

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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' REPLY BRIEF

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I. ASSIGNMENTS OF ERROR

Petitioner reincorporates the Assignments of Error set forth in Petitioner's Brief.

II. STATEMENT OF THE CASE

Petitioners reincorporate the Statement of Facts and Procedural History set forth in Petitioners' Brief. The circuit court's ruling depriving the West Virginia Department of Health and Human Resources ("DHHR")¹ and Tim Secrist of qualified immunity from Respondent's claims was in error as a matter of law. All of Respondent's allegations against Petitioners arise from Petitioners' exercise of discretionary governmental functions and duties. Although she makes a last-ditch attempt to do so in her Response Brief, she has failed to identify any violation of clearly established laws by Petitioners and/or conduct which was fraudulent, malicious, or oppressive.

III. SUMMARY OF ARGUMENT

Petitioners reincorporate the Summary of Argument set forth in Petitioner's Brief. In specific reply to Respondent's arguments made in her brief, Respondent is simply wrong as a matter of law that 1) Petitioners' actions were not discretionary functions; and 2) that Petitioners violated any of Mr. May's "clearly established" statutory or constitutional rights or otherwise engaged in conduct toward him, which was fraudulent, malicious, or oppressive. The remainder of Respondent's Brief is an exercise in obfuscation. Rather, the overwhelming weight of case law commands that this exact situation – a judgment call made in the "seemingly impossible position" of APS investigations -- is **precisely** the type of determination that the doctrine of qualified immunity is designed to protect.

¹ Effective January 1, 2024, DHHR was abolished and replaced by three new Cabinet-level departments. W. Va. Code § 5F-2-1a (2023). The reorganization has no effect on this appeal.

The circuit court erred in denying Petitioners' Motions to Dismiss Respondent's claims. Petitioners are clearly entitled to qualified immunity. *Markham v. W. Va. Dep't of Health & Hum. Res.*, No. 19-0163, 2020 WL 2735435 (W. Va. May 26, 2020); *Crouch v. Gillespie*, 240 W. Va. 229, 236, 809 S.E.2d 699, 706 (2018); *White by White*, 112 F.3d at 736 (4th Cir. 1997); *W. Va. Police, Dept. of Military Affairs and Public Safety v. J.H.*, 856 S.E.2d 679, 699 (W. Va. 2021)**Error! Bookmark not defined.**; *W. Va. Dept. of Educ. v. McGraw*, 800 S.E.2d 230 (W. Va. 2017); *W.Va. Bd. of Educ. v. Marple*, 783 S.E.2d 75 (W. Va. 2015); *W.Va. Reg'l Jail Auth. v. A.B.*, 766 S.E.2d 751 (W. Va. 2014).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners reassert that oral argument is warranted by Rule 19 as this appeal involves error in the circuit court's application of well-settled law. Petitioners recognize that the Court may resolve the matter through a Rule 21 Memorandum Decision

V. DISCUSSION

A. RESPONDENT MISUNDERSTANDS THE DOCTRINE OF QUALIFIED IMMUNITY.

Respondent's fundamental misunderstanding of the doctrine of qualified immunity is illustrated in her exhaustive recitation of the typical Rule 12(b)(6) standard for motions to dismiss, [Resp. Br. at 8-9], coupled with the assertion that Petitioners' "qualified immunity defense [should not] be presented to the jury." [*Id.* at 14-15]. Respondent also seems to implicitly suggest that assertion of qualified immunity at this stage is premature, given that she attempts to distinguish case law cited by Petitioners that is directly on point by arguing that it "was an appeal from the granting of summary judgment, not a motion to dismiss of a complaint. . . ." [*Id.* at 29]; [see also *id.* at 31] (asserting that "public policy interests demand denial of a

qualified immunity defense at this early stage. . . .”). As the Court well knows, resolving the issue of qualified immunity early in the case is paramount, as it has previously held:

‘[t]he very heart of the [qualified] immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.’ *Id.* at 148, 479 S.E.2d at 658. We also have recognized that a ruling on qualified immunity should be made early in the proceedings so that the expense of trial is avoided where the defense is dispositive. First and foremost, qualified immunity is an entitlement not to stand trial, not merely a defense from liability. See *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (‘The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.’). *Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015). Therefore, because we consistently have acknowledged that qualified immunity is not just a defense, but rather ‘an entitlement not to stand trial,’ *id.*, rulings on qualified immunity claims should be made as early in the proceedings as possible. The uniqueness of qualified immunity and its provision of total immunity from suit rather than just a defense is an important reason for the aforementioned heightened pleading.

