

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 24-670**

**TIM SECRIST and WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN  
RESOURCES,**  
*Defendants Below, Petitioners,*

**v.**

**TAMMY WATKINS (formerly Mounts), Administratrix of the Estate of William  
McKinsey May,**  
*Plaintiff Below, Respondent.*

---

Honorable Kelly Codispoti  
Circuit Court of Logan County  
Civil Action No. 22-C-96

---

**PETITIONERS' BRIEF**

---

Mark C. Dean (WVSB No. 12017)  
Brittany L. O'Saile (WVSB No. 14296)  
Steptoe & Johnson PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588  
Telephone: (304) 353-8000  
[Mark.Dean@steptoe-johnson.com](mailto:Mark.Dean@steptoe-johnson.com)  
[Brittany.OSaile@steptoe-johnson.com](mailto:Brittany.OSaile@steptoe-johnson.com)  
*Counsel for Petitioners*

## TABLE OF CONTENTS

|                                                                                                                                                                    |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| ASSIGNMENTS OF ERROR .....                                                                                                                                         | 1  |
| STATEMENT OF THE CASE.....                                                                                                                                         | 1  |
| SUMMARY OF THE ARGUMENT .....                                                                                                                                      | 6  |
| STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....                                                                                                               | 7  |
| STANDARD OF REVIEW .....                                                                                                                                           | 8  |
| ARGUMENT .....                                                                                                                                                     | 9  |
| I.    The Circuit Court committed reversible error in concluding that Mr. Secrist is not<br>entitled to qualified immunity on Ms. Watkins’ claim against him. .... | 11 |
| II.   The Circuit Court committed reversible error in concluding that DHHR is not entitled to<br>qualified immunity on Ms. Watkins’ claim against it. ....         | 15 |
| CONCLUSION.....                                                                                                                                                    | 19 |

## TABLE OF AUTHORITIES

### Cases

|                                                                                                                                          |            |
|------------------------------------------------------------------------------------------------------------------------------------------|------------|
| <i>Clark v. Dunn</i> , 195 W. Va. 272, 465 S.E.2d 374 (1995) .....                                                                       | 16         |
| <i>Crouch v. Gillespie</i> , 240 W. Va. 229, 809 S.E.2d 699 (2018).....                                                                  | 12, 13, 14 |
| <i>Hutchison v. City of Huntington</i> , 198 W. Va. 139, 479 S.E.2d 649 (1996).....                                                      | passim     |
| <i>John W. Lodge Distr. Co. v. Texaco, Inc.</i> , 161 W. Va. 603, 245 S.E.2d 157 (1978) .....                                            | 1          |
| <i>Markham v. W. Va. Dep’t of Health &amp; Hum. Res.</i> , No. 19-0163, 2020 WL 2735435 (W. Va. May 26, 2020) (memorandum decision)..... | 6, 12      |
| <i>Martin v. Saint Mary’s Dep’t of Soc. Servs.</i> , 346 F.3d 502 (4th Cir. 2003) .....                                                  | 13         |
| <i>Parkulo v. W. Va. Bd. of Prob. &amp; Parole</i> , 199 W. Va. 161, 483 S.E.2d 507 (1996).....                                          | 13         |
| <i>W. Va. State Police v. Hughes</i> , 238 W. Va. 406, 796 S.E.2d 193, (2017).....                                                       | 6, 12      |
| <i>W. Va. Bd. of Ed. v. Marple</i> , 236 W. Va. 654, 783 S.E.2d 75 (2015) .....                                                          | 8, 11, 17  |
| <i>W. Va. Dep’t of Health &amp; Hum. Res. v. Payne</i> , 231 W. Va. 563, 746 S.E.2d 554 (2013).....                                      | 17         |
| <i>W. Va. Div. of Corrs. &amp; Rehab. v. Robbins</i> , 248 W. Va. 515, 889 S.E.2d 88 (2023) .....                                        | 9          |
| <i>W. Va. State Police v. J.H.</i> , 244 W. Va. 720, 856 S.E.2d 679 (2021) .....                                                         | 7, 8       |
| <i>W. Va. Reg’l Jail &amp; Corr. Facility Auth. v. A.B.</i> , 234 W. Va. 492, 766 S.E.2d 751 (2014)..                                    | 12, 13, 16 |
| <i>White ex rel. White v. Chambliss</i> , 112 F.3d 731, 736 (4th Cir. 1997).....                                                         | 6, 12      |

### Statutes

|                              |              |
|------------------------------|--------------|
| W. Va. Code § 9-6-1(5) ..... | 1, 6, 10     |
| W. Va. Code § 9-6-2 .....    | 17           |
| W. Va. Code § 9-6-2(d) ..... | 1, 5, 14, 15 |

## ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law in denying Petitioner West Virginia Department of Health and Human Resources (“DHHR”)’s Motion to Dismiss premised upon DHHR’s qualified immunity from claims such as Respondent’s.

