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.,
Respondents (Plaintiffs).

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

PETITIONERS' REPLY BRIEF AND RESPONSE TO CROSS-ASSIGNMENT OF ERROR

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The Governmental Tort Claims and Insurance Reform Act ("Tort Claims Act" or the "Act") provides that a political subdivision is immune from liability if a loss or claim results from "the failure to provide, or the method or providing, police, law enforcement or fire protection[.]" *W. Va. Code § 29-12A-5(a)(5).* Respondent is correct that prior to *Albert v. City of Wheeling*, 238 W. Va. 129, 792 S.E.2d 628 (2016), this immunity was interpreted to apply only to the formulation and implementation of policy related to how police, law enforcement, or fire protection is to be provided. As the Court held in *Smith*:

> 3. The phrase "the method of providing police, law enforcement or fire protection' contained in W.Va. Code, § 29-12A-5(a)(5) refers to the formulation and implementation of policy related to how police, law enforcement or fire protection is to be provided." Syllabus Point 3, *Beckley v. Crabtree*, 189 W.Va. 94, 428 S.E.2d 317 (1993).
>
> 4. The phrase "the method of providing police, law enforcement or fire protection" contained in W.Va. Code, 29-12A-5(a)(5) refers to the decision-making or the planning process in developing a governmental policy, including how that policy is to be performed. To the extent that the holding of the Court is inconsistent with language in *Beckley v. Crabtree*, 189 W.Va. 94, 428 S.E.2d 317 (1993) and its progeny, the holdings in those cases are hereby modified.

Smith v. Burdette, 211 W. Va. 477, 566 S.E.2d 614 (2002)

In other words, prior to *Albert*, this immunity was limited to "governmental decisions as to how to provide police or fire protection" such as "the type and number of fire trucks and police cars considered necessary for the operation of the respective departments; how many personnel might be required; how many and where police patrol cars are to operate; the placement and supply of fire hydrants; and the selection of equipment options." *Beckley v. Crabtree,* 189 W.

Va. 94, 97, 428 S.E.2d 317, 320 (1993); *Mallamo v. Town of Rivesville*, 197 W. Va. 616, 626, 477 S.E.2d 525, 535 (1996)(quoting *Jackson v. City of Kansas City*, 235 Kan. 278, 680 P.2d 877 (Kan. 1984)).

However, Respondent's focus on pre-*Albert* cases, which discuss the scope of the police protection immunity, is flawed as *Albert* altered the scope of fire protection and police protection immunity. In *Albert*, the plaintiff sued after the Wheeling Fire Department failed to extinguish a fire at her home due to rocks clogging their fire hoses. The plaintiff argued that the City of Wheeling was liable under two (2) subsections of the Tort Claims Act: subsection 4(c)(2), which 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 acting within the scope of employment" and subsection 4(c)(3), which imposes liability on a political subdivision the negligent failure to keep public aqueducts open, in repair, and free from nuisance." *Albert v. City of Wheeling*, 238 W. Va. 129, 131, 792 S.E.2d 628, 630 (2016).

However, the Court noted that these grants of liability only apply where there is a no provision of immunity otherwise provided in *W. Va. Code §§ 29-12A-5, -6. Id.* at 132, 631. The Court found any potential liability for the negligent performance of its employee's actions and failure to keep aqueducts open, in repair, and free from nuisance was subject to the immunity for the "failure to provide, or the method of providing, police, law enforcement or fire protection" found in section 5(a)(5). Thus, the Court went on to examine the scope of such immunity and 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.

Although *Albert* dealt specifically with fire protection, the decision's reasoning clearly extends to police protection as well. As noted above, both fire protection immunity and police protection immunity are located within the same subsection of the Act, 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." *W. Va. Code § 29-12A-5(a)(5)*. Thus, it would be illogical to interpret fire protection immunity differently from police protection immunity when both are contained within the same subsection and both are subject to the operative language "the failure to provide, or the method of providing[.]" In fact, Justice Davis's dissent in *Albert* noted that the majority's decision would apply to claims "involving fire protection (and police protection)." *Albert*, 238 W. Va. at 138, 792 S.E.2d at 637. Justice Davis further noted that the majority opinion implicitly overruled syllabus points three and four of *Beckley*, which limited the police protection immunity and fire protection immunity to the formulation and implementation of policy. *Id.* at 138, 637.