W. Va. Reg’l Jail and Corr’l Facility Auth’y v. Estate of Grove, 244 W.Va. 273, 282, 852 S.E.2d 773, 782 (2020) (citations omitted). Indeed, given that qualified immunity is no mere defense to liability, the question is not one for a jury as Respondent believes, but “[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. . . .” Syl. Pt. 1, *Hutchinson v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). Respondent may only overcome this immunity under a “heightened pleading” standard. *W. Va. Reg’l Jail & Corr. Fac. Auth. v. Estate of Grove*, 852 S.E.2d 773, 781 (W. Va. 2020).² As described more fully in Petitioners’ opening Brief and further below,

² Respondent quotes *Grove*, among other cases, for the proposition that the “heightened pleading standard” required in a qualified immunity analysis a “misnomer.” [Resp. Br. at 10, n. 52]. This is true only inasmuch as “[a] plaintiff is not required to anticipate the defense of immunity in his complaint” and that a court may be within its discretion to order a more definite statement under *W. Va. R. Civ. P.* 12(e) if a defendant raises the immunity. *Grove*, *supra* at 781 (quoting *Hutchison*, *supra*). Respondent has not suggested that a more definite statement is required to overcome Respondents’ qualified immunity here. After this quotation from *Hutchison* cited by Respondent, the *Grove* Court went on to state in no uncertain terms that “**it is well-established that matters involving qualified immunity, such as the case presently before us, require a type of ‘heightened pleading’ standard**” and explicitly overturned the

Respondent has not met this standard and the Circuit Court below was in error in finding that she had.

B. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY FROM RESPONDENT’S CLAIMS.

1. Qualified Immunity Analysis.

As this Court has long explained the doctrine of qualified immunity:

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. 5, *W. Va. Dep’t of Human Servs. v. A.R.*, 290 W.Va. 590, 900 S.E.2d 16 (2024) (citation omitted). Indeed, “[q]ualified 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 *Hutchison v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996)). “Further, ‘[a] public officer is entitled to qualified immunity for discretionary acts, even if committed negligently.’” *Crouch, supra* at 234, 704 (quoting *Maston v. Wagner*, 236 W. Va. 488, 500, 781 S.E.2d 936, 948 (2015)). As this Court has described the analytical process for qualified immunity:

whenever a defendant raises the issue of qualified immunity in a motion to dismiss, the circuit court must look to our qualified immunity body of law and follow the steps this Court expressly has outlined to make the determination of whether qualified immunity applies under the specific circumstances of that particular case. Specifically, these steps include whether: (1) a state agency or employee is involved; (2) there is an insurance contract waiving the defense of qualified immunity; (3) the West Virginia Governmental Tort Claims and

circuit court below when it found that “***it is clear that the circuit court applied the notice pleading standard applicable to civil actions, generally, and not the heightened pleading standard required in cases involving qualified immunity.*** Accordingly, we find that the circuit court erred by failing to apply the heightened pleading standard in this particular matter and reverse its ruling in this regard.” *Grove, supra* at 781, 782 (emphases added). In short – Respondent cannot avoid her “heightened pleading” requirement.

Insurance Reform Act, W.Va. Code § 29-12A-1 *et seq.* would apply; (4) the matter involves discretionary judgments, decisions, and/or actions; (5) the 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; and (6) the State employee was acting within his/her scope of employment.

A.R., supra at 598, 24 (citations omitted).

2. Discretionary Nature of the Challenged Decision.

“[Q]ualified immunity determinations often center upon whether a decision was discretionary or nondiscretionary.” *Crouch*, 240 W. Va. at 234, 809 S.E.2d at 704 (2018). Indeed, given that steps (1) through (3) of the analysis have been ruled on by the Supreme Court of Appeals of West Virginia, “we proceed to step (4): whether the matter involves discretionary judgments, decisions, and/or actions.” *A.R., supra* at 599, 25. Respondent succinctly describes her claim against Petitioners in a single paragraph -- “had Defendant Secrist and/or any other agent of Defendant WV DHHR removed William McKinsey May, referred the matter to the prosecuting attorney, or sought court intervention, William McKinsey May would not have been in the house nor would he have remained in the house wherein his lethal injuries occurred.” [JA00022 at ¶ 62]. As courts have long recognized in the case of CPS workers, 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 by 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.* (emphasis added).

