No. 24-ICA-193

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

GEORGE NICHOLAS PARSONS,
Plaintiff Below, Petitioner,

v.

WILEY TYLER RAINES and THE CALHOUN COUNTY COMMISSION,
Defendants Below, Respondents.

BRIEF OF RESPONDENTS

Drannon L. Adkins, WV State Bar No. 11384
dadkins@pffwv.com
Christopher T. Ferro, WV State Bar No. 10507
cferro@pffwv.com
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545

Counsel for the Respondents

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I. STATEMENT OF THE CASE

Plaintiff's statement of the case contains sufficient information regarding the procedural background; however, it fails to include pertinent information regarding the factual background the Circuit Court carefully considered. As such, the Defendants are obliged to fill in the blanks left by Plaintiff's brief summation.

On April 18, 2021, Plaintiff was operating a 2003 Volkswagen Jetta in Calhoun County. J.A.1; J.A.94. Plaintiff's operation of the vehicle was illegal because Plaintiff had at least twice before been convicted of driving while suspended for DUI. JA.29-30. Despite not being able to legally operate a motor vehicle in the State of West Virginia, Plaintiff was doing so on April 18, 2021 when he was involved in an incident with Deputy Raines, which resulted in a motor vehicle crash from which Plaintiff claims substantial injuries. J.A.1-5; J.A.94-98.

As a result of the incident, Plaintiff was charged and indicted on several crimes, Fleeing in a Vehicle while DUI, Fleeing in a Vehicle with Reckless Indifference, and two counts Driving While Revoked for DUI (3rd Offense). JA.29-30. The Circuit Court conducted a jury trial on February 14 and 15, 2023. JA.32-34. On the morning of the trial, the State dismissed the Fleeing in a Vehicle while DUI, and the State and Mr. Parsons jointly moved to sever the second Driving While Revoked for DUI (3rd Offense) charge.[1] Id. Following the jury trial, Plaintiff was acquitted on the Fleeing in a Vehicle with Reckless Indifference charge, but was convicted of Driving While Revoked for DUI (3rd Offense). JA.32-34; J.A.36-37.

Despite having already been convicted of a felony arising out of the incident with Deputy Wiles, Plaintiff initiated a lawsuit against Deputy Wiles and the Calhoun County Commission. J.A.1-5. After the Defendants moved to dismiss, Plaintiff filed an Amended Complaint. J.A.94-

[1] Plaintiff subsequently entered a guilty plea to the severed charge. J.A.39-45.

98. The Amended Complaint did not contain any additional facts; rather, it merely substituted the word "crash" for "accident" in paragraphs 2, 3, 14, and 18. J.A.1-5; J.A.94-98.

II. SUMMARY OF THE ARGUMENT

Plaintiff's claims against the Defendants were properly dismissed because both Defendants were entitled to immunity and because the state-law claims were barred by the Wrongful Conduct Statute.

The Circuit Court correctly determined that the Calhoun County Commission was entitled to statutory immunity under the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1, *et seq*., for all of Plaintiff's causes of action. The Circuit Court correctly analyzed the allegation in the Complaint, and properly applied the framework mandated by the Tort Claims Act when it determined that regardless of the allegations of negligence, the police protection immunity provision applied.

Likewise the Circuit Court also properly found that Deputy Wiles was entitled to personal tort immunity under the Tort Claims Act for Plaintiff's state-law claims, as well as qualified immunity as to Plaintiff's federal cause of action. The Circuit Court correctly concluded that Plaintiff had failed to allege sufficient facts to strip Deputy Wiles of his personal tort immunity on the state-law claims. The Circuit Court further correctly determined that Deputy Wiles was entitled to qualified immunity on Plaintiff's federal claim because Plaintiff had failed to allege facts to assert a violation of a clearly established constitutional right.

Finally, the Circuit Court properly applied the Wrongful Conduct Statute, West Virginia Code § 55-7-13d(c), and correctly found that Plaintiff's injuries were proximately caused by his commission of a felony. The Court properly concluded that Plaintiff's injuries and damages were caused by his operation of a motor vehicle when his privilege for doing so had been revoked and

that Plaintiff had been convicted of driving suspended for DUI (3rd offense) as a result of the accident that forms the basis of the Complaint.

As the Circuit Court committed no error in its disposition of the Motion to Dismiss, its decision should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Defendants 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, the Defendants 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.

IV. ARGUMENT

A. The Circuit Court Did Not Err in Dismissing Plaintiff's Claims Under Rule 12(b)(6) (Assignment of Error Nos. 1 and 2)

Plaintiff contends that the Circuit Court committed reversible error in dismissing his claims because in his estimation, the Circuit Court failed to accept the facts as pleaded. Brief, at p. 3-4. At bottom, these two assignments of error are the overarching framework supporting his subsequent arguments and in any event, the Circuit Court accepted the facts as pled in deciding the motion to dismiss.

