IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 22-781
(Circuit Court of Kanawha County, West Virginia
Civil Action No. 22-C-145

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.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

A. Introduction

The Circuit Court correctly denied Petitioners' Motion to Dismiss finding that Petitioners are not entitled to dismissal based on qualified or prosecutorial immunity. Accordingly, the ruling of the Circuit Court should be affirmed and this case remanded for further proceedings.

B. Statement of Facts

Here, the facts alleged in Plaintiff's Complaint must be taken as true. Petitioner accurately captures the allegations from the Complaint pertinent to its appeal and further factual recitation would be redundant.

C. Circuit Court Order

With respect to the Circuit Court's Order from which Petitioners appeal, there are points in need of clarification. At page 5 of their brief, Petitioners wrongly claim that "...the Circuit Court erroneously found the MFCU and Lyle initiated their investigation on December 2, 2019, which was after the grievance decision was handed down." JA 012. Petitioners contend this finding by the Circuit Court is erroneous because Bailey plead in his Complaint that MFCU initiated its investigation on October 4, 2019. JA 048. It is true that Bailey plead that MFCU and Lyle initiated their investigation on October 4, 2019. What is not true is that the Circuit Court

found that MFCU and Lyle initiated their investigation on December 2, 2019. Paragraph 92 of the Circuit Court's Order reads "Defendants MFCU and Lyle **initiated contact** with Plaintiff relative to their investigation some two weeks after the Decision of WVPEGB, on December 2, 2019." JA 012 (emphasis added). So, the Circuit Court did not find that Petitioners initiated their investigation on December 2, 2019 because it was plead that the investigation was initiated on October 4, 2019. The investigation was initiated before the Decision of WVPEGB on November 19, 2019. JA 046. However, the salient point is that Petitioners did not initiate contact with Bailey until December 2, 2019, two weeks after the Decision exonerating him. This Decision was public information readily available to Petitioners. They chose to ignore it and proceed with a custodial interrogation of Bailey. Then, ultimately, Petitioners issued a report that flew in the face of the Decision and referred the matter to the Cabell County Prosecuting Attorney for prosecution. That is precisely the finding of the Circuit Court at paragraphs 93 and 94 of its Order. JA 012. The Circuit Court Order is exactly accurate in tracking the facts plead by Bailey and it's reasoning as to why Petitioners' conduct was properly plead as malicious and accordingly, why it denied Petitioners' Motion to Dismiss.

Petitioners contend, at page 5 of their brief, that the Circuit Court erroneously found that the WVPEGB Decision clearly exonerated Bailey. Any other reading of that Decision is fictitious. What matters here is that the Decision is not part of the record at this time as the Circuit Court was deciding a Motion to Dismiss and considered only the facts alleged by Bailey in his Complaint and took them to be true. The Circuit Court merely recited the allegations made by Bailey in his Complaint which was completely proper. JA 012.

Petitioners also criticize the Circuit Court Order for failing to cite any supporting law for finding, as alleged in the Complaint, that Lyle conducted a "custodial interrogation without providing [Bailey} with his Miranda rights." JA 012. Again, this finding by the Circuit Court tracks the allegations in the Complaint at paragraph 187. JA 049. Moreover, the Circuit Court did cite to multiple authorities at page 11 of its Order supporting its reasoning for denying Petitioners' Motion to Dismiss pursuant to the qualified immunity argument. JA 011. In short, the Circuit Court's Order is thorough relying upon the facts alleged in the Complaint and authority cited in the parties' briefs. The Circuit Court should be upheld.

Next, Petitioners erroneously argue that the Circuit Court's Order is contradictory in that it found that Petitioners procured Bailey's prosecution by the Cabell County Prosecutor's

Office but later found that Petitioners did not act as prosecutors but rather as investigators and therefore were not entitled to prosecutorial immunity. Petitioner's Brief at P. 5. The Circuit Court's Order is not contradictory unless the definition of contradictory has been changed to a ruling the Petitioners do not like. The Circuit Court correctly found that Petitioners acted as investigators rather than prosecutors. Indeed, at paragraph 77 of its Order, the Circuit Court found based on W.Va. Code §9-7-1 that MFCU's powers are to investigate and refer for prosecution. JA 010. Petitioners therefore are not prosecutors. They investigated and referred Bailey for prosecution to the Cabell County Prosecuting Attorney's Office. JA 010. The Circuit Court found that the Cabell County Prosecuting Attorney's Office was the prosecutor and entitled to immunity, but Petitioners were not prosecutors and not entitled to immunity. JA 010.

