MEDICAID FRAUD CONTROL UNIT; and NATHAN R. LYLE, in his individual capacity and in his capacity as an employee of the West Virginia Attorney-General, Medicaid Fraud Control Unit,

Petitioners,

v.

HISEL BAILEY,

Respondent.

PETITIONERS' BRIEF

From the Circuit Court of Kanawha County,
Civil Action No. 22-C-145

Caleb B. David, Esq. (WVSB #12732)
cdavid@shumanlaw.com
Tyler L. Rittenhouse, Esq. (WVSB #14097)
trittenhouse@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Sources

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because Petitioners are entitled to qualified immunity.
2. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because, to the extent the Circuit Court determined that Petitioners procured Respondent's prosecution, the Circuit Court was required to find that Petitioners acted as prosecutors and are entitled to prosecutorial immunity.

STATEMENT OF THE CASE

I. Introduction

This case arises out of an adverse employment decision against Respondent Hisel Bailey by his employer, the West Virginia Department of Health and Human Resources ("DHHR"), following an incident in which Bailey was alleged to have abused a patient at Mildred Mitchell-Bateman Hospital ("MMBH"). Following the incident, an investigation was undertaken by Legal Aid of West Virginia, Inc., and the matter was then referred to the Medicaid Fraud Control Unit ("MFCU"), which operates within the Office of the Attorney General. MFCU and Petitioner Nathan Lyle investigated the incident, including interviewing Bailey, and referred the matter to the Cabell County Prosecuting Attorney's Office for criminal prosecution. The Cabell County Prosecuting Attorney's Office reviewed MFCU's investigation report and concluded that criminal charges against Bailey were warranted. Additionally, a Cabell County Magistrate independently reviewed the evidence presented in support of that criminal complaint and determined that probable cause existed to justify issuing an arrest warrant. Bailey was charged with four crimes, but the Cabell County Prosecuting Attorney's Office later unilaterally dismissed those charges by exercising its prosecutorial discretion. Bailey filed a grievance against his employer, DHHR, and succeeded, resulting in DHHR being ordered to return Bailey to his prior employment position and

to remit backpay to Bailey. Bailey then filed suit against DHHR, two DHHR officials, MFCU and Lyle, Legal Aid of West Virginia, Inc., and two employees of Legal Aid.

Bailey's Complaint asserts claims against Petitioners for, *inter alia*, alleged violation of his Fourth Amendment right to be free from unreasonable search and seizure through Section 1983 and for malicious prosecution. Petitioners filed a Motion to Dismiss seeking dismissal of Bailey's Section 1983 and malicious prosecution claims on the grounds that Petitioners are entitled to qualified immunity and prosecutorial immunity. Following briefing, the Circuit Court entered an Order denying Petitioners' Motion on August 15, 2022.

II. Complaint

On February 25, 2022, Respondent Hisel Bailey filed his Complaint in the Circuit Court of Kanawha County. Joint Appendix "JA" at 014. Bailey alleges that he was employed by the DHHR at MMBH as a registered nurse. JA 018. Bailey alleges that, on January 7, 2019, he and a health services worker walked patient M.C. and a group of patients to the cafeteria for dinner. JA 019. Bailey claims that, on the way to the cafeteria, M.C. began talking about wanting to beat and kill his mother, which resulted in Bailey and the other employee attempting to redirect M.C. from his behavior. JA 019. Bailey alleges that, before getting to the doors of the cafeteria, M.C. "got mad and punched the wall which caused his knuckles to bleed and then stated that he liked to see his own blood and that he would bite himself." JA 019-020. Bailey alleges that M.C. then raised his forearm up to his mouth, and Bailey intervened to stop M.C. from hurting himself, which led to a struggle resulting in Bailey and M.C. going to the floor and M.C. suffering an injury to his forehead. JA 020.

Bailey alleges that, on January 11, 2019, Michelle Woomer, a behavioral health advocate employed by Legal Aid of West Virginia, Inc. ("LAWV"), saw M.C. and noted that he had a black eye. JA 021. Bailey alleges that Woomer asked M.C. how he got his black eye, and M.C. stated

that Bailey banged his head against a wall and then later told Woomer that Bailey banged his head against the floor. JA 021. Bailey alleges that, following this conversation, Woomer took it upon herself to investigate, which included viewing video of the incident and making a referral to Adult Protective Services. JA 021-022. Bailey alleges that the Director of Nursing at MMBH separately filed a patient grievance form, which then resulted in Craig Richards, CEO of MMBH, assigning Woomer to investigate the incident with Olivia Susan Shields. JA 023. Bailey claims he was suspended from his employment pending the investigation. JA 023.

Bailey alleges that, on February 25, 2019, Woomer submitted her investigation report, which substantiated the allegations of physical abuse against Bailey. JA 024. Bailey alleges that the report contains factual inaccuracies and false opinions and that the investigation was improperly conducted. JA 024. Bailey alleges that he was terminated, but he successfully availed himself of the grievance process through the Public Employees Grievance Board and was granted reinstatement with back pay, interest, restoration of benefits, and removal of the incident from his personnel file. JA 025, 045-046.

