
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 22-765

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MONONGALIA COUNTY COMMISSION, MONONGALIA COUNTY SHERIFF'S
DEPARTMENT, SHERIFF PERRY PALMER, in his official capacity as Sheriff of
Monongalia County, and JOHN DOE,
Petitioners (Defendants),

v.

AMANDA F. STEWART, individually and/or in her capacity as Administratrix of the
Estate of John D. Stewart, Jr.,
Respondents (Plaintiffs).

(On Appeal from the Circuit Court of Monongalia County,
West Virginia, Civil Action No. 21-C-101)

PETITIONERS' BRIEF

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II. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in denying Petitioners' Motion to Dismiss Count I of the Amended Complaint as West Virginia law does not provide a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution pursuant to *Fields v. Mellinger*, 244 W. Va. 126, 851 S.E.2d 789 (2020).
- B. The Circuit Court erred in failing to dismiss Count III of the Amended Complaint as the Monongalia County Commission is immune from suit for claims arising from the method of providing police protection pursuant to W. Va. Code § 29-12A-5(a)(5) and *Albert v. City of Wheeling*, 238 W. Va. 129, 792 S.E.2d 628 (2016).
- C. The Circuit Court erred in refusing to dismiss Count II of Respondent's Amended Complaint as Deputy Coe is immune from suit pursuant to W. Va. Code § 29-12A-5(b) because the Amended Complaint lacks sufficient factual allegations to establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner.
- D. The Circuit Court erred in failing to dismiss Respondent's Amended Complaint in its entirety as Petitioners are protected by qualified immunity.
- E. The Circuit Court erred in failing to dismiss Respondent's claim for punitive damages as Petitioners are immune from such a claim pursuant to W. Va. Code § 29-12a-7(a).

III. STATEMENT OF THE CASE

A. Allegations of the Original Complaint

Plaintiff below and Respondent herein, Amanda F. Stewart, individually and/or in her capacity as Administratrix of the Estate of John D. Stewart, Jr. (hereinafter respectively "Plaintiff" and "Decedent"), filed her original *Complaint for Wrongful Death* (hereinafter "Complaint") on April 2, 2021.¹ JA0003-JA0018. Therein, Plaintiff asserted that the Decedent was purchasing property from his sister, Jessica Stewart, and making monthly payments towards its purchase. JA0006 at ¶ 9. Plaintiff stated that on April 17, 2019, Decedent had a dispute with Jessica Stewart over his "living arrangements" at said property and the "status of his monthly payments." JA0006 at

¹Although the Defendants dispute many of Plaintiff's factual assertions, for purposes of ruling upon a motion to dismiss, the Court is to accept as true all of the factual allegations contained in the Complaint. *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).

¶ 10. As a result, Jessica Stewart contacted 911 and reported a domestic dispute regarding her and the Decedent. *JA0006 at ¶ 11.*

Thereafter, Deputy Jacob Coe (hereinafter “Deputy Coe”) arrived at the property in response.² *JA0006 at ¶ 12.* Plaintiff alleged that upon arrival, Jessica Stewart advised Deputy Coe that she had been arguing with the Decedent insofar as he had not been making monthly payments to her for the property and that she wanted to evict him. *JA0006 at ¶ 13.* Deputy Coe instructed Jessica Stewart that she would need to file an eviction proceeding to remove the Decedent from the property. *JA0006 at ¶ 14.* Stewart told Deputy Coe that the Decedent threatened her and showed Deputy Coe a video from her phone evincing their dispute. *JA0006 at ¶ 16.* Plaintiff alleged that Deputy Coe “radioed dispatch and called off any backup insofar as he did not perceive the situation as a criminal matter or a threat, but a civil matter.” *JA0007 at ¶ 17.* Deputy Coe further advised Jessica Stewart to take her children and travel with him to the police station to complete mental hygiene petition paperwork on Decedent, to which Jessica Stewart agreed. *JA0007 at ¶¶ 18-19.*

The Complaint stated that Jessica Stewart instructed her father, John D. Stewart, Sr., who was also at the scene “to go into the home and speak with [the Decedent]” and Deputy Coe “advised against this.” *JA0007 at ¶ 20.* The Complaint asserted the Decedent and his father, John D. Stewart, Sr., “came out of the home arguing and the father came to the area where [Jessica Stewart] and [Deputy Coe] were located.” *JA0007 at ¶ 21.* Plaintiff alleged that Deputy Coe “entered his cruise and radioed dispatch” and was advised that the Decedent had an active warrant

² Plaintiff’s *Complaint for Wrongful Death* and subsequent *Amended Complaint for Wrongful Death* named “John Doe Deputy” as a Defendant. However, subsequent to the filing of the Complaint, Plaintiff’s counsel requested counsel for Defendants accept service of the Summons and Complaint on behalf of Deputy Coe and service was accepted on behalf of Deputy Coe. Accordingly, the above-named counsel also represent Deputy Coe, although the caption of the pending matter has not been amended to reflect Deputy Coe as a named

and “did not inquire into the nature of the alleged warrant.” *JA0007 at ¶ 22*. The Complaint claimed that “[a]t all times material and relevant [the Decedent] did not have a warrant for his arrest.” *JA0007 at ¶ 23*.

The Complaint further alleged that Deputy Coe attempted to arrest or otherwise take the Decedent into custody and the Decedent resisted Deputy Coe. *JA0007-JA0009 at ¶¶ 24-35*. The Decedent began running from Deputy Coe towards his home and the Decedent “reached into his left pocket while looking over his right shoulder stating that he had a knife,” which Plaintiff asserts was a “small pocket or utility knife.” *JA0009 at ¶¶ 36-37*. Plaintiff alleged that the Decedent was standing on his porch, approximately fifteen (15) to twenty-two (22) feet away and Deputy Coe “asserted that [the Decedent] spun around on his porch and that the [Deputy Coe] believed that [the Decedent] was going to open his pocket and/or utility knife.” *JA0009 at ¶¶ 39-40*. Deputy Coe, “while approximately 15 to 20 feet away” then fired upon the Decedent, striking him twice and fatally wounding him. *JA0009 at ¶ 41*. The Amended Complaint generally claimed that Deputy Coe’s use of deadly force was not justified under the circumstances. *JA0009-JA0010 at ¶¶ 42-44*.