But just because one is not a prosecutor does not mean one cannot "procure" a prosecution. Indeed, that is exactly what Petitioners did here by investigating and referring this matter to the Cabell County Prosecuting Attorney's Office. JA 010. Paragraph 81 of the Circuit Court's Order correctly and consistently held that Petitioners "... were not prosecutors, they were investigators who referred this matter for prosecution, fraudulently and maliciously, which is why they are

not immune. JA 010. As this state well knows from the Fred Zain cases[1], an investigator who falsifies evidence to procure a prosecution is liable. This is no contradiction at all but rather a correct recitation of the allegations in the Complaint and application of the law of prosecutorial immunity to which Petitioners are not entitled.

II. SUMMARY OF ARGUMENT

The Circuit Court correctly denied Petitioners' Motion to Dismiss finding that the allegations in the Complaint (JA 014-064) sufficiently plead causes of action against Petitioners for which Petitioners are not entitled to either qualified immunity or prosecutorial immunity.

The Circuit Court's Order identifies several bases upon which immunity does not apply. Qualified immunity only applies to discretionary decisions. *W. Virginia Reg'l Jail and Corr. Facility Auth. V. A.B.,* 766 S.E.2d 751 (W.Va. 2014) and *Clark v. Dunn,* 465 S.E.2d 374 (W.Va. 1995). JA 011. As the West Virginia Supreme Court of Appeals has acknowledged, "qualified immunity, as opposed to absolute immunity, is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials. Indeed, the only realistic avenue for vindication of statutory

[1] Fred Zain was a chemist for the West Virginia State Police who falsified serology results to obtain convictions.

and constitutional guarantees when public servants abuse their offices is an action for damages." *Hutchison v. City of Huntington,* 479 S.E.2d 649, 658 (W.Va. 1996). "[W]hether qualified immunity bars recovery in a civil action ***turns on the objective legal reasonableness of the action assessed,*** in light of the legal rules that were clearly established at the time it was taken." *Id.* at 658-9 (citing *State v. Chase Securities, Inc.* 424 S.E.2d 591 (W.Va. 1992); *Bennett v. Coffman,* 361 S.E.2d 465 (W.Va. 1987)(emphasis added). JA 011.

Qualified immunity does not apply in situations where a state actor has knowingly violated a clearly established law **or** acted **maliciously, fraudulently or oppressively**. *See, W. Va. Reg'l Jail & Corr. Facility Auth. V. Grove,* 852 S.E.2d 773 (W.Va. 2020) citing *W. Va. Reg'l Jail & Corr. Facility Auth. V. A.B.,* 766 S.E.2d 751 (W.Va. 2014)(emphasis added). JA 011. Here, Plaintiff has pled exactly that relative to Defendants MFCU and Lyle, that their actions in participating in a false investigation and reporting the false results of the false investigation were malicious, fraudulent and oppressive. See Complaint, Paras. 230 and 231, JA 059.

The Circuit Court also correctly denied Petitioners' Motion to Dismiss based on prosecutorial immunity. First and foremost, Petitioners were not prosecutors. The Circuit Court specifically held that the Complaint nowhere alleged that

Petitioners were prosecutors. Circuit Court Order at paragraph 76, JA 010.

Petitioners rely on *Norfolk Southern Railway Company v. Higginbotham,* 721 S.E.2d 541 (W.Va. 2011) for the proposition that a claim for malicious prosecution requires a defendant to do more than simply submit the case to the prosecutor, but rather the defendant must assert control over the pursuit of the prosecution. However, Petitioners ignore the well-reasoned opinion of Judge Copenhaver in the case of *Wiegle v. Pifer,* 139 F.Supp.3d 760 (SDWV 2015) which provides the "false information" exception to the rule relied upon by Petitioners. Judge Copenhaver reasoned that where a defendant provides information known to be false to cause a prosecution, he may be held liable for causing said prosecution to occur.

That is precisely what is alleged here. On December 19, 2019, Petitioners authored their report which ignored the findings of WVPEGB by concluding that Bailey had abused, battered and assaulted a patient. Complaint, paragraphs 191-193, JA 049-050. The Complaint goes on to allege that Petitioners referred the matter to the Cabell County Prosecuting Attorney for the purpose of prosecution. These allegations support a claim under the "false information" exception based on the facts as plead and therefore, the Circuit Court was correct in denying Petitioners' Motion to Dismiss.