Bailey alleges that, following his reinstatement, he was "immediately suspended again pending criminal charges related to the same incident of January 7, 2019, because Richards, Shields, MMBH, Woomer, and/or LAWV had caused a criminal complaint to also be filed against [Respondent] Hisel Bailey and had made report to [Petitioner] MFCU which opened an investigation into the incident of January 7, 2019 …." JA 046-047. Bailey alleges that "Defendant MFCU initiated an investigation and demanded by letter of October 4, 2019, that [Respondent] Hisel Bailey submit to a custodial interrogation by its agents." JA 048.

Bailey alleges that, on December 2, 2019, MFCU, through Lyle and two other employees of the Attorney General's Office, conducted a "custodial interrogation." JA 048. Bailey claims that

MFCU and Lyle "knew or should have known that the investigation by Defendants Woomer and LAWV was significantly flawed and unreliable and that WVPEGB had cleared [Respondent] Hisel Bailey of all charges against him." JA 048. Bailey claims that Petitioners "provided information based on their investigation to the Cabell County Prosecuting Attorney's Office for the deliberate, intentional, fraudulent, and oppressive purpose of causing [Respondent] Hisel Bailey to be subject to criminal investigation that could lead to loss of his liberty." JA 048-049.

Bailey alleges that, on December 17, 2019, MFCU and Lyle authored a report related to the incident of January 7, 2019. JA 049. Bailey alleges that the findings of the report were wrongly concluded. JA 049-050. Bailey also alleges that the report wrongly referred the matter to the Cabell County Prosecuting Attorney, which resulted in criminal charges being filed against Bailey. JA 054. Bailey alleges that a Magistrate found probable cause against Bailey related to the incident of January 7, 2019; however, on March 2, 2021, the Cabell County Prosecuting Attorney dismissed all charges against Bailey. JA 055.

Bailey alleges as Count I that MFCU and Lyle's investigation and the subsequent prosecution by the Cabell County Prosecuting Attorney violated Bailey's Fourth Amendment right against unreasonable and unlawful seizure of the person. JA 055-057. Bailey further alleges as Count II that MFCU and Lyle's investigation and referral for prosecution constitute malicious prosecution. JA 057-059.

III. Circuit Court Order

On August 15, 2022, the Circuit Court entered an Order denying the Petitioners' Motion to Dismiss. Regarding qualified immunity, the Circuit Court found that, because Bailey pleaded that MFCU and Lyle's investigation was "false" and because Bailey pleaded that the results of the investigation were "malicious, fraudulent and oppressive," MFCU and Lyle are not entitled to

qualified immunity. JA 012. Despite Bailey pleading that MFCU and Lyle initiated their investigation on October 4, 2019, the Circuit Court erroneously found that MFCU and Lyle initiated their investigation on December 2, 2019, which was after the grievance decision was handed down. JA 048; 012. The Circuit Court erroneously found that the grievance decision ordering DHHR to return Bailey to his prior employment position and to remit backpay to Bailey was a "clear exoneration" by the Public Employees Grievance Board and, thus, criminal investigation was "malicious." JA 012. The Circuit Court further found that Lyle conducted a "custodial interrogation without providing [Bailey] with his Miranda rights." JA 012. Without citing to any supporting law, the Circuit Court found that Lyle has no immunity for this action.

Regarding Respondent's malicious prosecution claim, the Circuit Court found that "[Bailey] asserts that the prosecution procured by [Petitioners] MFCU and Lyle was without reasonable or probable cause because [Petitioners] MFCU and Lyle caused a Magistrate to find probable cause based on their false and flawed investigation and without probable cause." JA 006-007. Although the Circuit Court found that MFCU and Lyle "procured" the prosecution of Bailey, the Circuit Court also found that "MFCU and Lyle are not prosecutors and are not alleged to be prosecutors anywhere in the Complaint[,]" and, therefore, are not entitled to prosecutorial immunity. JA 010. While the Circuit Court found in one section of its order that MFCU and Lyle procured Bailey's prosecution, failed to provide the grievance decision to the Magistrate, and "duped" the Magistrate into finding probable cause, in denying MFCU and Lyle's Motion on prosecutorial immunity, the Circuit Court contradictorily found that MFCU and Lyle did not act as prosecutors and only investigated and referred the matter for prosecution, precluding them from the shield of prosecutorial immunity. JA 006-010. Based upon these clear legal errors, the Circuit Court denied Petitioners' Motion to Dismiss.