Count I of the Complaint asserted “a constitutional tort action under the West Virginia Constitution, pursuant to the common law, and specifically is not filed pursuant to 42 U.S.C. § 1983 or any other related federal statute.” *JA0010-JA011 at ¶¶ 46-50*. Count I asserted that the actions of Deputy Coe violated the constitutional rights guaranteed to Stewart and/or Plaintiff under Article III, Section 6 of the West Virginia Constitution. *JA0011 at ¶ 48*.

Count II of the Complaint asserted a claim against Deputy Coe for “negligence/wrongful death.” *JA0011-JA0012 at ¶¶ 51-54*. Count III of the Complaint alleged

defendant.

“vicarious liability and/or direct liability” against Defendants, Monongalia County Commission (hereinafter “the Commission”), the Monongalia County Sheriff’s Department, and Sheriff Perry Palmer. *JA0012-JA0014 at ¶¶ 55-62.*

Count IV of the Complaint asserted a claim against all Defendants and Petitioners herein for the “tort of outrage,” *i.e.* intentional infliction of emotional distress. *JA0014-JA0015 at ¶¶ 63-69.* Count V of the Complaint alleged a claim for “Strict Liability” against Defendants, Monongalia County Commission, the Monongalia County Sheriff’s Department, and Sheriff Perry Palmer. *JA0015-JA0016 at ¶¶ 70-74.*

B. Defendants’ Motion to Dismiss

Petitioners filed their *Motion to Dismiss Plaintiff’s Complaint for Wrongful Death* and *Memorandum of Law in Support of Motion to Dismiss Plaintiff’s Complaint for Wrongful Death* (hereinafter collectively “Defendants’ Motion to Dismiss”). *JA0019-JA0044.* Therein, Petitioners argued that Counts I and III of Plaintiff’s Complaint failed to state a claim upon which relief may be granted as West Virginia law does not provide a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution. *JA0034-JA0035.* Petitioners argued that Count II of the Complaint failed to state a claim upon which relief may be granted as the Complaint lacked sufficient factual allegations to establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner and, therefore, he is immune pursuant to the *West Virginia Governmental Tort Claims and Insurance Reform Act*, W. Va. Code § 29-12A-1, et seq. (hereinafter the “Tort Claims Act”). *JA0035-JA0036.* Petitioners sought dismissal of Counts III, IV, and V of the Complaint against the Commission based on the immunity provided by W. Va. Code § 29-12A-5(a)(5) for the method of providing police protection. *JA0036-JA0037.* Petitioners

also argued that the Complaint should be dismissed in its entirety as Defendants are protected by qualified immunity as the allegations of the Complaint fail to establish that Petitioners violated a clearly established statutory or constitutional right of the Decedent. *JA0038-JA0039*.

Petitioners sought the dismissal of Count IV of the Complaint as Plaintiff's claim for tort of outrage did not survive the Decedent's death. *JA0039-JA0040*. Moreover, Petitioners argued that Count V of the Complaint should be dismissed as "strict liability" is not a claim upon which relief may be granted based on the allegations of the Complaint. *JA0040*. Petitioners further argued that the Monongalia County Sheriff's Department should be dismissed as an improper party pursuant to W. Va. Code § 7-1-1(a). *JA0040-JA0041*. Last, Petitioners argued that Plaintiff's claim for punitive damages failed as a matter of law as Petitioners were immune from said claim. *JA0042*.

C. The Circuit Court's *Order from September 21, 2021 Hearing*

The Circuit Court held a hearing on Petitioners' Motion to Dismiss on September 21, 2022. On November 8, 2021, the Circuit Court entered its *Order from September 21, 2021 Hearing*. *JA0122-JA0125*. Therein, the Circuit Court denied Petitioners' Motion to Dismiss to the extent it sought dismissal of Counts I and III of the Complaint. In doing so, the Circuit Court adopted Respondent's argument that despite there being no private cause of action for violation of private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution, Respondent's claims in Counts I and III were permitted under the Wrongful Death Act, §55-7-1, *et seq.* *JA0122-JA0123*.

The Circuit Court denied Petitioners' Motion to the extent that it sought dismissal of Count II of the Complaint against Deputy Coe despite the lack of sufficient factual allegations to establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless

manner so as to defeat his immunity under the Tort Claims Act. Instead, the Circuit Court permitted Respondent to amend the Complaint within thirty (30) days of entry of the Order. *JA0123*.

Regarding Counts III, IV, and V of the Complaint, the Circuit Court purportedly granted Petitioners' Motion to Dismiss, in part, "pursuant to the immunities set forth in *W. Va. Code 29-12A-5(a)(5)*" but denied Petitioners' Motion to Dismiss "to the extent that it seeks to dismiss any and all claims of vicarious liability." *JA0123*.

The Circuit Court denied Petitioners' Motion to Dismiss to the extent that it sought the dismissal of all counts of the Complaint on the basis of qualified immunity, adopting Respondent's argument that the Complaint sufficiently alleged that Petitioners violated a clearly established statutory or constitutional right of Decedent and that any immunity argument presented by the defense is procedurally premature until discovery is provided on the existence and scope of insurance coverage. *JA0123*.

The Circuit Court denied Petitioners' Motion to the extent it sought dismissal of Count IV of the Complaint for tort of outrage as not surviving the death of the Decedent. The Circuit Court found that Respondent's "claim is brought in the [Plaintiff's] individual capacity" and provided the Plaintiff [Respondent] thirty (30) days to amend her Complaint to "clarify her cause of action[.]" *JA0123*.

The Circuit Court denied Petitioners' Motion to Dismiss seeking to dismiss Respondent's claim for, what it characterized as, "strict, vicarious liability" in Count V and provided Plaintiff [Respondent] thirty (30) days to amend the Complaint "to clarify her cause of action in Count V for vicarious liability." *JA0123-JA0124*. The Circuit Court granted Petitioners' Motion to Dismiss, in part, "to correct a misnomer to the extent that it names the Monongalia County Sheriff's

Department and Sheriff Perry Palmer as party-defendants insofar as the Sheriff's Department and the Monongalia County Commission are the same entities." *JA0124*.

D. Defendant's Appeal of Order from September 21, 2021 Hearing

On December 8, 2021, Defendants filed a *Notice of Appeal* in this matter in relation to the Circuit Court's *Order from September 21, 2021 Hearing*. The Notice of Appeal alleged several errors in the Circuit Court's denial of Defendant's Motion to Dismiss Plaintiff's Complaint for Wrongful Death.³

E. Allegations of Amended Complaint and Motion to Dismiss Amended Complaint

On October 21, 2021, Respondent filed her *Amended Complaint for Wrongful Death* (hereinafter "Amended Complaint"). *JA0106-JA0121*. The Amended Complaint removed Sheriff Perry Palmer as a Defendant. Additionally, the Amended Complaint eliminated the cause of action for "strict liability". For the most part, the Amended Complaint simply restated the allegations of the original Complaint.