Petitioner's reliance on *Brodnik v. Lanham,* Civ. Action No. 1:11-0178, 2016 U.S. Dist. LEXIS 100051 *13 (SDWV Aug. 1, 2016) is completely misguided. *Brodnik,* citing *Joseph v. Shepherd,* Nos. 04-4212, 05-4181, 21 F.App'x 692, 697 (10th Cir. Dec. 15, 2006) found that prosecutorial immunity extends to the actions of an investigator for the district attorney who presented the criminal charges to the district attorney. But here, Petitioners are not investigators for the Cabell County Prosecuting Attorney, they are an employee and division of a state agency, working separate and apart from the Cabell County Prosecuting Attorney.

The more reliable case is that of *Nogueros-Catagena v. U.S. Dep't of Justice,* No. 03-1113, 75 F.App'x 795, 798 (1st Circ. Sept. 26, 2003) which found that the application of prosecutorial immunity depends not on the job title but rather on the specific conduct in question. Here, prosecutorial immunity does not apply because of the conduct alleged against Petitioners for making a false report to the Cabell County Prosecuting Attorney in light of the publicly known findings of WVPEGB Decision of November 19, 2019, relative to the incident of January 7, 2019. JA 049-050. Accordingly, the Circuit Court was correct in denying Petitioner's Motion to Dismiss.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes that the decisional process would not be aided by oral argument and that this matter is ripe for Memorandum Decision under Rule 21 of the *West Virginia Rules of Appellate Procedure* upholding the Order of the Circuit Court and remanding this matter for further proceedings. However, should this Court agree with Petitioners that Rule 19 argument is appropriate, Respondent reserves his right to participate in said argument.

IV. ARGUMENT

1. Standard of Review.

This case comes before this Court challenging the Circuit Court's denial of a motion to dismiss pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. Review is *de novo*. *Boone v. Activate Healthcare, LLC*, 859 S.E.2d 419 (W.Va. 2021) citing Syl. Pt. 1, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 815 S.E.2d 474 (W.Va. 2018) citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W.Va. 1995). However, that *de novo* review must be made in light of the posture of the case presented to the Circuit Court pursuant to a Motion to Dismiss with no discovery having taken place and the Motion merely a challenge to the sufficiency of the pleadings. Here, the Circuit Court correctly found that the Respondent's Complaint (JA 014-064) sufficiently

plead facts supporting Respondent's claims against Petitioners such that they were not entitled to dismissal based on qualified or prosecutorial immunity. Discovery should proceed and if Respondent fails to accumulate evidence to support the exceptions to the claimed immunities, then summary judgment may be appropriate. But this case is not there yet.

Since this appeal arises from the denial of a Motion to Dismiss, this Court's *de novo* review must apply the same standards that the Circuit Court applied to decide this issue. The lower court decided this Motion to Dismiss, as any other, with little to no discovery upon which to rely and primarily the allegations contained within Respondent's Complaint. JA 014-064.

In assessing a Motion to Dismiss "[T]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Chapman v. Kane Transfer Company,* 236 S.E. 2nd 207 (W.Va. 1977) quoting *Conley v. Gibson,* 355 U.S. 41 (1977). Furthermore, "[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding,* 467 U.S. 69, 73 (1984). A motion to dismiss is evaluated under the standard of

Rule 8(a)(1) of the *West Virginia Rules of Civil Procedure.* Rule 8(a)(1) of the *West Virginia Rules of Civil Procedure* states that a claim for relief must contain, "A short and plain statement of the claim showing that the pleader is entitled to relief." *West Virginia Rule of Civil Procedure 8(a)(1).* A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice. *West Virginia Rules of Civil Procedure 8(f).* The trial court's consideration begins with the proposition that "for purposes of the motion to dismiss the complaint is construed in the light most favorable to plaintiff and it's allegations are to be taken as true." *Cantley v Lincoln County Commission,* 655 S.E. 2nd 490, 492 (W.Va. 2007) quoting *John W. Lodge Distributing Co. Inc v. Texaco Inc.,* 245 S.E. 2nd 157, 158 (W.Va. 1978). "The policy of Rule 8(f) is to decide cases upon their merits and if the complaint states a claim upon which relief can be granted under any legal theory a motion under Rule 12(b)(6) must be denied." *Id* at 470.