Accordingly, as this Court has noted, “***there is no dispute that the investigative process of DHHR in child abuse and neglect proceedings requires the exercise of discretion.***” *Crouch*, 240 W. Va. at 234, 809 S.E.2d at 704 (emphasis added). The same is true for APS investigative processes. *See Markham v. W. Va. Dep’t of Health & Hum. Res.*, No. 19-0163, 2020 WL 2735435, at *6 (W. Va. May 26, 2020) (finding challenged investigative decisions of APS workers to be “discretionary.”). In other words, these fundamental principles apply with equal force to removal decisions regarding “vulnerable adults,” such as Mr. May. *See W. VA. CODE § 9-6-1(2)*. Thus, “[t]he challenges facing a[n] [A]PS worker in making the determination of . . . whether to remove a [vulnerable adult] from a home[] ***strikes at the heart of qualified immunity.***” *Crouch v. Gillespie*, 240 W. Va. 229, 236, 809 S.E.2d 699, 706 (2018) (emphasis added);³ *see also White by White*, 112 F.3d at 736 (4th Cir. 1997) (holding that CPS removal decisions are “***precisely the sort that the doctrine of qualified immunity is designed to protect***”) (emphasis added).

Accordingly, the circuit court’s below finding that Petitioners’ decisions in the course of an APS investigation – where it is undisputed that Petitioner Secrist visited the home multiple times and observed improvements in Mr. May’s home situation - were “ministerial” rather than “discretionary,” and therefore removed from the protections of qualified immunity, [JA0005], are patently contrary to law. Respondent’s challenged actions from DHHR and Mr. Secrist were clearly discretionary.

³ *Crouch* involved a CPS investigation but, in the *Markham* decision, this Court found a case involving an APS investigation “analogous to *Crouch*.” *Markham, supra* at *19.

3. Respondent Has Not – and Cannot – Overcome Petitioners’ Qualified Immunity.

“To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated.” *Hutchison v. City of Huntington*, 479 S.E.2d 649, n. 11 (W. Va. 1996). To do this, Justice Cleckley set forth a straightforward test: “When broken down, it can be said that we follow a two-part test: (1) does the alleged conduct set out a constitutional or statutory violation, and (2) were the constitutional standards clearly established at the time in question?” *Id.* at 659. The Court further elaborated on this test:

The threshold inquiry is, assuming that the plaintiff's assertions of facts are true, whether any allegedly violated right was clearly established. To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a “particularized showing” that a “reasonable official would understand that what he is doing violated that right” or that “in the light of preexisting law the unlawfulness” of the action was “apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) Indeed, some courts hold that an “official may not be charged with knowledge that his or her conduct was unlawful unless it has been previously identified as such.” *Warner v. Graham*, 845 F.2d 179, 182 (8th Cir.1988. But, for a right to be clearly established, it is not necessary that the very actions in question previously have been held unlawful. *Anderson v. Creighton*, 483 U.S. at 640, 107 S.Ct. at 3039.

Id. at n. 11. In short, Respondent must allege more than the abstract. She must allege more than that Petitioners “could have done more” to prevent Mr. May’s unfortunate death. She must describe with a “particularized showing” how Petitioners affirmatively acted in violation of Mr. May’s rights. *A.B.*, *supra* at 766 (“This critical first step . . . may be effectively accomplished by identifying the official or employee whose acts or omissions give rise to the cause of action. This individual identification may more easily permit a proper examination of that particular official or employee's duties and responsibilities and any statutes, regulations, or other “clearly established” laws which are applicable to his or her duties.”)

a. Respondent has not established that any acts by Petitioners violated a “clearly established” statutory or constitutional right pertaining to Mr. May.

In cases where the challenged actions are discretionary, courts must next 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*.” Syl. Pt. 11, *W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). **“In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.”** *Id.* (emphasis added). Here, Respondent has identified omissions — Petitioners’ failure to remove Mr. May from his home and failure to refer the matter to the prosecuting attorney. Respondent has not, however, linked these omissions to a clearly established right or law or, in the alternative, demonstrated how they are otherwise fraudulent, malicious, or oppressive under *State v. Chase*.