Petitioners subsequently filed their *Motion to Dismiss Amended Complaint for Wrongful Death* before the Circuit Court. *JA0172-JA0199*. Therein, Petitioners argued that Count I of Respondent's Amended Complaint failed to state a claim upon which relief may be granted as West Virginia law does not provide a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution. *JA0184-JA0186*. Further, Petitioners asserted that Count II of Respondent's Amended Complaint should be dismissed as the Amended Complaint lacks sufficient factual allegations to establish that Deputy Coe acted with malicious

³The Supreme Court of Appeals of West Virginia entered a Scheduling Order and designated that appeal as

purpose, in bad faith, or in a wanton or reckless manner so as to defeat his immunity under the Tort Claims Act. *JA0186-JA0190*. Petitioners argued that Counts III and IV of the Amended Complaint should be dismissed as the Commission is immune from suit under the Tort Claims Act. *JA0190-JA0193*. Additionally, Petitioners argued that the Amended Complaint should be dismissed in its entirety as Petitioners are protected by qualified immunity. *JA0193-JA0194*. Petitioners also sought the dismissal of Count IV of the Amended Complaint as Respondent's claim for tort of outrage did not survive the Decedent's death. *JA0194-JA0197*. Last, Petitioners argued that Respondent's claim for punitive damages fails as a matter of law as Petitioners are immune from such a claim. *JA0197-JA0198*.

F. Removal to Federal Court and Subsequent Remand

On February 22, 2022, Respondent filed her *Response in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Wrongful Death*. *JA0200-JA0261*. Based on statements made within Respondent's *Response in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Wrongful Death*, Petitioners removed this matter to the United States District Court for the Northern District of West Virginia, at Clarksburg, and filed their *Notice of Filing of Notice of Removal* with this Court on March 1, 2022. *JA0262-JA0272*.

Petitioners then filed their *Motion to Dismiss Amended Complaint for Wrongful Death* before the United States District Court for the Northern District of West Virginia, at Clarksburg on March 8, 2022. On May 17, 2022, the United States District Court for the Northern District of West Virginia entered its *Order Memorializing Ruling at Motion Hearing*, which remanded this matter back to the Circuit Court of Monongalia County.

G. Denial of Motion to Dismiss Amended Complaint for Wrongful Death

On September 7, 2022, the Circuit Court entered its *Order from July 25, 2022 Hearing*. JA0001-JA0002. Therein, the Circuit Court denied Petitioners’ Motion to Dismiss the Amended Complaint for those reasons previously articulated by the Circuit Court in regard to the Petitioners’ Motion to Dismiss the Original Complaint. JA0001-JA0002.

IV. SUMMARY OF ARGUMENT

Petitioners present this appeal respectfully requesting that the *Order from July 25, 2022 Hearing* from the Circuit Court of Monongalia County be reversed. In Count I of the Amended Complaint, Respondent alleges that Petitioners violated Article III, Section 6 of the West Virginia Constitution and asserted a “constitutional tort action” seeking to recover monetary damages. However, this Court recently held in *Fields* that “West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution.” Syl. Pt. 3, *Fields v. Mellinger*, 244 W. Va. 126, 851 S.E.2d 789 (2020). Despite the express prohibition on such a claim in *Fields*, the Circuit Court denied Petitioners’ Motion to Dismiss to the extent that it sought to dismiss Count I of the Amended Complaint. The Circuit Court found that “[t]he plaintiff states a claim under the West Virginia Wrongful Death Act, W. Va. Code § 55-7-1, et seq.” However, the fact that Respondent’s claim was brought pursuant to the Wrongful Death Act does not obviate the clear holding of *Fields*. *Fields* did not carve out any exception for claims brought pursuant to the Wrongful Death Act. Moreover, the Wrongful Death Act itself makes clear that there must be a viable, underlying claim which could have been maintained if death had not occurred.

Count III of the Amended Complaint asserts a claim against the Commission for vicarious liability for the actions of Deputy Coe. W. Va. Code § 29-12a-5(a)(5) provides that a political subdivision is immune from liability if a claim results from the “failure to provide, or the method of providing, police, law enforcement or fire protection.” Pursuant to *Albert*, which dealt with fire protection, the immunity contained in W. Va. Code § 29-12a-5(a)(5) is not limited to the decision making process in developing a political subdivisions policies but rather extends to any loss or claim that results from the failure to provide or the method of providing police or fire protection. The Circuit Court denied Petitioners’ Motion in this regard “to the extent that it seeks to dismiss any and all claims of vicarious liability.” However, the Circuit Court erred as *Albert* expressly stated that the immunity provided in subsection (a)(5) is applicable even if the loss or claim is caused by the negligence of an employee of the political subdivision acting within the scope of employment.

Count II of the Amended Complaint asserts a claim against Deputy Coe for “negligence/wrongful death.” However, pursuant to W. Va. Code § 29-12A-5(b), Deputy Coe is immune from suit unless his acts or omissions were manifestly outside the scope of employment or official responsibilities; his acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or liability is expressly imposed upon the employee by a provision of W. Va. Code. The Amended Complaint does not assert that Deputy Coe acted outside the scope of his employment and liability is not imposed by any other provision of W. Va. Code. Therefore, Deputy Coe only loses his immunity if his alleged acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. The Circuit Court erred in failing to dismiss Count II of the Amended Complaint as the Amended Complaint lacks sufficient factual assertions to establish that

Deputy Coe's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.

Additionally, the Circuit Court erred in failing to dismiss Respondent's Amended Complaint in its entirety as Petitioners are protected by qualified immunity. When stripped of its conclusory allegations, Amended Complaint fails to establish the violation of a constitutional right that was clearly established at the time of the alleged violation and, therefore, is subject to dismissal. Moreover, Respondent failed to identify a specific constitutional right of Decedent which was violated. Along the same lines, Respondent did not to put forth any legal authority to show that such right was clearly established at the time of the shooting in question.

Last, the Circuit Court erred in failing to dismiss Respondent's claim for punitive damages within the Amended Complaint. W. Va. Code § 29-12A-7(a) prohibits an award of punitive damages against political subdivisions. Additionally, this immunity is extended to employees of political subdivisions named in their official capacities, such as Deputy Coe herein.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners assert that oral argument is unnecessary, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. However, if the Court believes oral argument is warranted, Petitioners submit that any such argument would be appropriate, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves the application of settled law.