SUMMARY OF ARGUMENT

Bailey asserts claims against Petitioners alleging, *inter alia*, violation of his Fourth Amendment rights through 42 U.S.C. § 1983 and malicious prosecution. Petitioners filed a Motion to Dismiss seeking dismissal of Bailey's Section 1983 and malicious prosecution claims. Petitioners moved for dismissal of Bailey's Section 1983 claim on the grounds that MFCU and Lyle are entitled to qualified immunity for the discretionary acts of investigating a report of patient abuse and referring the matter for prosecution. Bailey asserts, via Section 1983, a claim for violation of his Fourth Amendment right to be free from unreasonable search and seizure. Bailey alleges that Petitioners violated his Fourth Amendment right by "falsely" investigating a report of patient abuse and "falsely" referring the matter for prosecution. Petitioners have statutory duties to investigate and refer for prosecution all violations of applicable state and federal laws pertaining to the provision of goods and services under the medical programs of the State and abuse, neglect, or financial exploitation of residents in facilities receiving payments under the medical programs of the State. Bailey has failed to identify any violation of a clearly established law or right of which a reasonable official would have known. Instead, Bailey asserts that Petitioners (a) received a report of suspected patient abuse, (b) sent a letter to Bailey seeking an interview, (c) conducted an interview of Bailey, (d) concluded that a referral for prosecution should be made, and (e) made the referral for prosecution. Each of Petitioners' alleged actions is a discretionary action in the course of carrying out Petitioners' statutory duties. Bailey has failed to identify any violation of a clearly established law or right by Petitioners during the course of their investigation and referral for prosecution. Therefore, Petitioners are entitled to qualified immunity, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

Petitioners also moved for dismissal of Bailey's malicious prosecution claim on the grounds that they are entitled to prosecutorial immunity. Bailey alleges that MFCU and Lyle "set

afoot and caused" the prosecution of a complaint before the Board of Nursing and the criminal prosecution by the Cabell County Prosecuting Attorney's Office. The Supreme Court of Appeals of West Virginia has held, "[i]n an action for malicious prosecution, plaintiff must show: (1) that the prosecution was set on foot and conducted to its termination, resulting in plaintiff's discharge; (2) that it was caused or procured by defendant; (3) that it was without probable cause; and (4) that it was malicious. If plaintiff fails to prove any of these, he cannot recover." *Goodwin v. City of Shepherdstown*, 241 W. Va. 416, 421, 825 S.E.2d 363, 368 (2019). This Court explained that "procurement, within the context of a malicious prosecution action, 'requires more than just the submission of a case to a prosecutor; it requires that a defendant assert control over the pursuit of the prosecution.'" *Id.* at 423, 825 S.E.2d at 370 (quoting *Norfolk Southern Railway Company v. Higginbotham*, 228 W. Va. 522, 528, 721 S.E.2d 541, 547 (2011)).

Petitioners' Motion to Dismiss sought prosecutorial immunity to the extent that the Circuit Court found that Petitioners asserted control of the pursuit of the prosecution, which would transform Petitioners' role in the prosecution. The Circuit Court found that Petitioners procured the prosecution and also found that Petitioners were not prosecutors and, thus, were not entitled to prosecutorial immunity. The Circuit Court erred, however, because prosecutorial immunity is not reserved solely for prosecutors. Instead, "'prosecutorial immunity extends to certain agents of the prosecutor when they are engaged in performing tasks that are inherently prosecutorial in nature.'" *Brodnik v. Lanham*, Civ. Action No. l:11-0178, 2016 U.S. Dist. LEXIS 100051 *13 (S.D.W. Va. Aug. 1, 2016) (quoting *Joseph v. Shepherd*, Nos. 04-4212, 05-4181, 21 F. App'x 692, 697 (10th Cir. Dec. 15, 2006) (absolute immunity attached to actions of investigator for district attorney who presented criminal charges to the district attorney); *see also Nogueros-Cartagena v. U.S. Dep't of Justice*, No. 03-1113, 75 F. App'x 795, 798 (1st Cir. Sept. 26, 2003) (affirming dismissal of *Bivens*

malicious prosecution claim against FBI agent because "[t]he existence of absolute prosecutorial immunity is a matter of function; it depends not on the title or position of the official involved, but, rather, on the specific conduct in question."); *Tyler v. Wick*, No.14-cv-68-jdp, 2015 U.S. Dist. LEXIS 41426, 2015 WL 1486506, *11 (W.D. Wis. Mar. 31, 2015) (holding that probation officer was "entitled to absolute prosecutorial immunity" for recommendation that plaintiff's probation be revoked). Thus, to the extent Petitioners procured Bailey's prosecution, MFCU and Lyle performed tasks that are inherently prosecutorial in nature and are entitled to prosecutorial immunity. Therefore, the Circuit Court erred in denying Petitioners' Motion to Dismiss.

Accordingly, this Court should reverse the Circuit Court's order denying Petitioners' Motion to Dismiss and remand this case with instructions to the Circuit Court to enter an order finding that MFCU and Lyle are entitled to qualified immunity and prosecutorial immunity for Counts I and II of Bailey's Complaint.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this matter under Rule 19 will aid this Court in its decision process. This case involves issues of settled law that are narrow in scope and involves the Circuit Court's clear legal error in applying that settled law. W. Va. R. App. P. 19(a)(1) and (4).