A court reviewing the sufficiency of a Complaint, before the reception of any evidence should examine not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Scheuer v. Rhodes,* 416 U. S. 232, 236 (1974). A court must determine if the complaint states a plausible claim for relief, and if it does,

the motion to dismiss must be denied. *Cunningham v. Castelle*, 2011 U.S. Dist. LEXIS 108512, * 4 (S.D. W. Va. Sept. 22, 2011) A well-pled complaint must assert "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atlantic v. Twombly,* 550 U.S. 544, at 570 (2007). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is very remote and unlikely." *Id* at 556 (internal quotations omitted).

Here, the Circuit Court correctly applied the standard for deciding a Motion to Dismiss. Petitioners simply do not want their conduct, or misconduct, scrutinized under the microscope of discovery. The Circuit Court's Order must be upheld so that the conduct of this state agency and its employees see the light of day such that due process is done.

2. The Circuit Court Correctly Ruled that Petitioners are not Entitled to Qualified Immunity.

Petitioners failed in their attempt to defeat Respondent's claim on a Motion to Dismiss claiming qualified immunity, both as to Respondent's §1983 and malicious prosecution claims. The Circuit Court correctly found that qualified immunity only applies, if at all, to discretionary decisions. *W. Virginia Reg'l Jail and Corr. Facility Auth. V. A.B.,* 766 S.E.2d 751 (W.Va. 2014) and *Clark v. Dunn,* 465 S.E.2d

374 (W.Va. 1995). While the decision to investigate a matter may be discretionary, the manner in which such investigation is conducted is subject to certain rights.

As the Supreme Court of Appeals of West Virginia has acknowledged, "qualified immunity, as opposed to absolute immunity, is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages." *Hutchison v. City of Huntington,* 479 S.E.2d 649, 658 (W.Va. 1996). "[W]hether qualified immunity bars recovery in a civil action ***turns on the objective legal reasonableness of the action assessed,*** in light of the legal rules that were clearly established at the time it was taken." *Id.* at 658-9 (citing *State v. Chase Securities, Inc.* 424 S.E.2d 591 (W.Va. 1992); *Bennett v. Coffman,* 361 S.E.2d 465 (W.Va. 1987)(emphasis added).

Qualified immunity does not apply in situations where a state actor has knowingly violated a clearly established law **or** acted **maliciously, fraudulently or oppressively**. *See, W. Va. Reg'l Jail & Corr. Facility Auth. V. Grove,* 852 S.E.2d 773 (W.Va. 2020) citing *W. Va. Reg'l Jail & Corr. Facility Auth. V. A.B.,* 766 S.E.2d 751 (W.Va. 2014)(emphasis added). Here,

Respondent has pled exactly that relative to Petitioners MFCU and Lyle; that their actions in participating in a false investigation and reporting the false results of the false investigation were malicious, fraudulent and oppressive. See Order, Para. 89, JA 011-012 and Complaint, Paras. 230 and 231, JA 059. Petitioners were not entitled to qualified immunity based on these allegations and their motion was properly denied.

Specifically with respect to Petitioners, Respondent has alleged that their investigation and report were false and fraudulent in light of the fact that they occurred **after** the Decision of WVPEGB on November 19, 2019. See Complaint, paras. 16, 183, 185 and 186, JA 017-018, 048-049. Petitioners initiated contact with Respondent relative to their investigation some two weeks after the Decision of WVPEGB, on December 2, 2019. The Decision of WVPEGB is a matter of public record and known or should have been known to Petitioners. Nevertheless, despite the clear exoneration of Respondent by WVPEGB, Petitioners maliciously went forward with their investigation and false report to the Cabell County Prosecuting Attorney. The Circuit Court correctly analyzed the allegations related to Petitioners conduct and correctly denied their Motion to Dismiss finding that based on the allegations in the Complaint, Petitioners were not entitled to qualified immunity.

Further, Petitioner Lyle conducted a custodial interrogation without providing Respondent with his *Miranda* rights. This was a violation of Respondent's legal and constitutional rights under the Fourth Amendment to the *United States Constitution*. The Circuit Court correctly ruled that Petitioner Lyle has no immunity for such violation and his Motion to Dismiss was correctly denied. If there is qualified immunity for law enforcement and investigators to ignore the Constitution, then we may as well live in a police state and tear up the Constitution. But that surely is not what we stand for in this noble profession.

Petitioners cite the objectively reasonable officer standard set forth in *Short v. Walls,* Civ. Action No. 2:07-00531, 2009 U.S. Dist. LEXIS 29499, 2009 WL 914085 *9 (SDWV Mar. 31, 2009). There surely cannot be a law enforcement officer who is not aware of *Miranda v. Arizona,* 384 U.S. 436 (1966). Anyone who has watched an episode of "Law and Order" is familiar.