VI. STANDARD OF REVIEW

“Under Rule 12 of the West Virginia Rules of Civil Procedure, a circuit court's denial of a motion to dismiss a complaint that is predicated on the statutory immunity conferred by the Governmental Tort Claims and Insurance Reform Act is an interlocutory ruling that is subject to immediate appeal under the ‘collateral order’ doctrine.” *State ex rel. Grant Cty. Comm'n v. Nelson*, 244 W. Va. 649, 651, 856 S.E.2d 608, 610 (2021). Similarly, the denial of a motion to dismiss predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal. *Syl. Pt. 1, W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 657, 783 S.E.2d 75, 78 (2015). The denial of a motion to dismiss is reviewed *de novo*. *Id.* at 660, 81.

VII. ARGUMENT

A. **The Circuit Court erred in denying Petitioners’ *Motion to Dismiss* Count I of the Amended Complaint as West Virginia law does not provide a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution.**

In *Fields*, this Court answered the following certified question from the United States District Court for the Southern District of West Virginia: “Does West Virginia recognize a private right of action for monetary damages for violations of Article III, Section 6 of the West Virginia Constitution?” *Fields v. Mellinger*, 244 W. Va. 126, 127, 851 S.E.2d 789, 790 (2020). The Court, after analyzing the text of Article III, Section 6, noted that “[p]atently absent from this provision is any allowance for a private right of action for monetary damages.” *Id.* at 129, 792. The Court then turned its attention to analyzing whether a private right of action corresponds with the intent of the drafters and the electorate of the West Virginia Constitution and determined that there were no grounds to find the drafters and electorate intended to create such a cause of action for a violation of

Article III, Section 6. *Id.* at 129-132, 792-795. The Court further found that alternative remedies were available for a violation of Article III, Section 6 of the West Virginia Constitution such as state law claims for negligence in hiring, retention, and supervision, battery, outrageous conduct/intentional infliction of emotional distress, claims for excessive force under 42 U.S.C. § 1983, and a *Monell* claim for supervisor liability. Therefore, the Court expressly held that “West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution.” *Id.* at Syl. Pt. 3.

In the case at hand, Count I of the Amended Complaint clearly seeks to recover monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution in violation of *Fields*. Count I of the Amended Complaint purports to “allege[] a constitutional tort action under the West Virginia Constitution” and asserts that Deputy Coe “violated the constitutional rights guaranteed to [the Decedent] and/or Plaintiff under Article III, Section 6 of the West Virginia Constitution and/or the constitutional rights guaranteed to [the Decedent] and/or Plaintiff under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.” *JA0113-JA0114 at ¶¶ 56-57*. Additionally, Count I seeks to recover monetary damages for the purported violation of Article III, Section 6. *JA0114 at ¶ 59*.

Moreover, as in *Fields*, alternative remedies were available to Respondent for a violation of Article III, Section 6 of the West Virginia Constitution. Respondent could have asserted state law claims for negligence in hiring, retention, and supervision, battery, claims for excessive force under 42 U.S.C. § 1983, or a *Monell* claim for supervisor liability.

Despite the clear holding in *Fields*, the Circuit Court denied Petitioners’ Motion to Dismiss Count I of the Amended Complaint. In doing so, the Circuit Court found that “[t]he

plaintiff states a claim under the West Virginia Wrongful Death Act, W. Va. Code § 55-7-1, et seq.” *JA0001* at ¶ 1.⁴ The Circuit Court “reject[ed] [Defendants’] claim that the holding in *Fields* [...] precludes” Respondent’s claims in Count I of the Complaint. *JA0001* at ¶ 1.

The Circuit Court’s ruling is erroneous in several respects. First, the holding in *Fields* did not create any exception for claims brought pursuant to the Wrongful Death Act. Rather, as noted above, the Court in *Fields* expressly held that “West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution” and did not limit this holding to claims brought outside of the Wrongful Death Act. *Id.* at Syl. Pt. 3.

Second, the Wrongful Death Act makes clear that in order to state a claim thereunder, there must be a viable, underlying claim that could have been maintained if death had not occurred:

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after the death of the injured party.

⁴ As noted above, in its *Order from July 25, 2022* hearing which denied the Petitioners’ Motion to Dismiss the Original Complaint, the Circuit Court adopted its reasoning set forth in its prior *Order from September 21, 2021 Hearing*. Thus, when discussing the Circuit Court’s reasoning throughout the instant Brief, Petitioners will refer to the *Order from September 21, 2021 Hearing*.

W. Va. Code § 55-7-5 (emphasis added).

Thus, the Wrongful Death Act does not create an independent cause of action; instead, it merely permits a cause of action to be maintained against the alleged wrongdoer to the extent the Decedent, had he lived, would have been entitled to maintain such an action. Stated differently, the Wrongful Death Act permits a cause of action to be maintained against the wrongdoer “if, and only if, the injured party, had he lived, would have been entitled to maintain such action[.]” *Adams v. Grogg*, 153 W. Va. 55, 58, 166 S.E.2d 755, 757 (1969); *see also Stanton v. Elliott*, No. 2:19-CV-49, 2021 U.S. Dist. LEXIS 10917 (N.D.W. Va. Jan. 21, 2021)(finding that *Fields* barred plaintiff’s claim for violation of Article III, Section 6, despite allegedly causing the death of the decedent). In the case *sub judice*, pursuant to *Fields*, the Decedent clearly could not have maintained a cause of action to recover monetary damages for the violation of Article III, Section 6 had he lived. Therefore, Respondent cannot maintain such a claim under the Wrongful Death Act.

Moreover, in her underlying briefs, Respondent relied on *Maston v. Wagner*, 236 W. Va. 488, 781 S.E.2d 936 (2015). Respondent argued that the Court in *Maston* “recognized that the plaintiff’s claims therein were premised upon violations of the West Virginia Constitution, thereby implicitly holding that an excessive force case is a permissible cause of action under West Virginia State law.” However, *Maston* predates the Court’s decision in *Fields*, where the Court specifically held that West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution. *Fields, supra*, at Syl. Pt. 3.