2. The Circuit Court erred in denying Petitioner Tim Secrist’s Motion to Dismiss by concluding that the questions of whether Mr. Secrist’s purported actions “were ministerial functions which are violative of statutory duties pursuant to W. Va. Code § 9-6-14” or “willful, wanton, and/or intentional [such that they] are excepted from immunity pursuant to W. Va. Code § 9-6-2(d)[,]” are questions of fact requiring jury determination rather than determining that the threshold question of qualified immunity is a legal one for the Court.

## STATEMENT OF THE CASE<sup>1</sup>

“Defendant West Virginia Department of Health and Human Resources is an insured state agency with its principal place of business in Charleston, Kanawha County, West Virginia, and it maintains an Adult Protective Service office in Logan County, West Virginia.”<sup>2</sup> “At all times [alleged in Ms. Watkins’ Complaint], defendant Tim Secrist was an Adult Protective Service[s] (APS) worker acting as an agent, servant and employee of defendant West Virginia Department of Health and Human Resources (WV DHHR).”<sup>3</sup> William McKinsey May “was a person who

---

<sup>1</sup> Because the instant Order on appeal is an Order denying WVDHHR’s and Tim Secrist’s Motion to Dismiss, the recitation of facts below stems directly from Ms. Watkins’ Complaint and the pleadings filed in response. The court ordinarily assumes the allegations stated in the complaint to be true and construes the pleading in the light most favorable to the plaintiff. *See John W. Lodge Distr. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604–05, 245 S.E.2d 157, 158 (1978).

<sup>2</sup> Pl.’s Compl. at ¶ 5 [J.A. 00016].

<sup>3</sup> *Id.* at ¶ 6 [J.A. 00016].

suffered from mental retardation and, as such, was a ‘vulnerable adult’ as defined in West Virginia Code § 9-6-1(5).”<sup>4</sup>

“On or about April 16, 2020, a referral was made to the Adult Protective Services office in Logan, West Virginia, regarding allegations of abuse/neglect involving the decedent, William McKinsey May.”<sup>5</sup> “On April 23, 2020, Defendant Tim Secrist conducted a face-to-face interview with the decedent, the decedent’s sister, Candus May, and the sister’s boyfriend, Charles Adkins and made a report thereof as a result of his duties as an APS worker.”<sup>6</sup> During his initial visit, Mr. Secrist was “accompanied by Logan County Sheriff’s Deputy Sean Jarrells . . .” and made numerous findings related to the home’s condition.<sup>7</sup> Mr. Secrist also spoke directly to Mr. May, who “was alert and oriented . . .” and “inspected [Mr.] May’s feet as they had been reported to be black likely resulting from a medical condition . . . .”<sup>8</sup> Mr. May’s feet were not black at the time of Mr. Secrist’s inspection.<sup>9</sup> Mr. Secrist “noted that [Mr.] May was not overly thin, though he noted that he could use a extra few pounds.”<sup>10</sup> Mr. Secrist then made other findings related to the home, including notations regarding the toilet and water outlets.<sup>11</sup> At the end of Mr. Secrist’s initial visit, Mr. May’s sister and caretaker, Candus May, asked Mr. Secrist if he was going to remove Mr. May from the home.<sup>12</sup> Mr. Secrist responded that “he was unsure, but noted that some findings would have to be fixed rather soon in order to keep from removing [Mr. May] to another home.”<sup>13</sup>

---

<sup>4</sup> *Id.* at ¶ 9 [J.A. 00016].

<sup>5</sup> *Id.* at ¶ 11 [J.A. 00016].

<sup>6</sup> *Id.* at ¶ 12 [J.A. 00017].

<sup>7</sup> *See id.* at ¶¶ 13–23 [J.A. 00017–00018].

<sup>8</sup> *See id.* at ¶¶ 24–27 [J.A. 00018].

<sup>9</sup> *See id.* at ¶ 27 [J.A. 00018].

<sup>10</sup> *Id.* at ¶ 28 [J.A. 00018].

<sup>11</sup> *See id.* at ¶¶ 29–31 [J.A. 00018–00019].

<sup>12</sup> *See id.* at ¶ 32 [J.A. 00019].

<sup>13</sup> *See id.* at ¶ 33 [J.A. 00019].

Mr. Secrist then asked Ms. May about her income and obtained a telephone number for future contact.<sup>14</sup>

Later that same day, Mr. Secrist called Ms. May “and informed her that he did not want to remove [Mr.] May from the home though it was very close to being necessary.”<sup>15</sup> “In response, . . . Candus May informed [Mr.] Secrist that Appalachian Power was to install electrical service to the home on May 3, 2020.”<sup>16</sup> Mr. Secrist informed Ms. May “that he would be back to the home on May 4, 2020, to see if the electrical service was connected and the other issues corrected; if, however, the electrical service was not connected and the deficiencies [not] corrected, [Mr.] Secrist would start to get [Mr.] May to a safer place.”<sup>17</sup> Specifically, in addition to the electrical service, Mr. Secrist advised that “the kitchen/dining area where [Mr.] May’s recliner was located needed to be cleared so he could use his walker adequately[,]” “the hallway and back door needed cleared enough to allow the residents a safe escape from the home in case of fire and the clothes dryer blocking the toilet must be moved to allow everyone access to the toilet[,]” and the refrigerator [must] be working, be able to keep food cold, and must contain food when he returned.”<sup>18</sup>

On May 4, 2020, Mr. Secrist returned to the home and noted many improvements. Mr. Secrist observed “that steps had been added to the front porch, yet it contained no handrail[,]” “the kitchen area was more open on this visit and [Mr.] May was located in a bedroom off the kitchen[,]” “the bedroom was small but provided room to move around[,]” and “a mini-fridge had been purchased and contained food but the refrigerator was being run from a generator as the

---

<sup>14</sup> See *id.* at ¶ 34 [J.A. 00019].