Under Rule 12(b)(6), a party may move for dismissal of a complaint for "failure to state a claim upon which relief can be granted." W.VA. R. CIV. P. 12(b)(6). Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint. Id; Estate of Hough ex rel. Lemaster v.

Estate of Hough ex rel. Berkley County Sheriff, 205 W.Va. 537, 519 S.E.2d 640 (1999). The singular purpose of a motion to dismiss for failure to state a claim is to seek a determination as to whether the plaintiff is entitled to offer evidence to support claims made in the complaint. Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339 (1996).

"For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. John W. Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 605, 245 S.E.2d 157 (1978). However, to survive a motion to dismiss, a plaintiff's complaint must "at a minimum [ ] set forth sufficient information to outline the elements of his claim." Price v. Halstead, 177 W.Va. 592, 594, 355 S.E.2d 380 (1987).

This liberal standard does not relieve a Plaintiff of his or her obligation to present a valid claim. Wilhelm v. West Virginia Lottery, 198 W.Va. 92, 96-97, 459 S.E.2d 602 (1996). If the Court finds, beyond a doubt, that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief, the court should dismiss the Complaint. Owen v. Board of Educ., 190 W.Va. 677, 678, 441 S.E.2d 398 (1994).

However, unlike factual allegations, which are entitled to a presumption of truth, legal conclusions enjoy no such presumption. As such, "a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." Brown v. City of Montgomery, 233 W.Va. 119, 127, 755 S.E.2d 653, 661 (2014) (quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[2], at 386 (4th ed. 2012)).

This is particularly true where, as below, immunities are in play. Because "where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." West Virginia Board of Education v. Marple, 236 W.Va. 654, 660, 783 S.E.2d 75, 81 (2015) (citation

omitted); *see also*, Hutchison v. City of Huntington, 198 W.Va. 139, 147-148, 479 S.E.2d 649, 657-658 (1996) ("Public officials and 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."). That is because

> [i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. 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.

Hutchison, 198 W.Va. at 148, 479 S.E.2d at 658 (citations omitted). Thus, "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." Id.

Plaintiff implies that the Circuit Court erred in applying the heightened pleading standard instead of the liberal, notice pleading standard applicable to most non-immunity civil actions. Brief, at p. 3-4. Had the Circuit Court done so, it would have committed reversible error. *See*, West Virginia Regional Jail & Correctional Facility Authority v. Grove, 244 W.Va. 273, 282, 852 S.E.2d 773, 782 (2020) (reversing denial of 12(b)(6) where Circuit Court applied notice pleading standard, rather than the required heightened pleading standard).

Here, the Circuit Court correctly analyzed Plaintiff's Complaint under the required heightened pleading standard when rendering its decision on the Defendants' Motion to Dismiss. The Circuit Court waded through the allegations, accepting as true the factual allegations, and exercising its discretion to ignore the conclusory assertions. J.A.126-136. The Circuit Court recounted the facts as pleaded by Plaintiff and determined that as pleaded, the allegations did not overcome the Defendants' entitlement to qualified immunity, statutory immunity, and the protections of the Wrongful Conduct Statute. Id.

Of the paragraphs cited in Plaintiff's brief, only the first half of paragraph 13 relates to facts. Brief, at p. 4. The remaining paragraphs are nothing more than legal conclusions

masquerading as facts, which the Circuit Court was at liberty to ignore. A complaint must contain factual allegations supporting such conclusory assertions. State ex rel. WV Attorney General, Medicaid Fraud Control Unit v. Ballard, 249 W.Va. 304, 895 S.E.2d 159, 178-179 (2023). Plaintiff's Complaint and Amended Complaint were replete with conclusory assertions without factual allegations to support them. J.A.1-5; J.A.94-98. The Circuit Court properly determined that Plaintiff had failed to plead sufficient facts to overcome the Defendants' immunity, as well as application of the Wrongful Conduct Statute. J.A.126-136. Accordingly, the Circuit Court did not err in dismissing Plaintiff's Amended Complaint and the dismissal should be affirmed.

B. The Circuit Court Correctly Found that Deputy Raines was Entitled to Qualified Immunity on Plaintiff's Federal Claims (Assignment of Error Nos. 3, 4, and 5)

The Circuit Court did not commit error when it determined that Deputy Raines was entitled to qualified immunity when it found that Plaintiff had not alleged a violation of a clearly established constitutional right. As such, the decision below should be affirmed.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (*quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments [and] protects 'all but the plainly incompetent or those who knowingly violate the law.'" Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (*quoting* Malley v. Briggs, 475 U.S. 335, 341 (1986)).

Qualified immunity analysis typically 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 (2001); West v. Murphy, 771 F.3d 209, 213 (4th Cir. 2014) (*quoting* Pearson, 555 U.S. at 232).

Plaintiff purported to assert two federal theories—an excessive force claim under the Fourth Amendment, and a substantive due process claim under the Fourteenth Amendment. J.A.4; J.A.97. However, the Amendments apply separately, not in tandem, especially in situations in which the claimed basis involves an officer's use of an automobile. Further, the Circuit Court considered and rejected both theories in its order, finding that Plaintiff has failed to allege sufficient facts to establish either theory. J.A.133-136. That is, the Circuit Court resolved the qualified immunity question on the first prong—whether Plaintiff had alleged a violation of a constitutional right; not the issue of whether the law was clearly established.[2] Id.