Additionally, the fact that Count I of the Complaint alleges violations of “other

provisions of the West Virginia Constitution and/or the constitutional rights guaranteed to [Decedent] and/or Plaintiff, under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution” does not save Respondent’s claim. *JA0114 at ¶ 57*. As to Respondent’s contention of violations of “other provisions of the West Virginia Constitution,” such a claim is foreclosed by the recent *Stepp* case. *Stepp v. Cottrell*, 874 S.E.2d 700, 702 (W. Va. 2022). In *Stepp*, the Court held that “[c]laims for excessive force by police officers during the course of arrest, alleging a violation of West Virginia's Constitution, must be analyzed under the specific textual source of such protection, rather than as a broad, general claim under Article III, Section 10 alleging a violation of substantive due process.” *Id.* at Syl. Pt. 4. The Court in *Stepp* further held that “[c]laims of excessive force by police officers in the course of arrest are governed by the standards of the search and seizure clause contained in West Virginia's Constitution, Article III, Section 6.” *Id.* at 707. Thus, Respondent’s reference to purported violations of “other provisions of the West Virginia Constitution” does not save her claim.

Respondent’s claim that Petitioners also violated the United States Constitution likewise fails. Count I of the Amended Complaint states that it is “specifically [...] not filed pursuant to 42 U.S.C. § 1983 or any other related federal statute.” *JA0113 at ¶ 56*. However, there is no cause of action for violation of the U.S. Constitution in the absence of a 42 U.S.C. § 1983 claim. *Eggleton v. Town of Clendenin*, No. 2:07-0026, 2007 U.S. Dist. LEXIS 116628, at *21 (S.D. W. Va. Sep. 27, 2007) (“Inasmuch as no direct federal cause of action exists and plaintiff has expressly disavowed use of the section 1983 vehicle to redress the alleged violations of the constitution or statutes of the United States, her complaint fails to state a federal claim on which relief may be granted.”).

Therefore, the Circuit Court erred in failing to find that Count I of Respondent's Amended Complaint fails to state a claim in its entirety as West Virginia law does not provide a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution.

B. The Circuit Court erred in failing to dismiss Count III of the Amended Complaint in full as the Monongalia County Commission is immune from suit for the method of providing police protection pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, et seq.

The Tort Claims Act provides political subdivision and their employees immunity from suit under certain situations. The purpose of the Tort Claims Act is “to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.” *W. Va. Code § 29-12A-1*. Statutory immunities, such as those contained in the Tort Claims Act, are not merely a defense to liability; rather, they are an immunity from suit. *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649 (1996). “The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.” *Id.* As such, “local government units should be entitled to [...] statutory immunity under W. Va. Code, 29–12A–5(a), unless it is shown by specific allegations that the immunity does not apply.” *Id.* at 148, 658 (emphasis added). The sweep of the immunities provided by the Tort Claims Act is “necessarily broad” and protects “all but the plainly incompetent or those who knowingly violate the law.” *Id.*

The Act provides that a political subdivision “is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the

political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function” except in a few narrow circumstances. *W. Va. Code § 29-12A-4*. The Act provides five (5) instances in which a political subdivision may be liable for injuries to persons or property. *W. Va. Code § 29-12A-4(c)*. However, Plaintiff’s claims fall squarely within the immunity provided by *W. Va. Code § 29-12A-5(a)(5)*, which states that “[a] political subdivision is immune from liability if a loss or claim results from [...] the failure to provide, or the method of providing, police, law enforcement or fire protection.” This is what is known as the “law enforcement exception.” Syl. Pt. 8, *in part, Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991); Syl. Pts. 4 and 5, *Albert v. City of Wheeling*, 238 W. Va. 129, 792 S.E.2d 628 (2016).

In *Albert*, this Court held:

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

Albert, supra, at Syl. Pt. 4. While *Albert* dealt with fire protection, the Court’s reasoning also extends to police protection immunity as well. In other words, the police and fire protection immunity under *W. Va. Code § 29-12A-5(a)(5)* is not limited to the decision-making or planning process in developing a political subdivision’s policies. Rather, *W. Va. Code § 29-12A-5(a)(5)* provides immunity to any loss or claim that results from the failure to provide or the method of providing police or fire protection regardless of any alleged negligence on the part of a political subdivision’s employees. See *Taylor v. Clay County Sheriff’s Dept.*, 2020 U.S. Dist. LEXIS 30577, *15-16 (S.D.

W. Va. 2020)(holding that *Albert* immunizes political subdivisions from the negligent actions of their employees in providing police protection); *Daniels v. Wayne Cty.*, 2020 U.S. Dist. LEXIS 88971, at *12 (S.D. W. Va. 2020) (same); *McHenry v. City of Dunbar*, Civil Action No. 2:19-cv-00393, 2020 U.S. Dist. LEXIS 119681, at *8 (S.D. W. Va. July 8, 2020).

In ruling on Petitioners’ Motion to Dismiss, the Circuit Court agreed that *Albert* applies to police protection activities and purported to grant Petitioners’ Motion to Dismiss, in part, on these grounds. Nonetheless, the Circuit Court inexplicably denied Petitioners’ Motion “to the extent that it seeks to dismiss any and all claims of vicarious liability.” *JA0123 at p. 2, ¶ 3*. However, the holding in *Albert* expressly stated that the immunity is applicable even if the loss or claim is caused by the negligence of an employee of the political subdivision acting within the scope of his employment:

Statutory immunity exists for a political subdivision under the provisions of West Virginia Code § 29-12A-5(a)(5) (2013) if a loss or claim results from the failure to provide fire protection or the method of providing fire protection regardless of whether such loss or claim, asserted under West Virginia Code § 29-12A-4(c)(2) (2013), is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment.

Albert, 238 W. Va. at 130, 792 S.E.2d at 630 (emphasis added). Indeed, in *Albert*, the plaintiff argued that subsection 4(c)(2) of the Tort Claims Act authorizes the imposition of liability on a political subdivision “for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while within the scope of employment.” *Id.* at 132, 631. However, the Court in *Albert* found that this argument overlooked the fact that “instead of sanctioning potentially unlimited liability, subsection 4(c) begins with the disclaimer that the subsequent grants of liability are expressly made ‘[s]ubject to section 5 [§ 29-12A-5] and six [§ 29-

12A-6].” *Id.* Thus, the *Albert* Court found that “[b]ecause any potential liability set forth in subsection 4(c)(2) is made expressly subject to the grant of immunity provided in section 5(a)(5), there is no right to seek recovery from a political subdivision for the negligent performance of its employee's actions performed within the scope of his or her employment and authority when those actions pertain to either the failure to provide fire protection or the method of providing fire protection.” *Id.*

Thus, regardless of whether Respondent’s claim is caused by the acts of Deputy Coe within the course and scope of his employment, the Commission is immune as all claims against the Commission arise from the method of police protection pursuant to *W. Va. Code § 29-12A-5(a)(5)* and the Circuit Court erred in failing to dismiss Counts III of the Amended Complaint.