<sup>15</sup> *Id.* at ¶ 35 [J.A. 00019].

<sup>16</sup> *Id.* at ¶ 36 [J.A. 00019].

<sup>17</sup> *Id.* at ¶ 37 [J.A. 00019].

<sup>18</sup> *Id.* at ¶¶ 38–40 [J.A. 00019–00020].

electrical service had yet to be connected.”<sup>19</sup> Due to the substantial improvements made inside and outside of the home, “[Mr.] Secrist noted that there did not appear to be a reason to remove [Mr.] May from the home at th[at] time . . . .”<sup>20</sup>

On May 20, 2020, Mr. Secrist again visited the home.<sup>21</sup> Mr. Secrist noted that “the home was ‘still a wreck’ due to remodeling and noted that the electrical service ‘still’ had not been connected to the home.”<sup>22</sup> On June 3, 2020, Mr. Secrist again telephoned Ms. May to discuss the status of electrical service, and she advised him that her boyfriend “Charles Adkins had gone to get wiring at Lowe’s to connect the power as they were speaking.”<sup>23</sup> Ms. May stated that she would contact Mr. Secrist “as soon as the electrical service had been connected.”<sup>24</sup> Based on these representations and the improvements previously made to the home, Mr. Secrist decided to “close[] the referral and [] not open an APS case” on or about June 30, 2020.<sup>25</sup>

Ms. Watkins (Plaintiff-below and Respondent herein) contends that due to “[Mr.] Secrist’s willful and wanton misconduct and/or intentional misconduct, [Mr.] May was left in the care of Candus May and Charles Adkins as a result of [Mr.] Secrist’s and/or [] WV DHHR’s failure to remove him, failure to refer the matter to the prosecuting attorney, and/or failure to seek court intervention.”<sup>26</sup> “[A]s a result, [Mr.] May endured severe injuries and trauma while remaining in the home that was the subject of the abuse/neglect complaint[,]” ultimately passing away on August 14, 2020.<sup>27</sup>

\* \* \*

---

<sup>19</sup> *Id.* at ¶¶ 42–45 [J.A. 00020].

<sup>20</sup> *Id.* at ¶ 46 [J.A. 00020].

<sup>21</sup> *Id.* at ¶ 48 [J.A. 00020].

<sup>22</sup> *Id.* at ¶ 50 [J.A. 00021].

<sup>23</sup> *See id.* at ¶¶ 53–54 [J.A. 00021].

<sup>24</sup> *See id.* at ¶ 55 [J.A. 00021].

<sup>25</sup> *See id.* at ¶ 57 [J.A. 00021].

<sup>26</sup> *Id.* at ¶ 63 [J.A. 00023].

<sup>27</sup> *See id.* at ¶¶ 64–66 [J.A. 00023].

Ms. Watkins’ Complaint summarily describes the essence of her claim in a single paragraph—“had [Mr.] Secrist and/or any other agent of [] WV DHHR removed [Mr.] May, referred the matter to the prosecuting attorney, or sought court intervention, [Mr.] May would not have been in the house nor would he have remained in the house wherein his lethal injuries occurred.”<sup>28</sup> Ms. Watkins challenges Mr. Secrist’s and DHHR’s, specifically Adult Protective Services (“APS”)’s discretionary decision to not remove Mr. May from his home after thorough investigations into a report of abuse and neglect. Ms. Watkins’ wrongful death claim against Mr. Secrist and DHHR is the quintessential type of claim to which qualified immunity applies. Accordingly, Mr. Secrist and DHHR filed Motions to Dismiss with the trial court on July 28, 2023.<sup>29</sup> Further briefing ensued, and the Court held a hearing on October 12, 2023.

On October 9, 2024, the trial court entered an “Integrated Order Granting Plaintiff’s Motion to Amend Complaint and Denying Defs.’ Mot. to Dismiss.”<sup>30</sup> The trial court’s Order overlooks the substantive arguments advanced by DHHR and asserts that, the questions of whether Mr. Secrist’s purported actions “were ministerial functions which are violative of statutory duties pursuant to W. Va. Code § 9-6-14” or “willful, wanton, and/or intentional [such that they] are excepted from immunity pursuant to W. Va. Code § 9-6-2(d)” are questions of fact requiring jury determination.<sup>31</sup> Thus, according to the Court, the question of whether Mr. Secrist is qualifiedly immune (and, presumably, whether DHHR is qualifiedly immune) from Ms. Watkins’ suit sits

---

<sup>28</sup> See *id.* at ¶ 62 [J.A. 00022].