Further proof that *Albert*'s reasoning applies to police protection immunity is found in the multitude of federal district court cases which have so concluded. *Fields v. King*, 576 F. Supp. 3d 392, 403 (S.D. W. Va. 2021)(finding plaintiff's argument that *Albert* does not extend to police protection "meritless" because "*Albert* explicitly overruled *Smith* in its entirety"); *Means v. Peterson*, No. 2:20-cv-00561, 2020 U.S. Dist. LEXIS 212603, at *9 (S.D. W. Va. Nov. 13, 2020)("[T]he language of *Albert* is explicit. A municipality is not liable for damages that result from the negligence of a municipal employee when that negligence occurs in furtherance of providing police, law

enforcement, or fire protection."); *Dixon v. City of St. Albans*, No. 2:20-cv-00379, 2020 U.S. Dist. LEXIS 212599, at *8 (S.D. W. Va. Nov. 13, 2020)("[T]he immunity for employee negligence is not limited to policy questions as held in *Smith* but extends to all police and fire protection related employee negligence."); *Simerly v. Osborne*, No. 2:20-cv-00119, 2020 U.S. Dist. LEXIS 198607, at *15 (S.D. W. Va. Oct. 26, 2020)("Because the arrest is directly related to the method of providing police and law enforcement, the City is entitled to statutory immunity on this claim."); *Westfall v. Osborne*, No. 2:20-cv-00118, 2020 U.S. Dist. LEXIS 198606, at *15 (S.D. W. Va. Oct. 26, 2020) (same); *McHenry v. City of Dunbar*, Civil Action No. 2:19-cv-00393, 2020 U.S. Dist. LEXIS 119681, at *7 (S.D. W. Va. July 8, 2020)("That same immunity has been extended in this district to acts in furtherance of the method of providing police protection."); *Daniels v. Wayne Cty.*, No. 3:19-0413, 2020 U.S. Dist. LEXIS 88971, at *11 (S.D. W. Va. May 19, 2020)("*Albert* immunizes political subdivisions from the negligent actions of their employees in providing police protection."); *Taylor v. Clay Cty. Sheriff's Dep't*, No. 2:19-cv-00387, 2020 U.S. Dist. LEXIS 30577, at *16 (S.D. W. Va. Feb. 24, 2020)("In effect, the *Albert* court overruled the limitation of the police protection immunity in *Smith*.").

Moreover, any argument that such an interpretation of the Tort Claims Act would leave an individual allegedly subjected to excessive force without recourse fails. First, the employee of a political subdivision could still be liable for excessive force if sufficient evidence exists that said employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. *W. Va. Code § 29-12A-5(b).* Second, the Act does not apply to civil claims based upon alleged violations of the Constitution or statutes of the United States. *W. Va. Code § 29-12A-18(e).* Thus, a purported victim of excessive force could still file suit pursuant to *42 U.S.C. § 1983.*

Thus, the Court should affirm the Circuit Court's conclusion that that the Tort Claims Act and *Albert* provide immunity to the County for the method of providing police protection.

III. ARGUMENT

A. The Circuit Court erred in finding that qualified immunity did not apply to Petitioners.

As previously set forth by Petitioners, 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). Moreover, the generalized assertion of the violation of 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. Creigh*ton, 483 U.S. 635, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

Here, Respondent is attempting to defeat qualified immunity by doing just that – asserting a generalized violation of constitutional rights in the form of an allegation of excessive force. Respondent asserts that Deputy Coe "had no justifiable reason or cause to seize or arrest [Decedent]; but regardless, he escalated the situation with him." *Respondent's Brief at 18.* However, Respondent fails to address the fact that the Amended Complaint asserts that Deputy Coe was advised by dispatch that 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. Respondent has failed to address case law, which states that an officer is entitled to rely on a warrant even if it later turns out to be invalid. *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).