C. The Circuit Court erred in failing to dismiss Count II of Respondent’s Amended Complaint as the Amended Complaint lacks sufficient factual allegations to establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The Tort Claims Act also extends immunity to employees of political subdivisions, such as Deputy Coe, “unless (1) [h]is or her acts or omissions were manifestly outside the scope of employment or official responsibilities; (2) [h]is or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) [l]iability is expressly imposed upon the employee by a provision of this code.” *W. Va. Code § 29-12A-5(b)*; Syl. Pt. 1, *Beckley v. Crabtree*, 189 W. Va. 94, 428 S.E.2d 317 (1993); Syl. Pt. 3, *Cabell Cty. Comm’n v. Whitt*, 242 W. Va. 382, 836 S.E.2d 33 (2019).

In the instant matter, the Amended Complaint does not assert that Deputy Coe acted outside the scope of his employment. In fact, the Amended Complaint states that Deputy Coe’s

alleged actions were “within the scope of his employment.” *JA0116 at ¶67*. Furthermore, liability is not expressly imposed on Deputy Coe by any other provision of West Virginia Code. Therefore, Deputy Coe can only lose his immunity under the Tort Claims Act if his acts or omissions “were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]” *W. Va. Code § 29-7 (b)*.

Count II of the Amended Complaint alleges, in part, that Deputy Coe breached a duty of reasonable care “and did commit negligence against [the Decedent] and/or the Plaintiff.” *HA0115 at ¶62*. To the extent Count II of the Amended Complaint relies on an allegation of negligence, the Circuit Court erred in failing to dismiss the same as an allegation of negligence is not sufficient to defeat Deputy Coe’s immunity under the Tort Claims Act.

As noted above, the Amended Complaint alleges that Deputy Coe arrived at the property at issue after Jessica Stewart called 911 to report a domestic dispute involving the Decedent *JA0108 at ¶¶ 9-12*. Jessica Stewart advised that the Decedent had threatened her and showed a video from her phone evincing their dispute. *JA0108 at ¶ 15*. The Decedent then began to argue with his father, John D. Stewart, Sr. *JA0109 at ¶ 20*. Deputy Coe was advised by dispatch that the Decedent had an active warrant. *JA0109 at ¶ 21*. Respondent claims that the Decedent did not actually have an active warrant. *JA0109 at ¶ 22*. Deputy Coe instructed the Decedent to put his hands behind his back. *JA0110 at ¶ 26*. Deputy Coe “asserted that [the Decedent] put his fists up into a fighting stance.”⁵ *JA0110 at ¶ 28*. The Decedent refused to place his hands behind his back, therefore, Deputy Coe pulled out his taser. *JA0110 at ¶¶ 29, 31*. However, the Decedent again

⁵Plaintiff uses this phrasing at various places throughout the Amended Complaint. Plaintiff states at various times that Deputy Coe “asserted” that the Decedent did or did not do certain things but the Amended Complaint never asserts that Deputy Coe was incorrect in these assertions. Therefore, Petitioners have omitted the “Deputy Coe asserted” phrasing in the recitation of some of the factual allegations of the Amended Complaint set forth above.

refused Deputy Coe's command to place his hands behind his back. *JA0110 at ¶ 32*. Deputy Coe reached to grab the Decedent's wrist and the Decedent "pulled away" and "turned to run toward his home." *JA0110 at ¶¶ 34-35*. Deputy Coe sprayed pepper spray at Decedent "but missed him." *JA0110 at ¶ 36*. The Decedent ran towards his home and "reached into his left pocket while looking over his right shoulder stating that he had a knife," which Respondent characterizes as a "small pocket or utility knife." *JA0111 at ¶ 38-39*. Respondent states that the Decedent was standing on his porch and Deputy Coe was on the ground about fifteen (15) to twenty-two (22) feet away. *JA0111 at ¶ 41*. The Decedent then "spun around on his porch" and Deputy Coe asserted that he "believed that the Decedent was going to open his pocket and/or utility knife." *JA0110 at ¶¶ 42*. In response, Deputy Coe fired upon the Decedent, striking him with two (2) shots and fatally wounding him. *JA0110 at ¶ 43*. Respondent claims that at the time the Decedent was shot, Deputy Coe was separated from the Decedent "by a porch, porch railing, and/or wooden steps." *JA0111 at ¶ 44*.

Count II of the Amended Complaint does allege, in conclusory fashion, that Deputy Coe acted "in violation of clearly established statutory or constitutional rights or laws," or otherwise acted fraudulently, with malicious purpose, in bad faith, or in a wanton or reckless manner. *JA0111 at ¶¶ 63-64*. The Amended Complaint also makes conclusory allegations such as the Decedent "posed no physical threat" and Deputy Coe's use of deadly force was "not authorized and/or justified by the circumstances." *JA01112 at ¶¶ 45, 47*. However, conclusory allegations such as these are insufficient to overcome Deputy Coe's immunity under the Act. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009) ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.").

Moreover, Respondent's allegation that the Decedent did not in fact have an active warrant does not save her claim. As noted above, the Amended Complaint states that Deputy Coe was advised by dispatch that the Decedent had an active warrant. *JA0109 at ¶ 21*. The Amended Complaint does not allege that Deputy Coe knew that Decedent allegedly did not have an active warrant, but attempted to take him into custody regardless. Therefore, Deputy Coe acted reasonably after being advised that the Decedent had an active warrant. *Hanks v. Cty. of Del.*, 518 F. Supp. 2d 642, 649 (E.D. Pa. 2007) (“When a defendant is named in a bench warrant, probable cause for arrest exists, and any Fourth Amendment argument arising out of the arrest is without merit even if the bench warrant later turns out to be invalid.”); *Johnson v. Dobry*, No. 15-3434-cv, 2016 U.S. App. LEXIS 16637, at *3 (2d Cir. Sep. 12, 2016) (finding that an officer is entitled to rely on a warrant unless he had been involved in obtaining it by fraud or it was invalid on its face). Therefore, the allegation that the Decedent did not have an active warrant does not establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Additionally, Respondent's allegation that Deputy Coe was fifteen (15) to twenty-two (22) feet away from the Decedent at the time of the shooting does not establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner. “There is no rule that officers must wait until a suspect is literally within striking range, risking their own and others' lives, before resorting to deadly force.” *Reich v. City of Elizabethtown*, 945 F.3d 968, 982 (6th Cir. 2019) (noting that an assailant can close a distance of twenty (20) feet “in a second or two”).