In her Response, Respondent contends that DHHR’s and Mr. Secrist’s failure to remove Mr. May or refer the matter to the prosecuting attorney or to law enforcement for any further investigation, and decisions to close the APS referral, violated *W. Va. Code* §§ 9-6-14 and 9-6-2(d). [Resp. Br. at 6]. The cited statutes, however, do not afford vulnerable adults such as Mr. May any “clearly established” rights to be violated.⁴ *W. Va. Code* § 9-6-14 provides:

⁴ Respondent discusses *W. Va. Div. of Corr. & Rehab v. Robbins*, 248 W. Va. 515, 899 S.E.2d 88 (2023) at considerable length in support of her argument that Petitioners violated Mr. May’s “clearly established” rights. This reference is baffling. In *Robbins*, this Court held that the complaint set forth enough information to infer that individual officers violated inmates’ Eighth Amendment rights, which the officers “d[id] not contest . . . is clearly established” and declined to reverse the circuit court on that point. *Robbins*, 248 W. Va. at 527, 899 S.E.2d at 100. **The Eighth Amendment is not at issue in this matter.** This Court **did** overturn the circuit court’s denial of qualified immunity for the Division of Corrections for discretionary actions in alleged negligent hiring, training, etc. *Id.* at 529, 102. The case only proceeded as to DOC on a theory of vicarious liability because there was insufficient evidence to “permit [the Court] to conclude, at this stage, that the Officers’ alleged acts and omissions occurred beyond the scope of their employment with DOC...” *Id.* at 531, 104. **Vicarious liability is not at issue in this appeal.**

Any person subject to the mandatory reporting provisions of this article who knowingly fails to make any report required herein or any person who knowingly prevents another person from making such a report is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$100 or imprisoned in the county jail for not more than ten days, or both fined and imprisoned.

W. VA. CODE § 9-6-14. This statute simply imposes criminal penalties for violations and does not afford “vulnerable adults” with clearly established rights. Regardless, Petitioners’ actions were in no way violative of the “mandatory reporting” requirements contained in *W. Va. Code* § 9-6-9. Indeed, DHHR is a **receiver** of such reports. W. VA. CODE § 9-6-11(b).

Under *W. Va. Code* § 9-6-9, social service workers are required to make reports pursuant to the conditions of *W. Va. Code* § 9-6-11 if they “ha[ve] reasonable cause to believe that a vulnerable adult or facility resident is or has been neglected, abused, financially exploited or placed in an emergency situation, or if [they] observe[] a vulnerable adult or facility resident being subjected to conditions that are likely to result in abuse, neglect, financial exploitation, or an emergency situation.” W. VA. CODE § 9-6-9. Petitioners had no reason to believe that Mr. May had been abused or neglected, placed in an emergency situation, or subjected to conditions likely to lead to such circumstances. Indeed, making such a determination ***is necessarily a discretionary judgment call protected by qualified immunity.*** See, e.g., *Ritchie v. Turner*, 559 S.W.2d 822, 838 (Ky. 2018) (Finding qualified immunity to apply in a CPS matter, because “[a]ssessing the information gathered from the investigation and making the actual determination of whether reasonable cause exists to believe abuse is occurring or has occurred, on the other hand, ***requires personal judgment, a discretionary function.*** Consequently, under the statute, no further action is required when one investigates and concludes there is no reasonable cause to believe that a child is being or has been abused.”) (emphasis added).

Respondent’s lengthy discussion of *Robbins* is, frankly, inapplicable.

It is undisputed that, upon multiple visits to Mr. May, Mr. Secrist noted improvements to Mr. May's living conditions. [See JA00170-179]. At all times, Mr. May "liked living [in the home] and got enough to eat." [JA00170]. Mr. Secrist did not find him to be "overly thin." [Id.]. While Mr. Secrist informed Mr. May's caregiver that further improvements needed made, Mr. May's caregiver (Mr. May's and Petitioner's sister) and her boyfriend were nevertheless making noteworthy efforts to comply with Mr. Secrist's requests. For example, on a follow-up visit, Mr. Secrist noted that steps had been built to the front porch; the kitchen area was "more open;" Mr. May's bedroom had "room to move around;" there was an operational refrigerator full of food powered by a generator; and a pole for electricity service had been installed, they were waiting for AEP to hook it up. [JA00174-175]. Mr. Secrist reported that "[Candus May and Charles Adkins] had obviously worked hard to get things in compliance with the directives from [the APS Social Worker/Secrist] on the initial visit," and "[APS Social Worker/Secrist] sees no reason at this time to begin the process of removing William from this home." [Id.]. ***Importantly, Respondent's own Complaint admits that Mr. May's home conditions were improving during the period Mr. Secrist was investigating.*** [JA00020-21]. Mr. Secrist, and therefore necessarily DHHR, never believed Mr. May to be in a circumstance requiring removal from the home or mandatory reporting. Nonetheless, the mandatory reporting provisions still fail to afford **Mr. May** with a clearly established right, which, if violated, could defeat Petitioners' qualified immunity.