ARGUMENT

I. Standard

"This Court has held that '[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.'" *Boone v. Activate Healthcare, LLC*, 245 W. Va. 476, 859 S.E.2d 419, 422 (2021) (citing Syl. Pt. 1, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995))). Stated otherwise, "'[w]hen a party ... assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss

will be reviewed *de novo*.' Syl. Pt. 4, in part, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998)." *W. Va. Reg'l Jail & Corr. Facility Auth. v. Grove*, 244 W. Va. 273, 852 S.E.2d 773, 780 (2020). "We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court." *Gastar Exploration, Inc. v. Rine*, 239 W. Va. 792, 806 S.E.2d 448, 454 (2017) (quoting *Blackrock Capital Inv. Corp. v. Fish*, 799 S.E.2d 520, 526 (W. Va. 2017)).

Additionally, "[i]n Syllabus point 1 of *West Virginia Board of Education v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015), [this Court] held: '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.'" *Grove, supra*. In that regard:

> It is well-established that "[t]his Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. l, *Findley v. State Farm Mut. Auto, Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002). Moreover, "[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.' Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). This review, however, is guided by the following principle regarding immunity:
> [t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.
> Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B., 234 W. Va. 492, 766 S.E.2d 751, 760 (2014) (emphasis added). As this Court has recognized, "[t]he Court observed in *Robinson* that allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing them with 'the right not to be subject to the burden of trial.'" *City of Saint Albans v. Botkins*, 228 W. Va. 393, 719 S.E.2d 863, 867 (2011) (internal citation omitted).

II. Discussion

A. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because Petitioners are entitled to qualified immunity.

Bailey has asserted in Count I of his Complaint that Petitioners MFCU and Lyle violated his Fourth Amendment rights by allegedly conducting a "custodial interrogation" and by investigating him for potential crimes. Bailey asserts this claim pursuant to 42 U.S.C. § 1983, and, therefore, it is governed by federal law. Bailey also asserts in Count II of his Complaint that MFCU and Lyle maliciously prosecuted him, which is a state common law claim. Because the claims are governed by slightly different qualified immunity analyses, each will be addressed separately. Under both analyses, the Circuit Court erred in denying Petitioners' Motion to Dismiss.

1. Section 1983 Claim

"The doctrine of qualified immunity protects government officials '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 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Because it is an immunity, and not merely a defense, it protects government officials not only from liability, but also from the burdens of trial and preparing for trial, so it must be addressed by the court at the earliest possible stage of the litigation. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). "[I]t is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

"Whether a Defendant is entitled to qualified immunity can be determined at the motion to dismiss stage of the proceedings." *Bowman v. Kovslek*, Civ. Action No. 1:10-cv-106, 2011 U.S. Dist. LEXIS 93185, 2011 WL 3667566 (N.D.W. Va. May 31, 2011) (citing *Behrens v. Pelletier*,

516 U.S. 299, 309 (1996)). Qualified immunity is a defense to claims seeking to hold an individual defendant personally liable while that individual is acting in his or her official capacity. *See Lane v. Franks,* 573 U.S. 228, 243, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014) (stating under the doctrine of qualified immunity "courts may not award damages against a government official in his personal capacity" except in certain circumstances).

The test for qualified immunity is a two-pronged inquiry: (1) whether a constitutional right has been violated on the facts alleged; and (2) whether the right was clearly established at the time, such that it would be clear to an objectively reasonable officer that his conduct violated that right. *Short v. Walls*, Civ. Action No. 2:07-00531, 2009 U.S. Dist. LEXIS 29499, 2009 WL 914085 *9 (S.D.W. Va. Mar. 31, 2009) (citing *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct is unlawful in the situation he confronted." *Id*. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id*.; *see also Minor v. Yanero*, Civ. Action No. 5:06-cv-75, 2008 U.S. Dist. LEXIS 24049, 2008 WL 822102 *9 (N.D.W. Va. Mar. 26, 2008) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir.1992)). The *Minor* Court stated, "[t]o determine whether a defendant is entitled to qualified immunity, a court must, as a threshold matter, determine whether a constitutional or statutory right was deprived. If there was no deprivation of such a right, then a defendant is entitled to qualified immunity and the Court need not inquire further." *Minor*, 2008 U.S. Dist. LEXIS 24049, 2008 WL 822102 at *8 – 9.