Respondent claims that Deputy Coe "killed the decedent from a distance of 15 to 22 feet away with his firearm based upon an unjustifiable claim that he was in danger as a result of an unopened pen knife." *Respondent's Brief at 18.* However, as the Amended Complaint makes clear, Deputy Coe instructed Decedent to put his hands behind his back and Decedent refused and put up his fists in a fighting stance, turned and 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." *JA0110 at ¶¶ 26-39.* Decedent was standing on his porch and then "spun around" and Deputy Coe asserted that he "believed that the Decedent was going to open his pocket and/or utility knife," resulting in Deputy Coe firing upon the Decedent. *JA0110 at ¶¶ 41-43.*

Respondent makes generalized allegations that Deputy Coe's conduct was unwarranted, but has failed to provide any legal authority showing that such a situation is violation of a clearly established constitutional right. As Petitioner previously noted, "[t]here 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").

Thus, for all these reasons, the Circuit Court erred in finding that Petitioners were not entitled to qualified immunity.

B. The Circuit Court erred in failing to dismiss Count III of the Amended Complaint in its entirety as the 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.*

As set forth in Section III.A. above, in *Alberts*, the 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. For the reasons set forth above and incorporated herein by reference, although *Albert* dealt with fire protection, the Court's reasoning also extends to police protection immunity as well.

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.* This is directly contrary to holding in *Albert* quoted above, which established statutory exists for a political subdivision under subsection 5(a)(5) if a loss or claim results from the method of providing police protection "regardless of whether such loss or claim [...] is caused by the negligent

performance of acts by the political subdivision's employees while acting within the scope of employment." *Id.* at Syl. Pt. 4.

In *Albert* the plaintiff made the exact same argument as Respondent makes here, 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, 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.

First, Respondent argues that Deputy Coe may be held liable for his "negligence" pursuant to *W. Va. Code § 29-12A-4(c)(2)*. However, subsection (c)(2) refers to liability for a political subdivision and not liability for the employee of a political subdivision:

> (c) Subject to sections five [§ 29-12A-5] and six [§ 29-12A-6] of this article, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows: [...]
>
> (2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.

W. Va. Code § 29-12A-4(c)(2) (emphasis added).

On the other hand, the immunity of an employee of a political subdivision is addressed in subsection 5(b):

> (b) An employee of a political subdivision is immune from liability unless one of the following applies:
>
> (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
>
> (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
>
> (3) Liability is expressly imposed upon the employee by a provision of this code.

W. Va. Code § 29-12A-5(b). Thus, contrary to Respondent's argument, Deputy Coe is not liable for negligence and only loses his immunity under the Tort Claims Act if Respondent can show that Deputy Coe's acts or omission "were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]"[1] *W. Va. Code § 29-12A-5(b)(2).* Thus, an allegation of negligence is insufficient to defeat Deputy Coe's immunity under the Tort Claims Act.

Further, contrary to Respondent's allegations, the allegations of the Amended Complaint are insufficient to establish that Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner. As set forth above, the allegations of the Amended Complaint when taken as a whole show that Deputy Coe attempted to arrest Decedent after being advised he had an active warrant, Decedent refused to place his hands behind his back and put his fists up into a fighting stance, Deputy Coe attempted to pepper spray Decedent, Decedent continued to disobey commands and ran toward his home while reaching into his left pocket and stating that he had a

[1]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.

knife, the Decedent then "spun around" causing Deputy Coe to believe Decedent had a knife, Deputy Coe then fired upon Decedent believing that he was going to open the pocket knife. *JA0108-JA0111 at ¶¶ 15-43.*

As previously articulated, Respondent's allegations that Decedent did not actually have an active warrant, that Decedent was fifteen (15) to twenty-two (22) feet away from Decedent at the time of the shooting, and that the knife at issue was allegedly a "pen knife" do not establish that Deputy Coe acted with malice, bad faith, wantonness, or recklessness. *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); *Reich v. City of Elizabethtown*, 945 F.3d 968, 982 (6th Cir. 2019)("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" and an assailant can close a distance of twenty (20) feet "in a second or two."); *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.").