<sup>29</sup> See Def. Tim. Secrist’s Mot. to Dismiss and to Strike & Def. DHHR’s Mot. to Dismiss and to Strike [J.A. 00034–00150 & J.A. 00152–00190, respectively].

<sup>30</sup> See “Integrated Order Granting Pl.’s Mot. to Am. Compl. and Denying Defs.’ Mot. to Dismiss” (Oct. 9, 2024) [J.A. 00001–00008].

<sup>31</sup> See *id.* at ¶¶ 21, 24 [J.A. 00005–00006].

with the jury, not the judge. Insofar as qualified immunity is a well-settled area of law intended as a complete bar from suit, Petitioners now challenge these determinations.

### SUMMARY OF THE ARGUMENT

At its core, qualified immunity shields government officials, agencies, and employees from “civil liability [for actions undertaken in their official capacities] so long as the actions do not violate a clearly established law or constitutional duty.” *W. Va. State Police v. Hughes*, 238 W. Va. 406, 411, 796 S.E.2d 193, 198 (2017). “Qualified immunity is broad and protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Id.* (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996)). As courts have long recognized in the case of child placement decisions, removal decisions “involve[] weighing professional opinions of child abuse against the obvious interests in maintaining the integrity of a household,” and result in a “tug and pull of competing concerns.” *White ex rel. White v. Chambliss*, 112 F.3d 731, 736 (4th Cir. 1997).

“Premature action by a social worker can disrupt the legitimate interest parents possess in raising and disciplining their children. On the other hand, a failure to act can leave a child defenseless in the face of physical abuse and brutality.” *Id.* The doctrine of qualified immunity recognizes this difficult and seemingly impossible position and affords such decisionmakers immunity to avoid “the course of public agencies . . . becom[ing] one of inaction, thus leaving children in abusive environments.” *Id.* These fundamental principles apply with equal force to removal decisions regarding “vulnerable adults,” such as Mr. May. *See* W. Va. Code § 9-6-1(5).<sup>32</sup>

---

<sup>32</sup> In fact, the Supreme Court of Appeals of West Virginia, when analyzing qualified immunity for an APS investigative decision, deemed the case “analogous to *Crouch*[.]” a case related to CPS workers. *See Markham v. W. Va. Dep’t of Health & Hum. Res.*, No. 19-0163, 2020 WL 2735435, at \*7 (W. Va. May 26, 2020) (memorandum decision).

“Because an objective of qualified immunity is to save specific individuals and agencies from suit and, when appropriate, from pre-trial discovery and litigation, deferring a ruling on qualified immunity acts as an effective denial of such protections.” *W. Va. State Police v. J.H.*, 244 W. Va. 720, 730–31, 856 S.E.2d 679, 689–690 (2021). “The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine,” and thus, is an issue ripe for a motion to dismiss. Syl. Pt. 1, *Hutchinson v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

In this case, the Circuit Court ruled that the questions of whether Mr. Secrist’s purported actions “were ministerial functions which are violative of statutory duties pursuant to W. Va. Code § 9-6-14” or “willful, wanton, and/or intentional [such that they] are excepted from immunity pursuant to W. Va. Code § 9-6-2(d)” are questions of fact requiring jury determination.<sup>33</sup> The Circuit Court further denied DHHR’s motion to dismiss without substantively addressing the arguments advanced by DHHR in support thereof. Insofar as Ms. Watkins’ allegations clearly implicate the doctrine of qualified immunity, this Court should reverse the Circuit Court’s decision and hold that both DHHR and Mr. Secrist are qualifiedly immune from Ms. Watkins’ suit.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument pursuant to Rule 19(a)(1) of the *West Virginia Rules of Appellate Procedure* is appropriate in this case, as this appeal involves an “assignment[ ] of error in the application of settled law”—namely, the doctrine of qualified immunity. Alternatively, to the extent that this appeal involves issues of fundamental public importance, Petitioners request oral argument pursuant to Rule 20 of the *West Virginia Rules of Appellate Procedure*. There is public interest in this appeal because the doctrine of qualified immunity provides immunity from suit. If state

---

<sup>33</sup> See “Integrated Order Granting Pl.’s Mot. to Am. Compl. and Denying Defs.’ Mot. to Dismiss” at ¶¶ 21, 24 [J.A. 00005–00006].

agencies and their respective employees must undergo discovery (or, as the subject Circuit Court Order concludes, a jury determination) prior to deciding whether qualified immunity applies, the doctrine and the reasons therefor are obviated.

Should the Court set this matter for oral argument, Petitioners submit that the ten (10) minutes of argument afforded under *W.Va. R. App. P.* 19(e) is sufficient. Insofar as “[a] memorandum decision reversing the decision of a circuit court should be issued in limited circumstances.[.]” and Petitioners are seeking a reversal of the Circuit Court’s Order denying their respective motions to dismiss, Petitioners do not anticipate resolution through Memorandum Decision.