"The qualified immunity rule seeks a proper balance between two competing interests." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866, 198 L. Ed. 2d 290, 318 (2017). On one hand, damages

suits 'may offer the only realistic avenue for vindication of constitutional guarantees.'" *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "'On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'" *Id.* at 1866, 198 L. Ed. 2d at 318-19 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). "As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to 'discretionary functions' performed in their official capacities." *Id.* (citing *Anderson*, 483 U.S. at 638). "The doctrine of qualified immunity gives officials 'breathing room to make reasonable but mistaken judgments about open legal questions.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

Here, Bailey alleges that MFCU and Lyle violated his Fourth Amendment right to be free from unreasonable seizure of the person. JA 055-057. While Plaintiff makes conclusory allegations that Lyle's investigation was "clearly false, flawed, unjustified and retaliatory," Bailey fails to allege sufficient facts to demonstrate that it would be clear to an objectively reasonable officer that Lyle's conduct violated Bailey's rights. Indeed, it is unclear from the Complaint how Lyle "seized" Bailey's person at all.

Bailey alleges that MFCU initiated an investigation and demanded by letter of October 4, 2019, that Bailey submit to a "custodial interrogation." JA 048. Bailey alleges that, on December 2, 2019, MFCU, through Lyle and two other employees of the Attorney General's Office, conducted a "custodial interrogation." JA 048. Bailey does not appear to claim that the "custodial interrogation" itself violated his Fourth Amendment rights; however, on the face of the Complaint, it is apparent that Bailey's conclusory allegation that the interview was "custodial" is incorrect.

The Supreme Court of the United States has defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Here, it is clear from Bailey's allegations that he had not been taken into custody or otherwise deprived of freedom of action, and no custodial interrogation occurred. Instead, Bailey received a letter requesting that he submit to an interview, which was arranged *two months* after Bailey's receipt of the request. JA 048. Bailey does not allege that he was arrested or otherwise taken into custody. Thus, Bailey's conclusory allegation that he was subjected to a custodial interrogation is not supported by the factual allegations and should be disregarded. Regardless, to the extent the Court accepts Bailey's conclusory allegation that he was subjected to a custodial interrogation as true, Bailey has failed to identify any clearly established law stating that MFCU and Lyle were prohibited from initiating a custodial interrogation or from asking Bailey questions about the report of patient abuse.

On the contrary, MFCU and Lyle have specific statutory powers and duties to investigate abuse of patients in healthcare facilities. MFCU operates within the Office of the Attorney General. W. Va. Code § 9-7-1. MFCU has, *inter alia*, the following powers and duties:

> (1) The investigation and referral for prosecution of all violations of applicable state and federal laws pertaining to the provision of goods or services under the medical programs of the state including the Medicaid program.
>
> (2) The investigation of abuse, neglect, or financial exploitation of residents in board and care facilities and patients in health care facilities which receive payments under the medical programs of the state.

W. Va. Code § 9-7-1(b)(1)-(2). Thus, MFCU has the duty to investigate and refer for prosecution claims of patient abuse such as those alleged against Bailey. The manner in which such investigations are carried out is a discretionary decision subject to qualified immunity. Even assuming that MFCU and Lyle conducted a custodial interrogation, Bailey has failed to identify

any clearly established law or right that was violated. Therefore, to the extent that Bailey claims that the "custodial interrogation" violated his Fourth Amendment rights, MFCU and Lyle are entitled to qualified immunity as a matter of law, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

Bailey further alleges that MFCU and Lyle violated his Fourth Amendment rights by failing to read him his *Miranda* rights. Again, MFCU and Lyle had no reason to provide Bailey with a *Miranda* warning because Bailey was not in their custody. To the extent the Court accepts Bailey's conclusory allegation that he was subjected to a custodial interrogation as true, Bailey's allegations still fail to establish a violation of a clearly established law or right to overcome qualified immunity. Indeed, the law is clear that failure to provide a *Miranda* warning is not a constitutional violation and is not actionable at all.[1]

In *Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L.Ed.2d 984 (2003), the Supreme Court of the United States reversed the Ninth Circuit's denial of qualified immunity related to a claim that an arrestee was not provided a *Miranda* warning while being interrogated while being treated for gunshot wounds. *See generally id.* In finding that qualified immunity applied, the Supreme Court explained,

> Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person. As we explained, we have allowed the Fifth Amendment privilege to be asserted by witnesses in noncriminal cases in order to safeguard the core constitutional right defined by the Self-Incrimination Clause--the right not to be compelled in any criminal case to be a witness against oneself. We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause--the admission into evidence in criminal cases of confessions obtained through coercive custodial questioning. *See Warren v.*

[1] *Miranda* warnings safeguard individuals' Fifth Amendment rights under the Self-Incrimination Clause. Bailey does not make any claim under the Fifth Amendment and only asserts a violation of his Fourth Amendment rights. Regardless, the failure to provide a *Miranda* warning is not actionable under either Amendment.