Petitioners' argument that their interrogation of Respondent was not custodial requires factual analysis not present at the Motion to Dismiss stage. Whether an interrogation is custodial depends on the totality of the circumstances that focus on the physical and psychological restraints on the person at the time of the interrogation. *U.S. v. Axsom,* 289 F.3d 496 (8th Cir. 2002). The determinative

factors are not whether the Respondent was placed under arrest or in handcuffs, but rather how intimidating, coercive and compelling the environment was. *Id.*

Here, Respondent alleged in his Complaint that the custodial interrogation was conducted by three persons, one of whom was an attorney. Complaint, para. 184, JA 048. It was conducted two weeks after the WVPEGB Decision exonerating Respondent and therefore, at a time at which Respondent should not have been interviewed. Complaint, Para. 183, JA 048. Petitioners' letter of October 4, 2019 "demanded" that Respondent submit to the interrogation. Complaint, Para. 182, JA 048.

The custodial interrogation took place without Respondent being advised of his *Miranda* rights. Complaint, Para. 187, JA 049. During the interrogation, Petitioner Lyle became argumentative with Respondent. Complaint, Para. 188, JA 049. During the interrogation, Petitioner MFCU through its agent attorney David Holtzapfel asked irrelevant and intimidating questions about Respondent's divorce and why he was no longer working as a registered nurse. Complaint, Para. 190, JA 049.

The *Axsom* factors require consideration of who asked the questions and how they were asked. Here, three persons including an attorney interrogated a single subject. The three

on one situation created a more coercive environment. They asked intimidating and irrelevant questions. They were from the West Virginia Attorney-General's Office/Medicaid Fraud Unit giving them an air of authority. No one was with Respondent thus making the environment more coercive. By letter of October 4, 2019, Petitioners demanded the interrogation. Complaint, Para. 182, JA 048. Respondent did not voluntarily approach Petitioners.

Suffice to say, the Complaint alleged sufficient facts upon which the Circuit Court concluded that a custodial interrogation took place. Further, based on the facts alleged, the Circuit Court concluded that there were sufficient facts alleged to defeat a Motion to Dismiss that the custodial interrogation was conducted improperly such that Petitioners are not entitled to immunity.

Moreover, Petitioners cannot claim ignorance of the Fourth Amendment to the *United States Constitution* and its guarantee of freedom from unreasonable searches and seizures. Petitioners caused Respondent's unreasonable seizure when he was deprived of his liberty when forced to turn himself in to a Magistrate after the Cabell County Prosecuting Attorney filed charges filed against him based on Petitioners' report. JA 054-055.

Petitioners correctly cite *Ashcroft v. al-Kidd,* 563 U.S. 731 (2011) for the proposition that the doctrine of qualified immunity is designed to allow officials to make reasonable but mistaken judgments. If only that were the case here. No reader of WVPEGB's Decision could have adjudged Respondent's conduct otherwise. While WVPEGB's Decision is not part of the record in this case, it is cited numerous times in the Complaint which is part of the record upon which the Circuit Court relied in denying Petitioners' Motion to Dismiss. At paragraph 30 of the Complaint, it is alleged that the WVPEGB Decision found in favor of Respondent and ordered his reinstatement. JA 005. At paragraphs 64 through 66 of the Circuit Court's Order, it relied on allegations in the Complaint that Petitioners duped the Magistrate by failing to provide him (or the prosecutor) with a copy of WVPEGB's Decision which exonerated Respondent knowing that their report relied on the same information and evidence that WVPEGB did in reaching its conclusions favorable to Respondent. JA 08-09. The Circuit Court specifically found that Petitioners' investigation and report occurred after the WVPEGB Decision and that Petitioners initiated contact with Respondent after the WVPEGB Decision. Order at Paras. 91-92, JA 012.