### **STANDARD OF REVIEW**

A circuit court’s denial of a motion to dismiss based on qualified immunity is immediately appealable. *See* Syl. Pt. 1, *W. Va. Bd. of Ed. v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015). “The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.” Syl. Pt. 1, *Hutchinson v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

“When a party . . . assigns as error a circuit court’s denial of a motion to dismiss, the circuit court’s disposition of the motion to dismiss will be reviewed *de novo*.” Syl. Pt. 4, *W. Va. St. Police v. J.H.*, 244 W. Va. 720, 856 S.E.2d 679 (2021) (alteration in original) (internal quotation omitted). “*De novo* means that this Court ‘give[s] a new, complete and unqualified review to the parties’ arguments and the record before the circuit court’ under the same standard employed by the circuit court: ‘The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set

of facts in support of h[er] claim which would entitle h[er] to relief.” *W. Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W. Va. 515, 523, 889 S.E.2d 88, 96 (2023) (first quoting *Doe v. Logan Cnty. Bd. of Educ.*, 242 W. Va. 45, 48, 829 S.E.2d 45, 48 (2019); and then quoting Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)).

Under West Virginia law, immunities “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.” *Id.* at 523, 889 S.E.2d at 96 (quoting *Hutchinson*, 198 W. Va. at 148, 479 S.E.2d at 658). “A State agency or public official is denied that right irrevocably if required to try a claim from which the agency or official is immune; ‘[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.’” *Id.* at 523, 889 S.E.2d at 96 (quoting *Hutchinson*, 198 W. Va. at 148, 479 S.E.2d at 658). “Due to that strong public policy, [this Court] ha[s] advised that ‘[p]ublic officials . . . should be entitled to qualified immunity from suit . . . unless it is shown by specific allegations that the immunity does not apply.’” *Id.* at 523, 889 S.E.2d at 96 (quoting *Hutchinson*, 198 W. Va. at 147–48, 479 S.E.2d at 657–58). Only where “the information contained in the pleadings is sufficient to justify the case proceeding further [should] the early motion to dismiss [] be denied.” *Hutchinson*, 198 W. Va. at 150, 479 S.E.2d at 660.

## ARGUMENT

Ms. Watkins’ lawsuit asserts a wrongful death claim against Petitioners DHHR and Mr. Secrist.<sup>34</sup> In support of her claim, Ms. Watkins alleges the following:

---

<sup>34</sup> Pl.’s Compl. at ¶ 62 (“[H]ad Defendant Secrist and/or any other agent of Defendant WV DHHR removed [Mr.] May, referred the matter to the prosecuting attorney, or sought court intervention, [Mr.] May would not have been in the house nor would he have remained in the house wherein his lethal injuries were incurred.”); *see id.* at ¶ 66 (“[Mr.] May’s death, which occurred on August 14, 2020, was the proximate and/or direct result of Defendant Secrist’s willful and wanton misconduct and/or intentional misconduct . . .”) [J.A. 00022–00023].

- a. “Defendant West Virginia Department of Health and Human Resources is an insured state agency . . . and it maintains an Adult Protective Service office in Logan County, West Virginia.”<sup>35</sup>
- b. “At all times [] mentioned [in Ms. Watkins’ Complaint], defendant Tim Secrist was an Adult Protective Service[s] (APS) worker acting as an agent, servant, and employee of defendant West Virginia Department of Health and Human Resources (WV DHHR).”<sup>36</sup>
- c. Mr. May “was a person who suffered from mental retardation, and as such, was a ‘vulnerable adult’ as defined in W. Va. Code § 9-6-1(5).”<sup>37</sup>
- d. “On or about April 16, 2020, a referral was made to the Adult Protective Services office in Logan, West Virginia, regarding allegations of abuse/neglect involving the decedent, [Mr.] May.”<sup>38</sup>
- e. Thereafter, Mr. Secrist investigated the referral, conducted numerous house visits, and followed up with Mr. May’s caregiver, Candus May, via phone to observe the status of improvements to the home.<sup>39</sup>
- f. “Then, on or about June 30, 2020, . . . Defendant Secrist closed the referral and did not open an APS case.”<sup>40</sup>
- g. Mr. May later passed away on August 14, 2020, which Ms. Watkins alleges stemmed proximately and/or directly from “Defendant Secrist’s willful and wanton misconduct and/or intentional misconduct[,]” namely Mr. Secrist’s decision not to remove Mr. May from his home.<sup>41</sup>

“The ultimate determination of whether qualified or statutory immunity bars a civil action [which is the precise question here] is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.” Syl. Pt. 1, *Hutchinson*, 198 W. Va. 139, 479 S.E.2d 649 (1996). Ms. Watkins’ allegations all challenge discretionary decisions Mr. Secrist made as an APS worker (and, by virtue

---

<sup>35</sup> *Id.* at ¶ 5 [J.A. 00016].

<sup>36</sup> *Id.* at ¶ 6 [J.A. 00016].

<sup>37</sup> *Id.* at ¶ 9 [J.A. 00016].

<sup>38</sup> *Id.* at ¶ 11 [J.A. 00016].

<sup>39</sup> *See id.* at ¶¶ 12–56 [J.A. 00017–J.A. 00021].

<sup>40</sup> *See id.* at ¶ 57 [J.A. 00021].