1. Fourth Amendment

In the Fourth Amendment context, a seizure occurs where an officer exhibits a "show of authority" and the person submits to that assertion of authority, such that he is brought under the officer's control. California v. Hodari D., 499 U.S. 621, 626 (1991). A Fourth Amendment seizure "requires the use of force *with intent to restrain*. Accidental force will not qualify… Nor will force intentionally applied for some other purpose satisfy this rule." Torres v. Madrid, 592 U.S. 306, 317 (2021) (emphasis in original) (internal citation omitted). That is, a person is not "seized" pursuant to the Fourth Amendment unless a law enforcement officer "has in some way restrained the liberty of a citizen." United States v. Jones, 678 F.3d 293, 299 (4th Cir. 2012) (*quoting* Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968)).

The Circuit Court determined that Deputy Raines was entitled to qualified immunity because it found that Plaintiff had failed to allege facts establishing a Fourth Amendment violation. J.A.133-134. While the Amended Complaint asserts (in conclusory fashion) that Deputy Raines

[2] Plaintiff's brief argues both prongs, but the Circuit Court only addressed the first—whether the facts, as asserted, alleged a violation of a constitutional right. J.A.133-136.

intentionally crashed into Plaintiff, J.A.97, it contains no facts to support an inference or claim that he did so with an intent to seize Plaintiff. J.A.94-98. Plaintiff does not allege that he was being pursued by Deputy Raines or was otherwise subject to a Fourth Amendment seizure or attempted seizure. Id. Nor could he, as "no Fourth Amendment seizure would take place where a pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit, but accidentally stopped the suspect by crashing into him." County of Sacramento v. Lewis, 523 U.S. 833, 844 (1998) (citations and quotation marks omitted).

Where immunities are implicated, heightened pleading standards are required. Marple, 236 W.Va. at 660, 783 S.E.2d at 81; Hutchison, 198 W.Va. at 147-148, 479 S.E.2d at 657-658. To overcome Deputy Raines's qualified immunity, Plaintiff was required to plead sufficient facts establishing the violation of a clearly established constitutional right. Id. Instead, Plaintiff's complaint establishes nothing more than a simple automobile accident and "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." Lewis, 523 U. S. at 849.

In his brief, Plaintiff now asserts that Deputy Raines violated the Fourth Amendment through the "use of excessive force during the course of an arrest[.]" Brief, at p. 5. However, the Amended Complaint contains no allegations that Deputy Raines seized Plaintiff or placed him in custody after the crash. J.A.94-98. Rather, the Amended Complaint details an automobile crash. Id. Plaintiff cannot re-write his theory on appeal.

Additionally, when evaluating an excessive force claim, the Court should determine whether the force applied was "objectively reasonable in light of the facts and circumstances confronting [the officer]" at the time. Smith v. Ray, 781 F.3d 95, 101 (4th Cir. 2015) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)). The objective reasonableness standard requires the

Court to consider "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396 (citation omitted). Indeed, "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Id. at 397. Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id.; Smith v. Murphy, 634 Fed.Appx 914, 916 (4th Cir. 2015).

The Circuit Court determined it did not need to address whether the use of force was constitutionally reasonable because it found that the Amended Complaint did not allege a Fourth Amendment excessive force claim. J.A.133-134.

Accordingly, because the Circuit Court correctly determined that Plaintiff had failed to allege sufficient facts establishing a Fourth Amendment excessive force claim, its decision that Deputy Raines was entitled to qualified immunity was patently correct and should be affirmed.

2. Fourteenth Amendment

The Circuit Court likewise correctly determined that Deputy Raines was entitled to qualified immunity under Plaintiff's Fourteenth Amendment substantive due process theory.

To bring a Fourteenth Amendment substantive due process claim, a plaintiff must allege facts showing that a defendant's behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Dean v. McKinney, 976 F.3d 407, 413 (4th Cir. 2020) (citations omitted). That is because "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." Lewis, 523 U.S. at 848. Rather, the "touchstone" of due process is the "protection of the individual against arbitrary action of government." Id. at 845. The Supreme Court has "repeatedly

emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense." Id. at 846 (quotation marks omitted). Accordingly, only abuse that "shocks the conscience" is cognizable under the Due Process Clause. Id.

In Dean, the Fourth Circuit found that the Lewis Court had "described a 'culpability spectrum' along which behavior may support a substantive due process claim." Dean, 976 F.3d at 414 (*quoting* Lewis, 523 U.S. at 848-849). One end of the spectrum is an "intent to harm" standard which is "conduct intended to injure [that is] in some way unjustifiable by any government interest[,]" while the other is "negligently inflicted harm [which] is categorically beneath the threshold of constitutional due process" conduct. Id. (citation omitted). Lying between the two extremes is deliberate indifference. Id.