Respondent's Complaint often refers to the WVPEGB Decision. At paragraph 72, the Complaint alleges that the

Decision exonerated Respondent of the allegations of patient abuse concerning the incident of January 7, 2019 ordering him reinstated with back pay and that all references to the incident be removed from his personnel file "...as though it had never occurred." JA 027. How could anyone read that portion of the Order and yet still continue an investigation of Respondent and report Respondent to the Cabell County Prosecuting Attorney without at least advising the prosecutor of the existence of this Decision that effectively wiped the incident of January 7, 2019 off the books against Respondent. That is precisely why Petitioner's conduct was not a reasonable mistake but rather a concerted effort to maliciously cause harm to Respondent. If Petitioners enjoy immunity for this sort of conduct, then the Constitution may as well not exist. Petitioners withheld exculpatory evidence from the prosecutor that he would have been obligated to disclose pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). Indeed, Petitioners and every other person at MFCU involved in this matter are subject to disclosure by prosecutors pursuant to *Giglio v. United States,* 405 U.S. 150 (1972), which expands mandatory *Brady* disclosures of exculpatory evidence to include mandatory disclosures of matters which impact the credibility of material witnesses. Let there be no mistake here, Petitioners willfully withheld information contained in

the WVPEGB Decision from the Cabell County Prosecuting Attorney. That is the cause of action here.

Defendant Michelle Woomer investigated the incident of January 7, 2019 for Defendant Legal Aid of West Virginia, Inc. ("LAWV") pursuant to a contract with Defendant West Virginia Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital ("DHHR"). Paragraph 74 of the Complaint identified that Woomer inaccurately attributed statements to a fact witness and omitted key facts supporting Respondent's innocence. JA 027. Paragraph 79 of the Complaint alleges that Woomer began her investigation of Respondent based on feeling "in her being" and her "intuition" that something bad had occurred. JA 028.

Paragraph 123 of the Complaint alleges that Woomer testified before WVPEGB that she did not interview any other witnesses because the video of the incident spoke for itself despite the video being of poor quality and omitting portions of the incident. JA 036-037. For instance, Woomer testified before WVPEGB that she saw no evidence of Respondent throwing up (after the patient had grabbed and squeezed his testicles during the incident) while the video shows Respondent bending over and heaving before entering the restroom. Complaint, Paras. 32 and 140, JA 020 and 040. There was no evidence presented to WVPEGB

that Respondent intentionally inflicted any pain upon the patient. Complaint, Para. 152, JA 042.

Had any reasonable investigator merely read the WVPEGB Decision, any further investigation would have ceased. Had any reasonable investigator provided a copy of the WVPEGB Decision to the prosecutor, no charges would have been filed against Respondent. And in the unlikely event that a prosecutor would have attempted to filed charges but provided the Magistrate with a copy of the WVPEGB Decision, probable cause would not have been found. Yet, Petitioners knew of the WVPEGB Decision, ignored it and withheld it. There can be no immunity for such unreasonable, irresponsible and reprehensible behavior. Petitioners knew based on the WVPEGB Decision that Woomer's report was flawed and unreliable. Complaint, Para. 199, JA 051.

This recitation of the facts alleged in the Complaint defeats Petitioners' argument that Respondent failed to overcome the heightened pleading standard. Respondent's allegations are not merely conclusory as Petitioners suggest at page 17 of their brief. Rather, they are detailed in a Complaint consisting of some 242 numbered paragraphs. Moreover, the Circuit Court's Order cites to more than simple conclusory allegations at paragraphs 91 through 93 (JA 012) for the allegations supporting the heightened pleading standard. Petitioners conducted their investigation of Respondent and issued their false report with

knowledge that WVPEGB's Decision found the investigation of Defendants Woomer and LAWV significantly flawed. Yet, Petitioners proceeded to conduct their own investigation based on that of Defendants Woomer and LAWV and reached the same conclusion that WVPEGB had already declared flawed. The Circuit Court was correct to find Respondent's allegations sufficient to meet the heightened pleading standard set forth in *W.Va. State Police v. J.H.*, 856 S.E.2d 679 (W.Va. 2021). Petitioners' argument in this regard is simply not persuasive. In short, Petitioner investigated and reported a man who had been exonerated by a neutral tribunal (WVPEGB). This strongly suggests that their motive was some malicious purpose. That malicious purpose was likely Petitioners' support of their fellow state agency and Defendant herein, DHHR, who sought to retaliate against Respondent for his refusal to testify favorably for Defendant DHHR in a prior grievance (*Rees v. DHHR/MMMBH,* Docket No. 2016-0357-DHHR). Complaint, Paras. 206-208, JA 053-054.

Moreover, it is important to remember that this case is before this Court as a result of the denial of a Motion to Dismiss. Petitioners argue at page 18 of their brief that "Bailey has failed to establish any concrete or particularized facts..." Bailey is not required to "establish" any facts in

his Complaint. He is only required to plead facts, and that he has done.