<sup>41</sup> *See id.* at ¶¶ 63, 66 [J.A. 00023].

of his employment therewith, decisions DHHR made) when tasked with investigating a report of abuse and neglect. This is precisely the type of suit the doctrine of qualified immunity exists to preclude. Accordingly, Petitioners Mr. Secrist and DHHR request that this Court reverse the Circuit Court's denial of their respective motions to dismiss and conclude that they are entitled to qualified immunity on Ms. Watkins' claim.

**I. The Circuit Court committed reversible error in concluding that Mr. Secrist is not entitled to qualified immunity on Ms. Watkins' claim against him.**

“[T]he purpose of qualified immunity is to allow officials to do their jobs and to exercise judgment, wisdom, and sense without worry of being sued.” *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 661, 783 S.E.2d 75, 82 (2015). As this Court has noted, “the public interest behind qualified immunity is that the official conduct of the officer not be impaired by constant concern about personal liability.” *Id.* (quoting *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 177, 483 S.E.2d 507, 523 (1996)). Indeed, “fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.” *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982) (quotations omitted)). “The fact that the public fisc is kept safe by a state insurance policy does not mean that a public officer is able to do his or her job unhampered by frivolous litigation.” *Id.*

Federal courts express a similar approach to qualified immunity in the context of removal decisions by Child Protective Services' employees:

The discretionary judgment which was made in removing the White children was obviously not an easy one. It involved weighing professional opinions of child abuse against the obvious interests in maintaining the integrity of a household. Here the tug and pull of competing concerns is evident. **Premature action by a social worker can disrupt the interest parents possess in raising and disciplining their children. On the other hand, a failure to act can leave a child defenseless in the face of physical abuse and brutality. These types of decisions are precisely the sort that the doctrine of qualified immunity is designed to protect.**

*White ex rel. White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997) (emphasis added) (citations omitted) (holding that the government was entitled to qualified immunity for its protective removal decisions). This Court, when reviewing APS investigative decisions for purposes of qualified immunity, deemed the case “analogous to *Crouch*[,] [a case involving Child Protective Services].” *Markham v. W. Va. Dep’t of Health & Hum. Res.*, No. 19-0163, 2020 WL 2735435, at \*7 (W. Va. May 26, 2020) (memorandum decision). Accordingly, this Court’s holdings regarding Child Protective Services workers are instructive on the question of qualified immunity for Adult Protective Services workers, such as Mr. Secrist.

“Qualified immunity is broad and protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *W. Va. State Police v. Hughes*, 238 W. Va. 406, 411, 796 S.E.2d 193, 198 (2017) (quoting *Hutchinson* at 148, 479 S.E.2d at 658). Public officials are “entitled to qualified immunity for discretionary acts, even if committed negligently.” *Crouch v. Gillespie*, 240 W. Va. 229, 234, 809 S.E.2d 699, 704 (2018) (quoting *Maston v. Wagner*, 236 W. Va. 488, 500, 781 S.E.2d 936, 948 (2015)).

As this Court has aptly held:

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.* In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.

Syl. Pt. 11, *W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (citation omitted).

If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts

in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

*Id.* at 504, 766 S.E.2d at 763 (quoting Syl. Pt. 4, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995)).

To determine whether a State employee is entitled to qualified immunity, the Court first evaluates the alleged governmental acts or omissions which purportedly give rise to the suit. *See e.g.*, Syl. Pt. 7, *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996). The essential inquiry is whether the allegations, acts, or omissions constitute policy-making actions or discretionary governmental functions. *See id.* at 174, 483 S.E.2d at 520. Thus, “[q]ualified immunity is ‘justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.’” *Crouch*, 240 W. Va. at 236, 809 S.E.2d at 706 (quoting *A.B.*, 234 W. Va. at 507–08, 766 S.E.2d at 766–67) (emphasis in original). As recognized by this Court:

“[T]he purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make officials unduly timid in carrying out their official duties.”

*Id.* at 236, 809 S.E.2d at 706 (quoting *W. Va. Dep’t of Health & Hum. Res. v. Payne*, 231 W. Va. 563, 577, 746 S.E.2d 554, 568 (2013)).

This Court has previously noted that “[t]he challenges facing a CPS worker in making the determination whether or not a situation of present danger exists and, if so, whether to remove a child from the home, strikes at the heart of qualified immunity.” *Id.* at 236, 809 S.E.2d at 706 (emphasis added); *see also Martin v. Saint Mary’s Dep’t of Soc. Servs.*, 346 F.3d 502, 506 (4th Cir. 2003) (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)) (“The contours of the right to familial integrity may not be ‘sufficiently clear’ in certain situations, to be

deemed ‘clearly established’ . . . A public official must decipher what conduct violates protected rights, but an official will not be held liable for ‘bad guesses in gray areas.’”). The same is true for removal decisions made by APS workers.