Plaintiff hedges claiming that either "intent to harm" or "deliberate indifference" standard, as opposed to the negligence standard, applies. Brief, at p. 6. For good reason, Plaintiff cannot premise a constitutional tort claim upon negligence. Lewis, 523 U.S. at 849. Yet, that is precisely the facts alleged in the Amended Complaint. J.A.94-98. The Amended Complaint is replete with allegations sounding in negligence. Id. It is not until Count IV that Plaintiff reverses course to allege in conclusory fashion that Deputy Raines acted intentionally. J.A.97-98.

In any event, even assuming Plaintiff is correct that either "intent to harm" or "deliberate indifference" standard should apply, the Circuit Court correctly found that Plaintiff's Amended Complaint failed to allege sufficient facts under either standard. J.A.135-136.

The Dean Court noted that the "intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation." Dean, 976 F.3d at 414 (citations omitted). In Lewis, the Supreme Court concluded that the intent to harm standard controls when an officer is involved in a high-speed chase because

the officer must make instantaneous judgments with little or no opportunity to reflect or deliberate. Lewis, 523 U.S. at 846.

On the other hand, the deliberate indifference standard "is sensibly employed only when actual deliberation is practical." Dean, 976 F.3d at 415 (citations omitted). The deliberate indifference standard is only employed where the defendant has the "luxury ... of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." Id. (*quoting* Lewis, 523 U.S. at 853). The "deliberate indifference" standard imposes liability where the evidence shows (1) the officer subjectively recognized a substantial risk of harm, and (2) the officer subjectively recognized that his actions were inappropriate in light of that risk. Id. at 416 (*citing* Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 303 (4th Cir. 2004)).

Plaintiff's Amended Complaint fails as it alleges no facts supporting culpability under either theory. J.A.94-98. Plaintiff alleged that he was driving his automobile in Calhoun County, while Deputy Raines was driving in the opposite direction and there was an automobile crash. J.A.94-95. That is the extent of the factual allegations. While the Amended Complaint asserts (in conclusory fashion) that Deputy Raines intentionally crashed into Plaintiff, J.A.97, there are no facts alleged to support that conclusion. J.A.94-98.

Nor does the Amended Complaint allege facts establishing that Deputy Raines had the time to deliberate on his actions. J.A.94-98. The Amended Complaint contains no facts detailing the manner in which Deputy Raines was driving. Id. There are no factual allegations that he was speeding, that he was operating his cruiser in a reckless manner, or otherwise placing anyone at an unreasonable risk. Id.

Where immunities are implicated, heightened pleading standards are required. Marple, 236 W.Va. at 660, 783 S.E.2d at 81; Hutchison, 198 W.Va. at 147-148, 479 S.E.2d at 657-658. To overcome Deputy Raines's qualified immunity, Plaintiff was required to plead sufficient facts establishing the violation of a clearly established constitutional right. Id. Instead, Plaintiff's complaint establishes nothing more than a simple automobile accident and "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." Lewis, 523 U. S. at 849.

The Circuit Court agreed, finding that Plaintiff had failed to allege insufficient facts to assert a Fourteenth Amendment Due Process claim. J.A.135-136. Because the Circuit Court correctly determined that Plaintiff had failed to allege sufficient facts establishing a Fourteenth Amendment substantive due process claim, its decision that Deputy Raines was entitled to qualified immunity was patently correct and should be affirmed.

C. The Circuit Court Correctly Determined that Deputy Raines was Entitled to Statutory Immunity on Plaintiff's State Law Claims (Assignment of Error No. 6)

The Circuit Court was correct in holding that Deputy Raines was entitled to personal tort immunity under the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1, *et seq*., because Plaintiff failed to plead facts supporting his conclusory assertion of a statutory exception.

In general, the Tort Claims Act provides that an employee of a political subdivision is immune unless one of three circumstances is present: (1) the employee was acting outside the scope of his or her employment; (2) the employee acted maliciously, in bad faith, or in a wanton or reckless manner; or (3) liability is expressly imposed by another code provision. West Virginia Code § 29-12A-5(b). West Virginia Code § 29–12A–5(b) establishes "three statutory exceptions

to an employee's immunity..." Mallamo v. Town of Rivesville, 197 W.Va. 616, 621, 477 S.E.2d 525, 530 (1996).