Petitioners' make the blanket statement that their "...investigatory conclusions are, by definition, discretionary in nature." Petitioners' Brief at P. 16. But that is not the case when the conclusions ignore the evidence and draw a false and fraudulent conclusion. This is not a case of a simple mistake. This is a case of Petitioners relying on Defendants Woomer and LAWV's flawed report as evidenced by the WVPEGB Decision handed down prior to Petitioners' Report. This case is about Petitioners willful failure to advise the prosecutor that the WVPEGB had conducted a full hearing and reached a different conclusion than their report. There cannot be immunity for officials who lie and intentionally conceal facts that result in criminal charges and an arrest.

Petitioners do a masterful job of citing the law in their brief. Their brief, however, is noticeably lacking in reference to the facts of this case. That is because the factual allegations of this case, upon which the Circuit Court relied in denying Petitioners' Motion to Dismiss, establish a cause of action for Respondent to which Petitioners are not entitled to immunity.

Petitioners circularly argue that the Court should ignore Respondent's allegations of a custodial interrogation.

Petitioner's Brief at P. 13. That argument of course ignores the well-settled law that requires a Circuit Court to take the allegations in the Complaint as true for purposes of deciding a Motion to Dismiss. But then, Petitioners argue that taking the allegation as true, Respondent failed to identify any clearly established law broken by Petitioners in the conduct of their custodial interrogation. First, as set forth above, the custodial interrogation was conducted after the WVPEGB Decision and therefore, should never have occurred in the first place, that Decision having fully exonerated Respondent. But moreover, Respondent alleged in his Complaint that the custodial interrogation occurred without him being advised of his *Miranda* rights. Complaint, Para. 187, JA 049. *Miranda* has been established law since 1966. Fifty-seven years should suffice to make it "clearly" established law. Accordingly, Petitioners are not entitled to qualified immunity and the Circuit Court's Order should not be disturbed.

3. The Circuit Court Correctly Ruled that Petitioners are not Entitled to Prosecutorial Immunity.

Petitioners' claim of prosecutorial immunity failed and their Motion to Dismiss was properly denied. The cases cited in Petitioners' brief specifically apply to prosecutors or those employed by prosecutors. Petitioners are not prosecutors and are not alleged to be prosecutors anywhere in the Complaint.

JA 014-064. Petitioners cite the MFCU powers at W.Va. Code §9-7-1 which specifically state it is charged with the "...investigation and referral for prosecution..." (emphasis added). Nowhere are Petitioners authorized to prosecute.

Clearly, Petitioners did not act as the prosecutor in this matter. They **investigated and referred** this matter to the Cabell County Prosecuting Attorney's Office for prosecution. That office was the prosecutor and immune from liability, hence they are not a Defendant herein. But Petitioners were not prosecutors, they were investigators who referred this matter for prosecution, fraudulently and maliciously, which is why they are not immune. Petitioners' Motion to Dismiss was properly denied.

Petitioners ignore the well-reasoned opinion of Judge Copenhaver in the case of *Wiegle v. Pifer,* 139 F.Supp.3d 760 (SDWV 2015) which provides the "false information" exception to the rule relied upon by Petitioners. Judge Copenhaver reasoned that where a defendant provides information known to be false to cause a prosecution, he may be held liable for causing said prosecution to occur.

Moreover, qualified immunity is not available as a defense to persons sued in their official capacity as state actors. *Shelton v. Wallace,* 886 F.Supp. 1365 (SDWV 1195) citing *Brotherton v. Cleveland,* No. 91-3316, 1992 WL 151286, 1992

U.S.App. LEXIS 15947, at *12-13 (6th Cir.1992). Here, Petitioner Lyle is sued in both his individual and official capacity. Complaint, Para. 11, JA 016. But more to the point here with respect to Petitioners' assertion of prosecutorial immunity, that does not extend to a prosecutor involved in investigatory functions. *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993). Interestingly, this case was cited by Petitioners in their brief at page 19 but supports the Circuit Court's denial of Petitioners' Motion to Dismiss based on prosecutorial immunity.

In *Buckley,* the Court held that a prosecutor, while acting as an investigator, is not acting in his role as an advocate for the state and therefore, does not enjoy absolute immunity. The Court reasoned activities such as investigating a bootprint, had they been done by police, would not enjoy absolute or prosecutorial immunity, but rather only qualified immunity. Here, it is not in dispute that Petitioners were not functioning as prosecutors, they were functioning as investigators. Indeed, Petitioners concede this point at page 19 of their brief wherein they state that "[T]he Medicaid Fraud Control Unit operated within the Office of the Attorney General and is charged with the **investigation and referral** for prosecution..." (emphasis added). Therefore, pursuant to *Buckley,* Petitioners do not enjoy prosecutorial immunity.