In this case, Mr. Secrist’s determinations on whether to remove Mr. May from his home, which arose after numerous in-home visits, follow up calls, and observations of improvement, are the sole actions challenged in Ms. Watkins’ Complaint. While Ms. Watkins alleges that Mr. Secrist’s actions “were ministerial functions which are violative of statutory duties pursuant to W. Va. Code § 9-6-14” or “willful, wanton, and/or intentional [such that they] are excepted from immunity pursuant to W. Va. Code § 9-6-2(d)[,]”<sup>42</sup> this Court has held that qualified immunity insulates against “skeletal assertions” such as those that are “based on vague or principled notions [of government responsibility].” *Crouch*, 240 W. Va. at 238 n.22, 809 S.E.2d at 708 n.22 (alteration in original) (citing *A.B.*, 234 W. Va. at 516 n.33, 766 S.E.2d at 755 n.33). Ms. Watkins fails to allege any specific actions taken by Mr. Secrist other than those stemming directly from his discretionary investigation and removal decision as an APS worker. Taking Ms. Watkins’ allegations as true, Mr. Secrist, at worst, made a “‘bad guess[] in [a] gray area[],” which is precisely what qualified immunity exists to protect.

While the Circuit Court concluded that the questions of whether Mr. Secrist pursuant to W. Va. Code § 9-6-14” or engaged in “willful, wanton, and/or intentional [acts such that they] are excepted from immunity pursuant to W. Va. Code § 9-6-2(d)<sup>43</sup>[,]” are questions for the jury (thus

---

<sup>42</sup> While “willful, wanton, and/or intentional” misconduct is the exception to the *statutory* immunity afforded by *W. Va. Code* § 9-6-2(d), that statutory immunity is not at issue on this appeal. Rather, the issue on appeal is *qualified* immunity. To overcome qualified immunity, a plaintiff must allege either 1) violation of a “clearly established” statutory or constitutional right; or 2) conduct that was “*otherwise fraudulent, malicious, or oppressive.*” Syl. Pt. 11, *W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (emphasis added).

precluding an application of qualified immunity at the motion to dismiss stage), this Court has been quite clear that such questions are inherent in the *purely legal* application of the doctrine of qualified immunity. Under the Court's well-established law, Ms. Watkins' Complaint against Mr. Secrist fails to allege facts sufficient to overcome Mr. Secrist's qualified immunity for his APS investigation and removal decision. Accordingly, Petitioner Secrist requests that the Court reverse the Circuit Court's denial of his Motion to Dismiss and hold that the doctrine of qualified immunity insulates Mr. Secrist from Ms. Watkins' suit.

## **II. The Circuit Court committed reversible error in concluding that DHHR is not entitled to qualified immunity on Ms. Watkins' claim against it.**

As previously stated, Ms. Watkins' Complaint asserts a wrongful death claim against Petitioners Mr. Secrist and DHHR. The Circuit Court's Order challenged herein failed to address DHHR's substantive arguments for dismissal and the application of qualified immunity thereto.<sup>44</sup> The Court's Order predominantly concludes that Mr. Secrist's purported violations of West Virginia Code § 9-6-2(d) and/or West Virginia Code § 9-6-14 require jury determination prior to the application of qualified immunity. As discussed above, that conclusion is in legal error.

With respect to DHHR, Ms. Watkins' Complaint asserts two primary factual allegations (which, in reality, are tailored to address Mr. Secrist's purported actions):

- a. "Additionally, the Plaintiff asserts, had Defendant Secrist *and/or any other agent of Defendant WV DHHR* removed [Mr.] May, referred the matter to the prosecuting attorney, or sought court intervention, [Mr.] May would not have been in the house nor would he have remained in the house wherein his lethal injuries were incurred."<sup>45</sup>
- b. "As a result of Defendant Secrist's willful and wanton misconduct and/or intentional misconduct,<sup>46</sup> [Mr.] May was left in the care of Candus May and Charles Adkins as a result

---

<sup>44</sup> See "Integrated Order Granting Pl.'s Mot. to Am. Compl. and Denying Defs.' Mot. to Dismiss" [J.A. 00001-00008].

<sup>45</sup> Pl.'s Compl. at ¶ 62 [J.A. 00022].

<sup>46</sup> Indeed, as this Court has warned:

We can perceive no stated public policy which is justifiably advanced by allocating to the citizens of West Virginia the cost of wanton official or employee

of Defendant Secrist's *and/or Defendant WV DHHR's* failure to remove him, failure to refer the matter to the prosecuting attorney, and/or failure to seek court intervention."<sup>47</sup>

Such allegations are wholly insufficient to overcome DHHR's qualified immunity, challenge discretionary decisions of a DHHR employee, and sound in negligence.

In *West Virginia Regional Jail & Correctional Facility Authority v. A.B.*, the Court explained that:

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.* **In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.**

Syl. Pt. 11, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014) (citation omitted) (emphasis added).

Further,

If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Syl. Pt. 4, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995); *see also* Syl. Pt. 7, *Jarvis v. W. Va. State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010) (quoting Syl. Pt. 6, *Clark v. Dunn*, 195

---

misconduct by making the State and its agencies vicariously liable for such acts which are found to be manifestly outside of the scope of his authority or employment. Such conduct is notable for being driven by personal motives which in no way benefit the State or the public, nor is it reasonably incident to the official or agent's duties.