Further, under Brooks v. City of Weirton, 202 W.Va. 246, 503 S.E.2d 814 (1998), an employee of a political subdivision can only be named as a party if one of the exceptions contained in West Virginia Code § 29-12A-5(b) applies. Syl. Pt. 5, Brooks, 202 W.Va. 246, 503 S.E.2d 814. However, to properly invoke an exception to immunity, a Plaintiff must meet the heightened pleading standard required by Hutchison, by pleading sufficient and specific factual allegations instead of using conclusory assertions. *See*, Ballard, 249 W.Va. 304, 895 S.E.2d at 177-178 (reversing denial of qualified immunity where the "complaint is filled with conclusory statements about [the officer's] actions being fraudulent, malicious, and oppressive"). The Ballard Court noted that in cases involving immunity, the heightened pleading standard requires more than mere conclusory assertions of the exception and that a Plaintiff must allege "specific facts" establishing the exception. Id. This is in line with a long history of cases requiring specific factual allegations to overcome immunities. Grove, 244 W.Va. at, 280, 852 S.E.2d at 780 ("in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." (citation omitted)); Marple, 236 W.Va. at 660, 783 S.E.2d at 81 (citation omitted); *see also*, Hutchison, 198 W.Va. at 147-148, 479 S.E.2d at 657-658 ("Public officials and 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." (emphasis added)).

Below, Plaintiff attempted to invoke only the second exception to Deputy Raines's personal tort immunity by claiming that his conduct was "wanton, willful, reckless and intentional…" J.A.3; J.A.96. However, like in Ballard, Plaintiff only invoked the exception in conclusory fashion and failed to plead "specific facts" establishing the exception. J.A.1-5. Nor did

Plaintiff seek to remedy such failure in his Amended Complaint, as it only substituted the word "crash" for "accident" in paragraphs 2, 3, 14, and 18. J.A.94-98. The Amended Complaint contains no "specific facts" supporting the mere conclusion that Deputy Raines acted in a "wanton, willful, reckless and intentional" manner. J.A.96. Nor did Plaintiff provide additional factual support in his reply in opposition to the motion to dismiss. J.A.65. Rather, Plaintiff stood by his previous pleading and only argued that his allegations were sufficient to withstand the motion to dismiss. Id. Plaintiff did not attempt to shore up his conclusory allegations with specific facts. Id. At bottom, Plaintiff did not provide the Circuit Court with specific information concerning the actions of Deputy Raines to bolster his conclusory assertions that Deputy Raines acted in a "wanton, willful, reckless and intentional" manner or was otherwise not entitled to personal tort immunity.

Because of this, the Circuit Court correctly concluded that Plaintiff has failed to allege specific facts to overcome Deputy Raines's personal tort immunity. J.A.132-133. It found that there were no factual allegations that Deputy Raines was acting manifestly outside the scope of his employment or that he acted in a wanton, willful, reckless, or intentional manner. Id.

Accordingly, because Plaintiff failed to allege specific facts establishing the exception to Deputy Raines personal tort immunity, the Circuit Court's determination that Deputy Raines was entitled to such immunity was correct and should be affirmed.

D. The Circuit Court Properly Applied the Wrongful Conduct Statute and Correctly Determined that the Wrongful Conduct Statute Precluded Plaintiff's State Law Claims Against the Defendants (Assignment of Error No. 7)

The Circuit Court correctly dismissed Plaintiff's state-law claims pursuant to the Wrongful Conduct Statute, which prohibits a plaintiff from prosecuting state law claims when his or her damages or injuries were proximately caused by the commission of a felony, the attempted

commission of a felony, or the fleeing from the commission or attempted commission of a felony. West Virginia Code § 55-7-13d(c).

The analysis of whether the Wrongful Conduct Statute bars a plaintiff's claim requires that a court evaluate two issues: (1) whether the plaintiff's damages arise out of his or her commission, attempted commission, or flight from the commission or attempted commission of a felony; and (2) whether the plaintiff's damages were suffered as "a proximate result" of his or her commission, attempted commission, or flight from the commission or attempted commission of a felony. West Virginia Code § 55-7-13d(c).

That is precisely the analysis the Circuit Court applied. J.A.133. The Circuit Court took judicial notice of Plaintiff's criminal records, which established that Plaintiff was convicted of Driving While Revoked for DUI (Third Offense) for the same incident for which he brought suit. J.A.133; J.A.136; JA.29-30; JA.32-34; J.A.36-37. Because that conviction was third offense, it was a felony. West Virginia Code § 17b-4-3(b). That felony conviction established the first element of the Wrongful Conduct defense. West Virginia Code § 55-7-13d(c).

Thus, all that was left for the Circuit Court was to determine whether Plaintiff's injuries and damages were "suffered as a proximate result" of his commission of a felony. West Virginia Code § 55-7-13d(c); West Virginia Code § 55-7-13d(d). The Legislature has commanded that a court make the determination as a "matter of law." West Virginia Code § 55-7-13d(d). If the court determines as matter of law, that the injuries and damages were "suffered as a proximate result" of a plaintiff's felonious conduct, "the claim shall be dismissed[.]" Id.

Plaintiff devotes a half-page of his brief concerning the Circuit Court's application of the Wrongful Conduct Statute. Brief, at p. 9. And, like below, he argues that Deputy Raines was the

sole proximate cause of the crash. Id. Notably, earlier in his brief, Plaintiff conceded that he sustained injuries as a result of the crash. Id. at p. 5, 6.