Respondent's other cited statutory provision fares no better. Pursuant to *W. Va. Code* § 9-6-2(d):

An adult protective services caseworker may not be held personally liable for any professional decision or action arrived at in the performance of his or her official duties as set forth in this section or agency rules promulgated: *Provided*, That nothing in this subsection protects any adult protective services worker from any

liability arising from the operation of a motor vehicle or for any loss caused by willful and wanton misconduct or intentional misconduct.

W. VA. CODE § 9-6-2(d). Again, this statutory provision does not afford “vulnerable adults” such as Mr. May with “clearly established” rights capable of violation. In fact, this provision enhances Petitioners’ arguments that neither Mr. Secrist, nor DHHR by association, can be liable for the discretionary, professional decisions not to remove Mr. May from his home or otherwise consult with law enforcement or additional agencies for intervention. Respondent’s Brief fails to demonstrate that the challenged actions violated any of Mr. May’s “clearly established” statutory or constitutional rights—a requisite element to defeating Petitioners’ qualified immunity.

b. Respondent has not established that Petitioners’ actions were fraudulent, malicious, or oppressive.

Because Respondent has not established a violation of Mr. May’s “clearly established” constitutional or statutory rights, the analysis may turn to whether Respondent has alleged conduct by Petitioners which could be deemed “fraudulent, malicious, or oppressive.” *Grove*, 244 W. Va. at 283, 852 S.E.2d at 783. Respondent’s Brief does not appear to allege that Petitioners made any fraudulent representation to Mr. May, nor does her Complaint. [JA00015-00024]. Accordingly, Respondent has not met the standard of pleading required for allegations of fraud. *See* W. VA. R. CIV. P. 9(b).

While this Court has not defined “oppressive” in the context of qualified immunity, it has equated the malicious and oppressive language with ***motive***. *See* *W. Va. Div. Nat. Res. v. Dawson*, 242 W. Va. 176, 192, 832 S.E.2d 102, 117 (2019) (“However, as the circuit court correctly noted, there is evidence in the record that could lead a jury to infer ***a malicious or oppressive motive***.”) (emphasis added). Here, Respondent has not alleged that Petitioners intended to harm Mr. May. Rather, Respondent’s allegations sound in a negligence theory which, by definition, lacks motive. It is undisputed that Petitioners investigated the alleged abuse and/or

neglect of Mr. May, required the caregivers to make necessary changes to his living conditions, observed that improvements to those living conditions were being made, and determined that there was no reason to remove Mr. May from the home or otherwise refer the matter to the prosecuting attorney.

In her attempt to thread the needle, Respondent repeatedly accuses Petitioners of “willful, wanton, and/or intentional misconduct,” [Resp. Br. at 1, 6, 7, 8, 12, 13, 20, 28, 30, 31], parroting the statutory language for an immunity exception under *W. Va. Code* § 9-6-2(d) – which is not at issue at all in this appeal. Regardless, Respondent’s allegations of ***intentional*** misconduct are mere boilerplate, which in no way meet the “heightened pleading standard” of making a “particularized showing” necessary to overcome Petitioners’ qualified immunity.

c. There is no causal connection between the violations that Respondent alleges occurred (if any) and Mr. May’s death.

Finally, even if Respondent could establish that Petitioners violated a clearly established right as to Mr. May or otherwise acted fraudulently, maliciously, or oppressively (which she has not and cannot), there is simply no causal connection between such alleged improprieties and Mr. May’s death. Mr. May died on August 13, 2020 – over one month after Mr. Secrist closed the file -- by “blunt force injuries” complicated by “atherosclerotic cardiovascular disease” – ***not*** the electricity-related allegations that Respondent repeatedly takes issue with. [*Compare* JA00021 at ¶ 57 *with* JA00028]. There is simply no evidence that, if Mr. Secrist and DHHR made any reports to the prosecuting attorney or other agencies and/or removed Mr. May from the home, Mr. May would have not passed away. *See Markham*, No. 19-0163, 2020 WL 2735435, at *7 (finding that, even if alleged violations occurred, “Petitioners ha[d] failed to show any causal relationship between their alleged damages and [the alleged violations].”).