In the same vein, Respondent's characterization of the knife at issue as a “pen knife” does not establish that Deputy Coe acted with malice, bad faith, wantonness, or recklessness. *See, e.g., Esty v. Town of Haverhill*, 2018 U.S. Dist. LEXIS 97339 (D. N.H.) (“Esty suggests in her

objection, and argued at the hearing, that the officers did not face a threat of serious harm because the knife in this case was small. This argument likewise fails.”).

Respondent also asserted that the Tort Claims Act is inapplicable because the Act “does not apply to, and shall not be interpreted to apply to [...] [c]ivil claims based upon alleged violations of the constitution or statutes of the United States[.]” *W. Va. Code § 29-12A-18(e)*. Respondent’s Amended Complaint does not make any claims which are based upon alleged violations of the constitution or statutes of the United States. In fact, the Amended Complaint expressly disavows any such claims, stating that it “specifically is not filed pursuant to 42 U.S.C. § 1983 or any other related federal statute.” *JA0113 at ¶ 56*. Moreover, Respondent’s counsel has stated on the record during the hearing on Petitioners’ Motion to Dismiss the original Complaint that no federal cause of action is being pursued herein. *JA0144 at 19:1-6*. Therefore, the exception within the Tort Claims Act for federal causes of action is inapplicable.

Thus, distilled to its essence, the Amended Complaint alleges that Deputy Coe was advised that the Decedent had an active warrant, Deputy Coe attempted to arrest the Decedent, and the Decedent resisted. Deputy Coe unsuccessfully attempted to subdue the Decedent using pepper spray. The Decedent fled and reached into his left pocket stating that he had a knife. The Decedent then spun around on the porch and Deputy Coe believed that the Decedent was going to open his pocket and/or utility knife. Even viewed in a light most favorable to Plaintiff, this chain of events as alleged fails to establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Therefore, the Circuit Court erred in failing to find that Deputy Coe is entitled to immunity under the Tort Claims Act.

D. The Circuit Court erred in failing to dismiss Respondent’s Amended Complaint in its entirety as Petitioners are protected by qualified immunity.

Under West Virginia law, “[g]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Syl. Pt. 1, in part, Bennett v. Coffman*, 178 W. Va. 500, 501, 361 S.E.2d 465, 466 (1987). The qualified immunity analysis established by the Supreme Court of the United States is essentially the same: “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, 129 S. Ct. 808, 815 (2009) (citations and quotations omitted). In the area of immunity for acts of governmental officials, West Virginia law is generally interpreted to be in conformity with federal law on the subject. *State v. Chase Sec.*, 188 W. Va. 356, 360, 424 S.E.2d 591, 595 (1992)(“[I]t would seem appropriate to construct, if possible, an immunity standard that would not conflict with the federal standard.”); *Robinson v. Pack*, 223 W. Va. 828, 834, 679 S.E.2d 660 (2009)(“In reviewing the development of immunity law with regard to public officials in Chase Securities, Justice Miller discussed the need for our state law in this area to conform with federal law.”). Therefore, federal law can be utilized to inform the Court’s analysis of this issue.

Qualified immunity analysis involves two inquiries: (1) whether the Plaintiff has established the violation of a constitutional right; and (2) whether that right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201-202, 150 L.Ed.2d 272 (2001); *West v. Murphy*, 771 F.3d 209, 213 (4th Cir. 2014). Once the qualified immunity defense is asserted,

the burden then shifts to the plaintiff to prove that the alleged conduct violated the law and that such law was clearly established when the alleged violation occurred. *Bryant v. Muth*, 994 F.2d 1082, 1086 (4th Cir. 1993).

In this case, Petitioners are entitled to qualified immunity as the allegations of the Complaint fail to establish that Petitioners violated a clearly established statutory or constitutional right of Decedent for all the reasons set forth above in Section D, *supra*, which are hereby incorporated by reference.

Moreover, despite this very issue being briefed multiple times in relation to both the Complaint and Amended Complaint, Respondent has not cited to a single case to demonstrate that a clearly established statutory or constitutional right was violated by Deputy Coe. “For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that ‘what he is doing’ violates federal law.” *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 (11th Cir. 1997). While a plaintiff is not required to provide a case directly on point, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015). The Supreme Court has “repeatedly told courts [...] not to define clearly established law at a high level of generality.” *Id.* at 308. The assertion of a generalized constitutional right does not defeat qualified immunity because “[i]f the test of ‘clearly established law’ were to be applied at this level of generality, [...] [p]laintiffs would be able to convert the rule of qualified immunity [...] into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

Despite having several opportunities to do so, Respondent has failed to identify a specific constitutional right of Decedent which was violated. Moreover, Respondent has failed to put forth any legal authority to show that such right was clearly established at the time of the shooting in question. Thus, the Circuit Court erred in failing to dismiss the Amended Complaint in its entirety as Petitioners are entitled to qualified immunity.

E. The Circuit Court erred in failing to dismiss Respondent’s claim for punitive damages as Petitioners are statutorily immune from such a claim pursuant to the Tort Claims Act.

1. The Commission is immune from a claim for punitive damages under the Tort Claims Act.

Under the Act, a political subdivision is not subject to punitive damages. *West Virginia Code § 29-12A-7(a)* states:

In any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited.

As this is an action involving a political subdivision and its employees, an award of punitive damages against the political subdivision is prohibited. Therefore, Respondent’s claim for punitive damages against the Commission fails to state a claim upon which relief can be granted and should have been dismissed by the Circuit Court.

In response to Petitioners’ Motion to Dismiss, Respondent argued that the Tort Claims Act was not applicable because it does not apply to civil claims based upon alleged violations of the constitution or statutes of the United States. *JA0218*. However, as set forth above, Respondent’s Amended Complaint does not make any claims which are based upon alleged violations of the constitution or statutes of the United States. In fact, the Amended Complaint expressly disavows any such claims, stating that it “specifically is not filed pursuant to 42 U.S.C. §

1983 or any other related federal statute.” *JA0113 at ¶ 56*. Moreover, Respondent’s counsel has stated on the record during the hearing on Petitioners’ Motion to Dismiss the original Complaint that no federal cause of action is being pursued herein. *JA0144 at 19:1-6*. Therefore, the exception within the Tort Claims Act for federal causes of action is inapplicable.