In Sanger v. Dodrill, 675 F.Supp.3d 368 (S.D.W.Va. 2023), the district court applied the Wrongful Conduct Statute in a motion to dismiss. In Sanger, the plaintiff sustained serious injuries after wrecking his motorcycle while attempting to flee from a traffic stop. Id. at 641. The defendants sought to apply the wrongful conduct rule to plaintiff's state law claims. Id. at 644. The district court determined that § 55-7-13d(c) required dismissal of the state law claims even though it is an affirmative defense because the facts establishing the defense were evident from the complaint. Id. The district court noted that plaintiff's fleeing fell within the felony fleeing statute and that the crash and subsequent injuries were proximately caused by that flight. Id. The same reasoning applies here.

The Wrongful Conduct Statute requires only that a defendant establish that the plaintiff's damages were suffered as a "proximate result" of his felonious conduct. West Virginia Code § 55-7-13d(c); West Virginia Code § 55-7-13d(d). Plaintiff would not have sustained any injuries but for feloniously violating the law by operating a motor vehicle when his privilege to do so had been revoked. That is, had Plaintiff not been committing the felony offense of Driving Revoked for DUI (Third Offense), he would not have been in a position to be injured as a result of the automobile accident at all.

As in Sanger, where the district court determined that the plaintiff's injuries were the proximate result of his attempted commission or flight from the attempted commission of a felony, the Circuit Court found, as a matter of law, that Plaintiff's injuries proximately resulted from his commission of a felony. J.A.133 Because of this finding, the Circuit Court was required to and did conclude that the Wrongful Conduct Statute precluded a Plaintiff from recovering for his injuries or damages that are a proximate result of the commission of a felony.

Accordingly, the Circuit Court's determination that the Wrongful Conduct Statute applied to Plaintiff's state-law claims was correct and should be affirmed.

E. The Circuit Court Properly Dismissed the State Law Claims Against the Calhoun County Commission Because the County Commission is Entitled to Statutory Immunity (Assignment of Error No. 8)

Plaintiff claims that the Circuit Court erred in finding that the Calhoun County Commission was entitled to immunity under the Tort Claims Act. Brief, at p. 9-11. Plaintiff asserts that the Circuit Court should have found that liability could be imposed on the County Commission solely based upon his reference to West Virginia Code § 29-12A-4(c)(2). Id. Plaintiff does not appreciate the interplay between the liability-creating provisions, and the immunity granting provisions of the Tort Claims Act.

1. Overview of the Tort Claims Act

The Tort Claims Act provides

> Except as provided in subsection (c) of this section, 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….

West Virginia Code § 29-12A-4(b)(1). Under this provision a political subdivision is "immune generally" from all causes of action. Randall v. Fairmont City Police Department, 186 W.Va. 336, 341, 412 S.E.2d 737, 742 (1991); *see also*, Zirkle v. Elkins Road Public Service District, 221 W.Va. 409, 414, 655 S.E.2d 155, 160 (2007) (noting that West Virginia Code § 29-12A-4(b)(1) is a "general grant of immunity" to political subdivisions); State ex rel. Grant County Commission v. Nelson, 244 W.Va. 649, 660, 856 S.E.2d 608, 619 (2021) (same).

But that general grant of immunity is subject to the liability-creating provisions in West Virginia Code § 29-12A-4(c). *See*, Randall, 186 W.Va. at 341, 412 S.E.2d at 742; Edward S. v.

Raleigh County Housing Authority, 248 W.Va. 458, 464, 889 S.E.2d 31, 37 (2023). Only negligence claims are permitted against political subdivisions. Zirkle, 221 W.Va. at 414, 655 S.E.2d at 160 ("Only claims of negligence specified in W.Va.Code [§] 29–12A–4(c) can survive immunity from liability under the general grant of immunity in W.Va.Code [§] 29–12A–4(b)(1).").

Yet, that does not end the analysis because the liability-creating provisions in West Virginia Code § 29-12A-4(c) are made expressly subject to additional immunity-granting carve-outs in West Virginia Code §§ 29-12A-5, and 29-12A-6. Albert v. City of Wheeling, 238 W.Va. 129, 132, 792 S.E.2d 628, 631 (2016) (noting that "subsection 4(c) begins with the disclaimer that the subsequent grants of liability are expressly made [s]ubject to section five [§ 29-12A-5] and six [§ 29-12A-6].'"); Hose v. Berkeley Cty. Planning Comm'n, 194 W.Va. 515, 521, 460 S.E.2d 761, 767 (1995) (same); Jones v. Logan Cnty. Bd. of Educ., 247 W.Va. 463, 881 S.E.2d 374, 381 (2022) ("Political subdivisions' liability for the negligence of their employees under § 29-12A-4(c) is expressly limited by § 29-12A-5.").

> In other words, while a political subdivision may face liability for [circumstances falling within West Virginia Code § 29-12A-4(c)], the political subdivision is immune from liability under the Act if the injured party's loss or claim results from any one of the seventeen specific types of acts or omissions listed in West Virginia Code § 29-12A-5(a).