> *Lincoln*, 864 F.2d 1436, 1442 (CA8 1989) (alleged *Miranda* violation not actionable under § 1983); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (CA3 1994) (same); *Bennett v. Passic*, 545 F.2d 1260, 1263 (CA10 1976) (same); *see also New York v. Quarles*, 467 U.S. 649, 686, 81 L. Ed. 2d 550, 104 S. Ct. 2626 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment forbids is the introduction of coerced statements at trial"). **Accordingly, [the officer]'s failure to read *Miranda* warnings to [the arrestee] did not violate [the arrestee]'s constitutional rights and cannot be grounds for a § 1983 action.** *See Connecticut v. Barrett*, 479 U.S. 523, 528, 93 L. Ed. 2d 920, 107 S. Ct. 828 (1987) (*Miranda*'s warning requirement is "not itself required by the Fifth Amendment . . . but is instead justified only by reference to its prophylactic purpose"); [*Michigan v.*] *Tucker*, 417 U.S. [433,] 444, 41 L. Ed. 2d 182, 94 S. Ct. 2357 [(1974)] (*Miranda*'s safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"). And the absence of a "criminal case" in which [the arrestee] was compelled to be a "witness" against himself defeats his core Fifth Amendment claim. The Ninth Circuit's view that mere compulsion violates the Self-Incrimination Clause finds no support in the text of the Fifth Amendment and is irreconcilable with our case law. Because we find that [the officer]'s alleged conduct did not violate the Self-Incrimination Clause, we reverse the Ninth Circuit's denial of qualified immunity as to [the arrestee]'s Fifth Amendment claim.

Chavez, 538 U.S. at 772-73 (internal citations omitted) (emphasis added). The Supreme Court recently reaffirmed *Chavez*, holding, "**Because a violation of *Miranda* is not itself a violation of the Fifth Amendment, and because we see no justification for expanding *Miranda* to confer a right to sue under §1983**, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion." *Vega v. Tekoh*, 142 S. Ct. 2095, 2108, 213 L. Ed. 2d 479 (2022).

Thus, regardless of whether MFCU and Lyle conducted a custodial interrogation that would warrant *Miranda* warnings, the law is clearly established that failure to read *Miranda* warnings is not a violation of Bailey's constitutional rights and is not actionable. Therefore, the alleged failure to read *Miranda* warnings cannot overcome MFCU and Lyle's qualified immunity defense, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

Additionally, Bailey alleges that his Fourth Amendment rights were violated because MFCU and Lyle reached the conclusion that Bailey abused a patient. Bailey makes the conclusory allegation that MFCU and Lyle initiated an investigation that was "clearly false, flawed, unjustified and retaliatory …." JA 055. Bailey also makes the conclusory allegation that the "false report and investigation by Defendants Richards, Shields and Lyle were in violation of Plaintiff Hisel Bailey's rights under the Fourth Amendment of the United States Constitution to be free from unreasonable seizures of the person." JA 056. MFCU and Lyle's investigatory conclusions are, by definition, discretionary in nature. As the Supreme Court of the United States has held, "[t]he doctrine of qualified immunity gives officials 'breathing room to make reasonable but mistaken judgments about open legal questions.'" *Ziglar*, 137 S. Ct. at 1866, 198 L. Ed. 2d at 318-19 (quoting *al-Kidd*, 563 U. S. at 743). Thus, even if MFCU and Lyle's conclusions were mistaken, qualified immunity still attaches to the discretionary determination that Bailey abused a patient. These are the exact types of decisions that qualified immunity is designed to insulate from civil actions, and this particular action is specifically provided for in the statute outlining MFCU's powers and duties. W. Va. Code § 9-7-1(b)(1)-(2). Thus, MFCU and Lyle's actions are specifically permitted by law, and nothing in Bailey's Complaint identifies a clearly established law violated by MFCU and Lyle. Therefore, MFCU and Lyle are entitled to qualified immunity as a matter of law, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

2. Malicious Prosecution Claim

The Supreme Court of Appeals of West Virginia has established a three-pronged test for determining whether a state entity is entitled to immunity for the actions of its employees. *See W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 507-08, 766 S.E.2d 751, 766-67 (2014). First, the reviewing Court must determine "whether the nature of the governmental acts or

omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or otherwise involve discretionary governmental functions." *Id.* at 507. Next, to the extent the acts or omissions are deemed discretionary functions, a reviewing court must determine whether the plaintiff has shown that the acts or omissions violated "clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive." *Id.* Third, if the plaintiff establishes a clearly established right or law which has been violated or can show fraudulent, malicious, or oppressive acts, the Court must determine whether such acts or omissions were within the scope of the employee's duties, authority and/or employment. *Id.* at 508.

Furthermore, when a plaintiff asserts a claim implicating qualified immunity and fails to meet a heightened pleading standard, a court is within its discretion to dismiss that claim. *W. Va. State Police v. J.H.*, 244 W. Va. 720, 856 S.E.2d 679 (2021). This Court has held:

> To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a "particularized showing" that a "reasonable official would understand that what he is doing violated that right" or that "in the light of preexisting law the unlawfulness" of the action was "apparent."