In response to Petitioners’ Motion to Dismiss, Respondent also argued that Petitioners’ Motion was premature “until and unless discovery is provided on the existence and scope of insurance coverage.” *JA0219*. Respondent argued that pursuant to W. Va. Code § 29-12A-9(a), “[i]f a policy or contract of liability insurance covering a political subdivision or its employees is applicable, the terms of the policy govern the rights and obligations of the political subdivision and the insurer with respect to the investigation, settlement, payment and defense of suits against the political subdivision, or its employees, covered by the policy.” *JA0219*. The Circuit Court denied Petitioners’ Motion to Dismiss Respondent’s claim for punitive damages and found that “discovery should be provided on the issue of punitive damages.” *JA0124 at ¶ 7*. It is unclear whether the Circuit Court determined that discovery was needed generally or specifically on the existence and scope of insurance coverage.

However, this argument fails for several reasons. First, W. Va. Code § 29-12A-16(d) specifically states that “[t]he purchase of liability insurance, or the establishment and maintenance of a self-insurance program, by a political subdivision does not constitute a waiver of any immunity it may have pursuant to this article or any defense of the political subdivision or its employees.” Therefore, regardless of the existence and scope of insurance coverage or the maintenance of a self-insurance program, pursuant to W. Va. Code § 29-12A-16(d), Petitioners have not waived any immunity pursuant to the Tort Claims Act.

Second, the Amended Complaint makes no assertion that any policy or contract of liability insurance has indeed waived the immunities provided Petitioners under the Tort Claims Act. As the Court is aware, when adjudicating a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, only the averments of the Complaint are considered to determine whether the Complaint states a claim upon which relief may be granted. *Riffle v. C.J. Hughes Constr. Co.*, 226 W. Va. 581, 583, 703 S.E.2d 552, 554 (2010)(“Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P.[.]”).

Third, allowing discovery on the existence and scope of insurance coverage before a defendant is entitled to immunity would be contrary to the purpose of the immunities granted under the Tort Claims Act. As noted above, “[t]he very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.” *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). If W. Va. Code § 29-12a-9(a) were interpreted in the manner sought by Respondent, political subdivisions and their employees would be subject to discovery regarding the existence and scope of insurance coverage in every case before being entitled to the immunity defenses provided by the Tort Claims Act.

Thus, for the reasons set forth above, the Circuit Court erred in failing to dismiss Respondent’s claim for punitive damages against the Commission.

2. Deputy Coe is immune from a claim for punitive damages under the Tort Claims Act.

Punitive damages are not recoverable against employees of a political subdivision named in their official capacities. In *Huggins*, the plaintiff brought suit against the City of Westover and its Mayor for various causes of action and sought to recover punitive damages. *Huggins v. City*

of *Westover Sanitary Sewer Bd.*, 227 W. Va. 573, 574-76, 712 S.E.2d 482, 483-85 (2011). The circuit court found that the Tort Claims Act barred the plaintiff's claim for punitive damages. On appeal, the plaintiff argued the Tort Claims Act did not bar his claim for punitive damages against the Mayor because he was named in his individual capacity and the Tort Claims Act does not prohibit punitive damages awards against an employee of a political subdivision who has been sued in his individual capacity. *Id.* at 578, 487. However, the Court found that because the complaint failed to set out a cause of action against the Mayor in his official capacity, the circuit court was correct in finding that the plaintiff could not recover punitive damages. *Id.* at 579, 488; *see also Meade v. Mynes*, No. 2:19-cv-00647, 2020 U.S. Dist. LEXIS 117906, at *13 (S.D. W. Va. July 6, 2020) (citing *Higgins, supra*) (“[T]he law allows for an award of punitive damages against employees of a political subdivision sued in their individual capacities.”); *Evans v. Swisher*, No. 1:15CV54, 2016 U.S. Dist. LEXIS 106707, at *23 (N.D.W. Va. Aug. 12, 2016) (same); *Robinette v. Judy*, Civil Action No. 1:15-cv-25, 2015 U.S. Dist. LEXIS 156170, at *16 (N.D.W. Va. Apr. 28, 2015) (“[B]ecause Plaintiff failed to assert a cause of action against Defendants Judy and Holder in their individual capacity, the undersigned finds that Plaintiff cannot recover punitive damages from them as well.”); *Austin v. Preston Cty. Comm'n*, No. 1:13CV135, 2014 U.S. Dist. LEXIS 146041, at *61 (N.D.W. Va. Oct. 14, 2014) (“In *Huggins v. City of Westover Sanitary Sewer Board*, the West Virginia Supreme Court of Appeals implied that when an employee of a political subdivision is named in his individual capacity, rather than his official capacity, punitive damages are available.”); *Arbaugh v. Bd. of Educ., Cnty. of Pendleton*, 329 F. Supp. 2d 762, 771 (N.D. W. Va. 2004)(punitive damage claim against employee of political subdivision not permitted where employee acted within the scope of his employment).

In the instant matter, the Amended Complaint does not allege that Deputy Coe acted outside the scope of his employment. In fact, the Amended Complaint asserts that Deputy Coe's actions as alleged in the Amended Complaint were within the scope of his employment. *JA0106 at ¶ 67*. Therefore, Respondent has not asserted any claims against Deputy Coe in his individual capacity. As a result, the Circuit Court erred in not dismissing Respondent's claim against Deputy Coe for punitive damages.

VIII. CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Honorable Court reverse the Circuit Court of Monongalia County's *Order from July 25, 2022 Hearing* and remand this matter to be dismissed with prejudice.

/s/Tiffany R. Durst

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 22-765

**MONONGALIA COUNTY COMMISSION, MONONGALIA COUNTY SHERIFF'S
DEPARTMENT, SHERIFF PERRY PALMER, in his official capacity as Sheriff of
Monongalia County, and JOHN DOE,
Petitioners (Defendants),**

v.

**AMANDA F. STEWART, individually and/or in her capacity as Administratrix of the
Estate of John D. Stewart, Jr.,
Respondent (Plaintiff).**

**(On Appeal from the Circuit Court of Monongalia County,
West Virginia, Civil Action No. 21-C-101)**

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioners, does hereby certify on this 22nd day of November, 2022, that a true copy of the foregoing *PETITIONERS' BRIEF* was served upon opposing counsel by uploading it to the West Virginia Supreme Court of Appeal's electronic filing system, File&ServeXpress, which will notify counsel and by e-mail and U.S. First Class Mail, addressed as follows as follows:

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