Edward S., 248 W.Va. at 464, 889 S.E.2d at 37. Thus, analysis of whether a political subdivision is entitled to immunity is a multi-step process. A court begins with the understanding that the political subdivision is generally immune under West Virginia Code § 29-12A-4(b)(1). The court next determines whether the cause of action fits within one or more of permissible negligence-based, liability-creating provisions in West Virginia Code § 29-12A-4(c). If the cause of action falls outside of those liability-creating provisions, the political subdivision remains immune. If, however, the cause of action does fall within one or more of the liability-creating provisions, the

court then determines whether one or more of the seventeen additional immunities contained in West Virginia Code § 29-12A-5(a) apply.

Plaintiff's analysis falters at the last step. Under Plaintiff's theory, a political subdivision is not immune if a cause of action arises under one or more of the liability-creating provisions, regardless of whether an additional immunity applies. Brief, at p. 9. But the final step of determining whether an additional immunity applies is required because the liability-creating provisions are expressly subject to such additional immunities.

2. The Circuit Court correctly determined that the Calhoun County Commission is Entitled to Immunity under the Tort Claims Act

As noted above, the Tort Claims Act permits certain negligence claims against political subdivisions, such as the negligent operation of vehicles by an employee of a political subdivision when such employee is acting within the scope of his or her employment or authority or for the general negligence of a political subdivision's employees who are acting within the scope of their employment. West Virginia Code § 29-12A-4(c)(1); 29-12A-4(c)(2). However, all such claims are still expressly subject to certain immunities contained within West Virginia Code §§ 29-12A-5 and 29-12A-6.

The Tort Claims Act restricts the liability of a political subdivision and its employees to limited circumstances of negligence. West Virginia Code § 29-12A-4(c). Because of this, a political subdivision cannot be held liable (directly or vicariously) for the alleged intentional conduct of its employees. "[C]laims of intentional and malicious acts are included in the general grant of immunity in W. Va. Code §29-12A-4(b)(1). Only claims of negligence specified in W. Va. Code §29-12A-4(c) can survive immunity from liability under the general grant of immunity in W. VA. Code § 29-12A-4(b)(1)." Zirkle, 221 W.Va. at 414, 655 S.E.2d at 160; Mallamo, 197 W.Va. at 624, 477 S.E.2d at 534 (finding town had no liability where police chief allegedly

committed conspiracy because conspiracy is an intentional act, not a negligent one); Nelson, 244 W.Va. at 659-660, 856 S.E.2d at 618-619 (rejecting claim that a county commission could be held vicariously liable for intentional conduct). So too are claims that an employee has acted in a willful or wanton manner as the Supreme Court has explained that the type of conduct that may be wanton or reckless is akin to an "intentional[ ]" act done in disregard of a known or obvious risk so great as to make it "highly probable" that harm would follow. Daugherty v. McDowell County Commission, 2022 WL 17444572, at *3 (2022) (memorandum decision); Holstein v. Massey, 200 W.Va. 775, 788, 490 S.E.2d 864, 877 (1997) (citation omitted). That is, claims of wanton or reckless conduct are claims of intentional conduct. Id.

Plaintiff contends that a jury should determine whether Deputy Raines acted negligently or intentionally. Brief, at p. 11. But the Circuit Court correctly determined that Plaintiff cannot maintain claims against the Calhoun County Commission based upon the alleged intentional, wanton, or reckless acts of Deputy Raines. J.A.132.. Plaintiff offers nothing to dispute the Circuit Court's decision and does not appear to address the black letter law that a political subdivision cannot be held liable for the intentional, wanton, or reckless acts of its employees. Brief, at p. 10-11. As such, Plaintiff should be deemed to have waived challenge to the Circuit Court's ruling as to that ground.

Moreover, Plaintiff's negligence and vicarious liability claims against the Calhoun County Commission fall within the immunity provided by West Virginia 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, 186 W.Va. 336, 412 S.E.2d 737; Syl. Pt. 4, Albert, 238 W.Va. 129, 792 S.E.2d 628. The Albert Court held that

> 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.

Syl. Pt. 4, Albert, 238 W.Va. 129, 792 S.E.2d 628. The Albert Court further held that

> Because any potential liability set forth in [§ 29-12A-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 [or police] protection or the method of providing fire [or police] protection

Albert, 238 W.Va. at 132, 792 S.E.2d at 631 (alteration supplied). Several federal courts have consistently recognized that Albert applies to claims involving negligence of police officers because police and fire protection are contained in West Virginia Code § 29-12A-5(a)(5). *See, e.g.,* Taylor v. Clay County Sheriff's Dept., 2020 WL 890247, *5-6 (S.D.W.Va. 2020) (holding that Albert immunizes political subdivisions from the negligent actions of their employees in providing police protection); Dixon v. City of St. Albans, 2020 WL 6702037, at *3 (S.D.W.Va. 2020) ("the immunity for employee negligence is not limited to policy questions … but extends to all police and fire protection related employee negligence."); Daniels v. Wayne County, 2020 WL 2543298, at *4 (S.D.W.Va. 2020) ("Albert immunizes political subdivisions from the negligent actions of their employees in providing police protection."); Means v. Peterson, 2020 WL 6702036, at *3 (S.D.W.Va. 2020); McHenry v. City of Dunbar/Dunbar Police Department, 2020 WL 3854084, at *3 (S.D.W.Va. 2020) (noting that Albert "has been extended in this district to acts in furtherance of the method of providing police protection."); Fields v. King, 576 F.Supp.3d 392, 402-404