*A.B.*, 766 S.E.2d at 765 (2014) In other words – if an employee's acts are indeed outside the scope of his employment, then the agency is entitled to qualified immunity. Yet Plaintiff has *also* alleged that Mr. Secrist was acting "at all times" within the scope of his employment with DHHR. [J.A. 00016]. Plaintiff cannot have her cake and eat it, too.  
<sup>47</sup> *Id.* at ¶ 63 [J.A. 00023].

W. Va. 272, 465 S.E.2d 374 (1995) (“In the absence of an insurance contract waiving the defense,<sup>[48]</sup> the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29–12A–1, *et seq.*, and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.”).

Boiled to its nub, Ms. Watkins’ Complaint alleges that DHHR (via Mr. Secrist), did its job poorly, which resulted in an unfortunate incident. This Court has previously recognized that such “skeletal assertions” are insufficient to strip DHHR and its officials (such as Mr. Secrist) of qualified immunity:

Respondents seem to argue simply that if the DHHR defendants were doing their job properly, this incident would not have occurred . . . . Although this overly simplistic analysis may be appealing in light of these tragic events, qualified immunity insulates the State and its agencies from liability based on vague or principled notions of government regulation.

*W. Va. Dep’t of Health & Hum. Res. v. Payne*, 231 W. Va. 563, 574, 746 S.E.2d 554, 565 (2013).

---

<sup>48</sup> The Supreme Court of Appeals of West Virginia has expressly held the policy of insurance procured through the Board of Risk and Insurance Management does not waive immunity defenses:

Therefore, we hold that the state insurance policy exception to sovereign immunity, created by West Virginia Code § 29–12–5(a)(4) [2006] and recognized in Syllabus Point 2 of *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983), applies only to immunity under the West Virginia Constitution and does not extend to qualified immunity. To waive the qualified immunity of a state agency or its official, the insurance policy must do so expressly, in accordance with Syllabus Point 5 of *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

. . . . Under the facts of this case, the Board and Mr. Linger are not precluded from claiming qualified immunity because the insurance policy’s terms do not expressly waive the defense. In fact, the Certificate of Liability Insurance contained in the record expressly states: “It is a condition precedent of coverage under the policies that the additional insured *does not waive any statutory or common law immunity conferred upon it.*”

*W. Va. Bd. Of Educ. v. Marple*, 236 W. Va. 654, 662, 783 S.E.2d 75, 83 (2015).

As in *Payne, A.B.*, and a host of other cases, qualified immunity bars Ms. Watkins' claim against DHHR because the allegations are mere skeletal assertions that do not rise to the level of violating any "clearly established" statutory or constitutional right, or otherwise constitute fraudulent, malicious, or oppressive misconduct. Mr. Secrist, as an agent of DHHR acting within his professional duties, made the discretionary decision not to begin the removal process of Mr. May after noting compliance with DHHR recommendations and improved living conditions at the home.

Mr. Secrist's duty as an employee of DHHR is not to tear apart families at the sight of a suboptimal condition; his job is to prevent, reduce, and eliminate abuse, neglect, and financial neglect of adults. *See* W. Va. Code § 9-6-2 (outlining the job duties of Adult Protective Services workers). None of Mr. Secrist's or DHHR's actions violated these duties. While Ms. Watkins' Complaint includes the words "willful and wanton misconduct and/or intentional misconduct," it utterly fails to identify any specific actions undertaken by Mr. Secrist (or DHHR) which violated any "clearly established" statutory or constitutional right, or were otherwise fraudulent, malicious or oppressive. Rather, as evidenced by her Complaint, Ms. Watkins merely challenges Mr. Secrist's and, by virtue of his employment, DHHR's investigation into a report of abuse. The challenged investigation and determinations therefrom all stem from Mr. Secrist's professional and discretionary judgment call. Under well-settled law, qualified immunity bars Ms. Watkins' claim against Mr. Secrist and DHHR for what amounts to, at worst, a "bad guess in a gray area." As such, Petitioners request that the Court reverse the Circuit Court's denial of their respective motions to dismiss and hold that the doctrine of qualified immunity insulates them from Ms. Watkins' suit.

## **CONCLUSION**

Wherefore, Petitioners Mr. Secrist and DHHR respectfully request that the Court reverse the Circuit Court's denial of their respective motions to dismiss and hold that qualified immunity bars Ms. Watkins' claim against them.

**TIM SECRIST and WEST VIRGINIA  
DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES,**

**By counsel,**

/s/ Mark C. Dean

Mark C. Dean (WVSB No. 12017)

Brittany L. O'Saile (WVSB No. 14296)

Steptoe & Johnson PLLC

P.O. Box 1588

Charleston, WV 25326-1588

Telephone: (304) 353-8000

[Mark.Dean@steptoe-johnson.com](mailto:Mark.Dean@steptoe-johnson.com)

[Brittany.OSaile@steptoe-johnson.com](mailto:Brittany.OSaile@steptoe-johnson.com)

*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of February, 2025, I served a true and exact copy of the foregoing “**Petitioners’ Brief**” by electronically filing the same via the Court’s electronic filing system, which will provide electronic notification to all counsel of record.

/s/ Mark C. Dean  
\_\_\_\_\_  
Mark C. Dean (WVSB No. 12017)