Rather, Respondent's entire claim is, essentially, that Petitioners "should have" removed Mr. May from his (and Respondent's) sister's home, which "might have" prevented his death weeks later. Such a hindsight assertion (which sounds in negligence, exactly the kind of allegation barred by qualified immunity) completely eviscerates the objective requirement that a reasonable official should know **at the time of their action** that their conduct has violated **the plaintiff's** (here, actually Mr. May's) rights. *Maston v. Wagner*, 781 S.E.2d 936, 949 (W. Va. 2019); *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014) (*rev'd on other grounds* 577 U.S. 7) ("Claims of qualified immunity must be evaluated in light of what the officer knew at the time he acted, not on facts discovered subsequently."). It is **undisputed** that what Mr. Secrist "knew at the time he acted" was that Mr. May's living conditions at his (and Respondent's) sister's house were **improving**.

C. DHHR IS ENTITLED TO QUALIFIED IMMUNITY FROM RESPONDENT'S NEGLIGENCE CLAIMS.

Respondent's Brief provides no basis to support abrogating Petitioners' qualified immunity from her claims in this matter. Without identification of a violation by Petitioners of "clearly established" constitutional or statutory rights pertaining to Mr. May, or conduct by Petitioners that was fraudulent, oppressive, or malicious under the applicable "heightened standard" of pleading, Respondent is left with little more than the assertion that Petitioners "could have done more" to prevent Mr. May's unfortunate death. This Court has already disposed of this exact argument. *W. Va. Div'n of Corr. v. P.R.*, 2019 WL 6247748 at *7 (W.Va. Nov. 22, 2019 (memorandum opinion)) ("When Policy Directive 332.02 is removed from the analysis, P.R is left with her general claims against the defendants of negligent staffing and negligent supervision of staff and inmates on the day of the alleged assault. However, her general negligence claims do not defeat the broad scope of qualified immunity. Our law is clear that the

doctrine of qualified immunity bars claims of mere negligence. See e.g., *Clark*, 195 W.Va. at 274, 465 S.E.2d at 376, syl. pt. 6. ***Simply making ‘the skeletal assertion that if ... [a correctional officer] were properly trained and supervised, the rape would not have occurred’ is nothing more than an ‘illusory and languid contention ... [not] sufficient to overcome the State’s immunity[.]’*** A.B., 234 W.Va. at 516 n.33, 766 S.E.2d at 775, n.33.”) (footnote omitted) (emphasis added); see also *W. Va. Dep’t of Health & Human Res. v. Payne*, 746 S.E.2d 554, 565 (W. Va. 2013) (“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 responsibility].”).

As in *Markham*, *Crouch*, *Payne*, A.B., and a host of other cases, qualified immunity bars Respondents’ claim against Petitioners because her 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 that Mr. May’s caregivers were making progress toward compliance with DHHR recommendations and improved living conditions at the home.

VI. CONCLUSION

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 Respondent’s

Complaint includes the boilerplate words “willful and wanton misconduct and/or intentional misconduct,” both it and her Brief in this Court utterly fail to identify any specific actions undertaken by Petitioners which violated any “clearly established” statutory or constitutional right, or were otherwise fraudulent, malicious or oppressive. Rather, Respondent 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. Critically, it is undisputed ***even by Respondent*** that Mr. Secrist observed improvements in Mr. May’s living conditions at his (and Respondent’s) sister’s home.

The doctrine of qualified immunity recognizes this difficult and seemingly impossible position that Mr. Secrist (and all APS and/or CPS workers) can be in under these circumstances. That is ***exactly*** why such decisions are “precisely the sort that the doctrine of qualified immunity is designed to protect” under well-settled law, and qualified immunity accordingly bars Respondent’s claim against Petitioners for what may amount 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 Respondent’s suit.

WHEREFORE, for the foregoing reasons and the reasons set forth in Petitioner’s opening Brief, Petitioners West Virginia Department of Health and Human Resources and Tim Secrist respectfully request that this Court **REVERSE** the circuit court’s Order failing to dismiss the claims against them, and remand this Civil Action back to the circuit court with directions that the circuit court enter an Order granting judgment and dismissal with prejudice as to Respondent’s claims.

Respectfully submitted this 16th day of April 2024.

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

By counsel,

/s/ Mark C. Dean

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2025, I served a true and exact copy of the foregoing “**Petitioners’ Reply 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 _____

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