Id. at 736, 856 S.E.2d at 695 (quoting *A.B.*, 234 W. Va. at 517, 766 S.E.2d at 776) (citation omitted).

Here, Bailey has failed to satisfy the heightened pleading standard required to overcome qualified immunity. While Bailey has made conclusory allegations that MFCU and Lyle's conduct was "false" and "malicious," Bailey has failed to plead sufficient factual support for these allegations. Instead, Bailey seemingly takes issue with MFCU and Lyle investigating the report of patient abuse at all and with the manner in which they investigated the report of patient abuse,

including who they interviewed, how they interpreted video of the events, and the conclusions they reached. JA 058. MFCU and Lyle had the statutory power and duty to conduct the investigation and had the discretion to make determinations regarding how evidence was obtained and how conclusions were reached. Bailey has identified no violations of clearly established law of which a reasonable official would have known, and, although Bailey makes the conclusory allegation that MFCU and Lyle's conduct was malicious, Bailey's Complaint does not contain facts to support that conclusion. Indeed, Bailey has failed to plead any facts to establish that MFCU and Lyle were aware of Bailey's existence prior to the investigation or that MFCU or Lyle had any vendetta against him. Rather, it is clear from the face of the Complaint that Bailey takes issue with the ultimate conclusions of the investigation and attempts to assert that malice can be inferred from those conclusions. Bailey has failed to establish any concrete and particularized facts showing that MFCU and Lyle's conduct violated any clearly established law or right to overcome the well-established qualified immunity that attaches to the discretionary functions carried out by MFCU and Lyle. Therefore, Petitioners are entitled to qualified immunity as a matter of law, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

B. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because, to the extent the Circuit Court determined that Petitioners procured Respondent's prosecution, the Circuit Court was required to find that Petitioners acted as prosecutors and are entitled to prosecutorial immunity.

The Circuit Court erroneously found both that MFCU and Lyle procured Bailey's prosecution and that MFCU and Lyle did not act as prosecutors. Because the Circuit Court found that MFCU and Lyle procured Bailey's prosecution, the Circuit Court was required to find that MFCU and Lyle acted as prosecutors and are entitled to prosecutorial immunity.

This Court has described the scope of prosecutorial immunity:

> Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, **initiating** and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process. . . . It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding.
> **The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office**. Therefore, it has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity.

Dale F. v. Peters, No. 19-0594, 2020 W. Va. LEXIS 203 *5-6 (W. Va. Apr. 6, 2020) (quoting *Mooney v. Frazier*, 225 W. Va. 358, 693 S.E.2d 333 (2010) (quoting Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, §8(c), at 213 (3d ed. 2008))) (emphasis added); *see also Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976) (extending absolute immunity to prosecutors from civil rights claims); *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L.Ed.2d 209 (1993) (state prosecutor denied absolute immunity in suit that involved job functions that were investigatory rather than prosecutorial in nature and thus were not performed in the role as advocate for the state).

The Medicaid Fraud Control Unit operates within the Office of the Attorney General and is charged with the investigation and referral for prosecution of violations of state and federal laws pertaining to the provision of goods and services under state medical programs and of abuse, neglect, or financial exploitation of patients in health care facilities receiving payments under the medical programs of the state. W. Va. Code § 9-7-1(b)(1)-(2). Thus, MFCU has the duty to investigate and refer for prosecution claims of patient abuse such as those alleged against Bailey.

The Circuit Court accepted as true Bailey's conclusory allegation "that the prosecution **procured by [Petitioners] MFCU and Lyle** was without reasonable or probable cause because [Petitioners] MFCU and Lyle caused a Magistrate to find probable cause based on their false and flawed investigation and without probable cause." JA 006-007 (emphasis added). A finding of

procurement of a prosecution is a finding that MFCU and Lyle did more than simply investigate and refer for prosecution.[2] This Court has held that "procurement, within the context of a malicious prosecution action, 'requires more than just the submission of a case to a prosecutor; it requires that a defendant assert control over the pursuit of the prosecution.'" *Goodwin v. City of Shepherdstown*, 241 W. Va. 416, 423, 825 S.E.2d 363, 370 (2019) (quoting *Norfolk Southern Railway Company v. Higginbotham*, 228 W. Va. 522, 528, 721 S.E.2d 541, 547 (2011)). Thus, having found that MFCU and Lyle asserted control over the pursuit of the prosecution, the Circuit Court was required to find that MFCU and Lyle engaged in prosecutorial actions.