The only additional argument Respondent now raises on this topic is a reference to an expert report prepared for Respondent by Timothy Dimoff, CPP, LPI ("Dimoff"). However, Dimoff's report was not attached to the Complaint or Amended Complaint. Rather, it is only contained in the record because it was attached to Respondent's *Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Amended Complaint for Wrongful Death. JA0200-*

JA0258. However, it is axiomatic that in considering a motion to dismiss for failure to state a claim, only matters contained in the complaint may be considered. *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 526, 854 S.E.2d 870, 888 (2020)("The general rule is, therefore, that circuit courts considering motions under Rule 12(b)(6) should confine their review to the four corners of the complaint or other disputed pleading and may not consider extraneous documents."). Thus, the Court should disregard any reference to Dimoff's report.

Thus, the allegations of the Amended Complaint are insufficient to establish Deputy Coe acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

D. Regardless of whether Respondent's claim was brought pursuant to the Wrongful Death Act, *W. Va. Code § 55-7-1, et seq.*, Count I of the Amended Complaint fails 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.

Respondent continues to assert that because her claim is brought pursuant to the Wrongful Death Act, *W. Va. Code § 55-7-1, et seq.*, she may assert a claim for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution despite the clear prohibition on such a claim established in *Fields v. Mellinger*, 244 W. Va. 126, 127, 851 S.E.2d 789, 790 (2020). In *Fields*, this 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." *Id.* at Syl. Pt. 3.

Count I of the Amended Complaint expressly seeks to recover monetary damages for 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 ¶¶ 56-59.* Despite the clear holding in *Fields*, the Circuit Court found, and Respondent continues to assert that, Count I can be maintained as it is brought pursuant to the Wrongful Death Act. However, the Wrongful Death Act is clear that the Act does not create a cause of action but merely permits a cause of action to proceed to the extent that the decedent, 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)(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[.]").

Respondent also implies that a cause of action must exist for excessive use of unnecessary use of force or else potential plaintiffs would be without recourse. Again, *Fields* has addressed this issue and 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.

Respondent is attempting to avoid the clear application of *Fields* by asserting that her reference to both the West Virginia and U.S. Constitution is "an allegation of violation of a clearly established law or right necessary for overcoming the potential for 'qualified immunity' defense." However, the fact that Respondent may anticipate an assertion of qualified immunity by the Petitioners does not create a cause of action where one otherwise does not exist. Regardless of how Respondent attempts to characterize her reference to the West Virginia and U.S. Constitutions, Count I of the *Amended Complaint* states that it is a "constitutional tort action under

the West Virginia Constitution" alleging violation of Article III, Section 6 of the West Virginia Constitution. Pursuant to *Fields*, such a cause of action simply does not exist.

Respondent's reliance on *Maston v. Wagner*, 236 W. Va. 488, 781 S.E.2d 936 (2015) is also misplaced. Respondent argues 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.

Respondent's remaining argument is somewhat unclear. It appears that Respondent asserts that Count I actually asserts a claim for battery and not for the violation of Article III, Section 6 of the West Virginia Constitution. However, this is plainly not supported by the actual allegations contained in Count I which fail to state a claim for battery in any manner whatsoever.

Thus, Count I of the Amended Complaint fails 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.

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.

Despite Respondent's claim to the contrary, the claim for punitive damages against the Commission is directly precluded by the Tort Claims Act:

> 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.

West Virginia Code § 29-12A-7(a). Respondent admits that the Tort Claims Act "generally bars punitive damages against political subdivision and their employees." *Respondent's Brief at 28.*

However, Respondent argues that discovery on the issue of insurance coverage is necessary. Respondent fails to address *W. Va. Code § 29-12A-16(d)*, which 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." The statute does not require that the policy specifically preserves statutory immunity.

Additionally, Respondent's argument in this regard is premised on a flawed reading of *Parkulo* and *Bender*. *Parkulo* addressed the immunity of the State and not that of a political subdivision. In that regard, it noted that *W. Va. Code §29-12-5* provided that the State is liable up to the limits of the State's liability insurance coverage. *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 169, 483 S.E.2d 507, 515 (1996). "If the terms of the applicable insurance coverage and contractual exceptions thereto acquired under W.Va. Code § 29-12-5 expressly grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the parties to any suit should have the benefit of the terms of the insurance contract." *Id.* at Syl. Pt 5 (emphasis added).