Petitioners labor vigorously to fit the round peg of what they did into the square hole of the law of prosecutorial immunity. At pages 18 and 19, they deny that they procured Bailey's prosecution, but rely on the Circuit Court's finding that they procured his prosecution and therefore, they are entitled to prosecutorial immunity. What a strained argument indeed.

Procurement does not make one a prosecutor. Petitioners strain this Court's holding in *Goodwin v. City of Shepherdstown,* 825 S.E.2d 363 (W.Va. 2019) to mean that procurement equals prosecutor. That is not what this Court held in *Goodwin*. *Goodwin* was a malicious prosecution case. Prosecutorial immunity was not raised in the appeal. While the *Goodwin* Court held that a Defendant must have procured a prosecution in order to be held liable for a claim of malicious prosecution, it did not hold that procuring a prosecution made one a prosecutor. *Goodwin* contains no discussion whatsoever of prosecutorial immunity.

Here, there is no dispute that Petitioners were not the prosecutor. That was the Cabell County Prosecuting Attorney. But Petitioners procured Respondent's prosecution by the Cabell County Prosecuting Attorney by providing that office with a false and fraudulent report based on evidence and witness statements known to be flawed. That resulted in the Cabell

County Prosecuting Attorney submitting the matter to a Magistrate who, duped by Petitioners' false report, found probable cause. Petitioners cannot escape the subsequent dismissal of all charges against Respondent. Complaint, Para. 17, JA 018, Circuit Court Order, Para. 44, JA 007. Petitioners cannot cloak themselves as prosecutor when legally convenient but deny that they procured this prosecution by their fraudulent actions. Petitioners are not prosecutors and are not entitled to prosecutorial immunity.

Petitioner's reliance on *Brodnik v. Lanham,* Civ. Action No. 1:11-0178, 2016 U.S. Dist. LEXIS 100051 *13 (SDWV Aug. 1, 2016) is completely misguided. *Brodnik* applied prosecutorial immunity to an IRS agent who recommended prosecution. *Brodnik,* citing *Joseph v. Shepherd,* Nos. 04-4212, 05-4181, 21 F.App'x 692, 697 (10th Cir. Dec. 15, 2006) found that prosecutorial immunity extends to the actions of an investigator for the district attorney who presented the criminal charges to the district attorney. But here, Petitioners are not investigators for the Cabell County Prosecuting Attorney, they are an employee and unit of the West Virginia Attorney-General, working separate and apart from the Cabell County Prosecuting Attorney. And Petitioners did more than recommend prosecution. They lied and concealed facts which exonerated Respondent in order to procure a prosecution.

The more reliable case is that of *Nogueros-Catagena v. U.S. Dep't of Justice,* No. 03-1113, 75 F.App'x 795, 798 (1st Circ. Sept. 26, 2003) which found that the application of prosecutorial immunity depends not on the job title but rather on the specific conduct in question. Here, prosecutorial immunity does not apply because of the conduct alleged against Petitioners for making a false report to the Cabell County Prosecuting Attorney in light of the publicly known findings of WVPEGB Decision of November 19, 2019, relative to the incident of January 7, 2019. JA 049-050. *Nogueros-Catagena* is entirely consistent with *Buckley* in that the act of the individual is the question, not the hat they were wearing. *Buckley* held that even a prosecutor when performing an investigatory function does not enjoy prosecutorial immunity. Similarly, here, procuring a prosecution by a false and fraudulent report does not magically turn Petitioners into prosecutors. And here, distinguishing the facts of *Brodnik,* Petitioners did more than merely recommend prosecution, they lied and concealed facts that exonerated Respondent. Accordingly, the Circuit Court was correct in denying Petitioner's Motion to Dismiss.

V. CONCLUSION

While the impact of this case is not nearly as severe as that of the Fred Zain cases of the late 1990's, the lessons of those cases should not be lost here. When a state official

lies and conceals evidence, there is no immunity. Respondent respectfully requests that this Court issue a decision affirming the Circuit Court's Order of August 15, 2022 denying Petitioners' Motion to Dismiss.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 22-781
(Circuit Court of Kanawha County, West Virginia
Civil Action No. 22-C-145

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

The undersigned counsel hereby certifies that on the 6th day of February, 2023, he served a true and correct copy of the foregoing **"RESPONDENT'S BRIEF"** on the parties hereto via FileAndServeXpress:

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