MFCU and Lyle do not need to be prosecutors for prosecutorial immunity to attach to their actions. "'[P]rosecutorial immunity extends to certain agents of the prosecutor when they are engaged in performing tasks that are inherently prosecutorial in nature.'" *Brodnik v. Lanham*, Civ. Action No. 1:11-0178, 2016 U.S. Dist. LEXIS 100051 *13 (S.D.W. Va. Aug. 1, 2016) (quoting *Joseph v. Shepherd*, Nos. 04-4212, 05-4181, 211 F. App'x 692, 697 (10th Cir. Dec. 15, 2006) (absolute immunity attached to actions of investigator for district attorney who presented criminal charges to the district attorney); *see also Nogueros-Cartagena v. United States Dep't of Justice*, No. 03-1113, 75 F. App'x 795, 798 (1st Cir. Sept. 26, 2003) (affirming dismissal of *Bivens* malicious prosecution claim against FBI agent because "[t]he existence of absolute prosecutorial immunity is a matter of function; it depends not on the title or position of the official involved, but, rather, on the specific conduct in question."); *Tyler v. Wick*, No.14-cv-68-jdp, 2015 U.S. Dist. LEXIS 41426, 2015 WL 1486506, *11 (W.D. Wis. Mar. 31, 2015) (holding that probation officer was "entitled to absolute prosecutorial immunity" for recommendation that plaintiff's probation

[2] MFCU and Lyle deny that they procured Bailey's prosecution; however, the Circuit Court made that finding, which is a finding that MFCU and Lyle asserted control over the prosecution, and, therefore, they are entitled to prosecutorial immunity.

be revoked). In *Brodnik*, the defendant, a special agent with the IRS, investigated the plaintiff for income tax evasion over a six-year period and, based on that investigation, recommended that the plaintiff be prosecuted. *Brodnik*, 2016 U.S. Dist. LEXIS 100051 *1-2. The plaintiff was eventually acquitted of all charges and brought multiple claims against the defendant. *Id.* at *2-3. The Court determined that the defendant was entitled to absolute immunity based on the extension of prosecutorial immunity to those involved in investigating criminal activity. *Id.* at *13-14. Dismissing the plaintiff's complaint, the Court stated, "[b]ased on the foregoing, [the mere fact] that [the defendant] *recommended* prosecution, **without more**, is subject to **absolute immunity** from liability." *Id.* at *14 (citing *Goldstein v. Moatz*, 364 F.3d 205, 216-17 (4th Cir. 2004) ("The function of recommending prosecution is protected by absolute immunity because it requires the exercise of discretion.")) (emphasis added).

Here, MFCU and Lyle are entitled to prosecutorial immunity regardless of their status as prosecutors or investigators. Like the defendant in *Brodnik*, Lyle, as an agent of MFCU, allegedly investigated Bailey for criminal activity and referred him to the Cabell County Prosecuting Attorney for prosecution. Thus, as the *Brodnik* Court held, MFCU and Lyle are entitled to absolute immunity for their investigation and referral regardless of whether they procured Bailey's prosecution. Based upon the Circuit Court's procurement finding, however, MFCU and Lyle acted in an even more prosecutorial manner than the defendant in *Brodnik* and asserted control over the pursuit of the prosecution.

To the extent that MFCU and Lyle procured the prosecution of Bailey by the Cabell County Prosecuting Attorney, they did so pursuant to their statutory duties and powers. Bailey cannot credibly claim that MFCU and Lyle simultaneously procured and controlled his prosecution but were not engaged in prosecutorial conduct. Based upon the Circuit Court's finding that MFCU and

Lyle procured and controlled the prosecution, they engaged in prosecutorial actions that are absolutely immune from Plaintiff's Section 1983 and malicious prosecution claims. Therefore, MFCU and Lyle are entitled absolute immunity, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

CONCLUSION

Petitioners request that this Court reverse the Circuit Court's order denying Petitioners' Motion to Dismiss and remand this case with instructions to the Circuit Court to enter an order finding that MFCU and Lyle are entitled to qualified immunity and prosecutorial immunity for Counts I and II of Respondent's Complaint.

/s/ Caleb B. David
Caleb B. David, Esq. (WVSB #12732)
cdavid@shumanlaw.com
Tyler L. Rittenhouse, Esq. (WVSB #14097)
trittenhouse@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
Counsel for Petitioners

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-781

WEST VIRGINIA ATTORNEY-GENERAL/ MEDICAID FRAUD CONTROL UNIT; and NATHAN R. LYLE, in his individual capacity and in his capacity as an employee of the West Virginia Attorney-General, Medicaid Fraud Control Unit,

Petitioners,

v.

HISEL BAILEY,

Respondent.

CERTIFICATE OF SERVICE

I, Caleb B. David, counsel for Petitioners, hereby certify that I have served a true and accurate copy of the foregoing "Petitioners' Brief" upon counsel of record by utilizing the Court's e-filing system, on this day, December 23, 2022, as follows:

Scott H. Kaminski, Esquire (WVSB #6338)
Ray, Winton & Kelley, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
ScottKaminski@rwk-law.com
Counsel for Respondent

/s/ Caleb B. David
Caleb B. David, Esquire (WVSB #12732)
Tyler L. Rittenhouse, Esquire (WVSB #14097)
Counsel for Petitioners