Respondent argues that *Bender* subsequently extended this principle to political subdivisions as well as the State. However, the issue before the Court in *Bender* was whether an insurance policy issued to a political subdivision provided insurance coverage to its employee under the facts and circumstances of that case. *Bender v. Glendenning*, 219 W. Va. 174, 176-77, 632 S.E.2d 330, 332-33 (2006). Moreover, the insurance policy at issue in *Bender* was issued to the State.

The Court subsequently addressed the same argument advanced by Respnodent herein in *Moses v. City of Moundsville*, No. 16-0680, 2017 W. Va. LEXIS 221 (Apr. 7, 2017) (memorandum decision). In *Moses*, the Court addressed whether the City of Moundsville was statutorily immune to the plaintiff's claims under the Tort Claims Act. On appeal, the plaintiff argued that the circuit court should have denied the City's motion to dismiss because it waived the immunity conferred upon it by the Tort Claims Act. *Id.* at *3. The Court rejected the plaintiff's argument that *Bender* held that a political subdivision can purchase an insurance policy that waives the immunity provided by the Tort Claims Act:

> Petitioner asserts that in *Bender v. Glendenning*, 219 W. Va. 174, 632 S.E.2d 330 (2006), this Court held that a political subdivision can purchase an insurance policy that waives the immunity conferred by the Act. In support of her argument, she also contends that because her action does not seek recovery of state funds, but instead seeks only recovery under and up to the limits of respondent's liability insurance coverage, the circuit court erred in granting respondent's motion to dismiss.
>
> At the outset, we note that *Bender* is a *per curiam* opinion. As we have previously stated, "[s]igned opinions containing original syllabus points have the highest precedential value because the Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court." Syl. Pt. 1, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014). As a *per curiam* opinion, *Bender* does not contain any original syllabus points and does not set forth any new points of law.

Id. at *3-*4. Thus, the Court held that despite the plaintiff's argument regarding waiver of immunity through the purchase of insurance coverage, the City was immune pursuant to *W. Va. Code § 29-12a-5(a)(11)* for claims covered by workers' compensation law.

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

Employees of political subdivision are immune from claims for punitive damages when they are sued in their official capacity. *Huggins v. City of Westover Sanitary Sewer Bd.*, 227 W. Va. 573, 712 S.E.2d 482 (2011). Respondent argues that the Circuit Court was correct in

finding discovery was needed on this issue because Deputy Coe could have been acting outside the scope of his employment. However, the allegations of the Amended Complaint are directly contrary to this argument and make clear that Deputy Coe is alleged to have been within the scope of his employment and has been named in his official capacity and not his individual capacity:

> 3. The defendant, John Doe Deputy, upon information and belief, is a resident of Monongalia County, West Virginia, and was, at all times material and relevant, an employee of the defendant, Monongalia County Commission, and/or its subdivision, the Monongalia County Sheriff's Department, employed in the capacity of Deputy Sheriff. A separate pleading listing the identity of John Doe Deputy may be filed with the Court under seal with the Court's permission.
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> 67. Defendant, Monongalia County Commission d/b/a Monongalia County Sheriff's Department is vicariously liable for the acts of Defendant, John Doe Deputy, as alleged herein that were done within the scope of his employment and/or are liable to indemnify him for this incident pursuant to the common law and/or pursuant to W. Va. Code § 29-12A-1, *et seq.*, as referenced by the above facts and counts.

JA0107 at ¶ 3, JA0116 at ¶ 67.

Thus, the Circuit Court erred in finding that Deputy Coe was not immune to Respondent's claim for punitive damages.[2]

IV. CONCLUSION

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

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[2]In a footnote, Respondent asserts that the Tort Claims Act "may not be applicable to a police shooting case" because the Act does not 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).* First, the Court should reject this argument as it was not sufficiently developed by Respondent. Respondent raises this argument in a footnote at the conclusion of her brief and fails to cite any legal authority in support thereof. *See City of Martinsburg v. Cty. Council,* 880 S.E.2d 62 (W. Va. 2022). Second, subsection 18(e) of the Act is simply inapplicable because, as Respondent admits, no federal claim is being asserted herein.

Dated this 1st day of February, 2023.

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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 1st day of February, 2023, that a true copy of the foregoing ***PETITIONERS' REPLY BRIEF AND RESPONSE TO CROSS-ASSIGNMENT OF ERROR*** 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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