(S.D.W.Va. 2021); Peterson v. Berkeley County Sheriff's Department, 2023 WL 8935058, at *3 (M.D.Pa. 2023) (holding that the "subsection allowing liability for an employee's negligent acts performed while in the scope of their employment, does not apply when the loss or claim results from the method of providing police or law enforcement protection.").

Plaintiff's claims ignore these cases, relying instead upon Syl. Pts. 3 and 4 of Beckley v. Crabtree, 189 W.Va. 94, 428 S.E.2d 317 (1993), and claiming that Albert is limited solely to claims involving fire protection. Brief, at p. 10-11. Plaintiff is incorrect.

The syllabus points in Beckley correspond to the same syllabus points in Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002), which Albert overruled. *See*, Albert, 238 W.Va. at 138, 792 S.E.2d at 637 (Davis, J. *dissenting*) (noting that the Albert majority "implicitly overruled" Syllabus Points 3 and 4 of Smith). That implicit overruling was recognized by the Southern District of West Virginia in Fields, which held that "Albert explicitly overruled Smith it is entirety because it could not be reconciled with the Supreme Court of Appeals' precedent on the issue of statutory immunity under the Tort Claims Act." Fields, 576 F.Supp.3d at 402-403 (finding argument that Albert left Syllabus Points 3 and 4 of Smith intact as "meritless"); *see also,* Peterson, 2023 WL 8935058, at *4 (same).

Plaintiff attempts to distinguish Albert reasoning that the "maintenance of fire hydrants [was] an integral component of fire protection services[,]" and therefore "the municipality's policy of inspecting and maintaining fire hydrants was directly related to the city's method of providing fire protection." Brief, at p. 10-11. The Albert court rejected the plaintiff's attempt to "creative[ly] plead" the claim as falling within a negligent inspection or maintenance framework. Albert, 238 W.Va. at 134-135, 792 S.E.2d at 633-634. And Plaintiff's own case, Brown v. Mason County Commission, 2019 WL 6654124 (S.D.W.Va. 2019), disputes the argument he makes because the District Court

held that the immunity applied to entities not covered by the Albert decision. Id. at *13 (finding that West Virginia Code § 29-12A-5(a)(5) applied to a county EMS service).

Plaintiff alleged that Deputy Raines was acting in his law enforcement capacity and was acting within the scope of his employment while operating a police cruiser on the date of the incident. J.A.1-5; J.A.94-98. The Circuit Court accepted that allegation and concluded that the Calhoun County Commission was entitled to immunity under the Tort Claims Act's police protection immunity. J.A.131-132. The Circuit Court did not tread new ground; rather, it determined that the police protection immunity applied to Plaintiff's negligence and vicarious liability claims regardless of whether Deputy Raines acted negligently or negligently operated the vehicle. Id. That is precisely what Albert holds. Syl. Pt. 4, Albert, 238 W.Va. 129, 792 S.E.2d 628.

Thus, the Circuit Court's determination that the Calhoun County Commission was entitled to immunity was correct and should be affirmed.

V. CONCLUSION

The Circuit Court properly granted the Defendants' *Motion to Dismiss* and correctly found that Plaintiff's Complaint failed to state claims upon which relief could be granted and that each of Plaintiff's claims failed due to qualified immunity, state statutory immunity, and the Wrongful Conduct Statute. For all the reasons set forth above, this Honorable Court should affirm the ruling of the Circuit Court below.

Respectfully submitted,

WILEY TYLER RAINES and
CALHOUN COUNTY COMMISSION,
Defendants Below, Respondents.

By Counsel,

/s/ Drannon L. Adkins
Drannon L. Adkins, WVSB No. 11384
Christopher T. Ferro, WVSB No. 10507

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545

No. 24-ICA-193

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

GEORGE NICHOLAS PARSONS,
Plaintiff Below, Petitioner,

v.

WILEY TYLER RAINES and THE CALHOUN COUNTY COMMISSION,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendants does hereby certify on this **23rd** day of **September 2024**, that a true copy of the foregoing ***"BRIEF OF RESPONDENTS"*** was served upon counsel of record via File & Serve Xpress:

Paul M. Stroebel, Esq.
Stroebel & Stroebel, PLLC
405 Capitol Street, Suite 102
PO Box 2582
Charleston, WV 25329
Counsel for Plaintiff

/s/ *Drannon L. Adkins*
Drannon L. Adkins, WVSB No. 11384
Christopher T. Ferro, WVSB No. 10507

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545