

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

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court did not err 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 did not err 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

This case concerns the wrongful death of William McKinsey May, who died on August 14, 2020, in Charleston, West Virginia.^{1 2} “William McKinsey May, was a resident of Logan County, West Virginia.”³ The Respondent-Plaintiff Tammy Watkins was duly appointed as the Administratrix of the Estate of William McKinsey May on October 7 2020.⁴ “At all times hereinafter mentioned, William McKinsey May was a person who suffered from mental retardation and, as such, was a “vulnerable adult” as defined in West Virginia Code §9-6-1(5).”⁵ “As such, William McKinsey May was unable to carry on his daily activities, including but

¹ The statement of the case recites facts directly from the Respondent’s-Plaintiff’s Complaint and the pleadings filed in response, contained within the Joint Appendix. References to the Appendix Record—the contents of which were agreed to by the parties—are set forth as “J.A. ___”; Plaintiff’s Complaint, (hereinafter referred to as “Pl. Compl.”) at ¶2. (JA 00015).

² As required in reviewing the Appellants’-Defendants’ Motion to Dismiss below, the Circuit Court **assumed the allegations stated in the complaint to be true and construed 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).**

³ Pl. Compl. at ¶3. (JA 00015)

⁴ *Id.* at ¶1. (JA 00015)

⁵ *Id.* at ¶9 (JA00016).

not limited to: personal hygiene, food preparation, personal care, and self-medical care (i.e., administration of medication), without the assistance of others.”⁶

The Petitioner-“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.”⁷ “At all times hereinafter mentioned, (Petitioner) defendant Tim Secrist was an Adult Protective Service (APS) worker acting as an agent, servant and employee of defendant West Virginia Department of Health and Human Resources (WV DHHR).”⁸ West Virginia Code § 9-6-1 details the goals and services for the Adult Protective Services, which includes: (A) Receiving reports of adult abuse, neglect, or exploitation; (B) Investigating the reports of abuse, neglect, or exploitation; (C) Case planning, monitoring, evaluation, and other case work and services; and (D) Providing, arranging for, or facilitating the provision of medical, social service, economic, legal, housing, law enforcement, or other protective, emergency, or support services. “Abuse” means the infliction or threat of physical or psychological harm, including the use of undue influence or the imprisonment of any vulnerable adult or facility resident. W. Va. Code § 9-6-1(3). “Neglect” means the unreasonable failure by a caregiver to provide the care necessary to maintain the safety or health of a vulnerable adult or self-neglect by a vulnerable adult. W. Va. Code § 9-6-1(4). “Emergency” or “emergency situation” means a situation or set of circumstances which presents a substantial and immediate risk of death or serious injury to a vulnerable adult. W. Va. Code § 9-6-1(6).

“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

⁶ *Id.* at ¶10 (JA00016).

⁷ *Id.* at ¶5 (JA00016).

⁸ *Id.* at ¶6. (JA00016)

McKinsey May.”⁹ At this time, and all other times referred to in the Complaint, except when Mr. May was moved to hospice care, Mr. May was residing with his sister, Candace May, in her boyfriend’s, Charles Adkins’, residence in Logan County, West Virginia.¹⁰ “On April 23, 2020, (Petitioner-) 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” at the residence with Mr. May present.¹¹ “On this date, (Petitioner-) Defendant Secrist was accompanied by Logan County Sheriffs Deputy Sean Janells”.¹²

Despite Mr. May’s sister and caretaker, Candus May, aware that an APS officer would be visiting that day, Petitioner Secrist found a yard full of building materials, junk, mud, and ditches which needed to be navigated to even arrive at the back door of the residence.¹³ Once inside, Petitioner Secrist not only saw just as much clutter as outside, the house was in an obvious poor state of repair, no rooms had electricity, a non-operational refrigerator contained room temperature food, and a generator powered the lights.¹⁴ Moreover, except for tap water in one bathroom, no water outlets were hooked up.¹⁵

Petitioner Secrist interviewed the decedent, Mr. May, as he sat in a recliner in what was supposed to be the dining room.¹⁶ Next to that recliner was a potty chair without a catch basin, as Candace May stated that they used any pot to catch waste to then dump it into the toilet.¹⁷ Notably, Mr. May was alert, his beard was trimmed, and he was dressed in sweatpants, a t-shirt, and socks.¹⁸ “H(h)is toe nails were thick and curled as toenails often get when neglected or

⁹ *Id.* at ¶11 (JA00016).

¹⁰ *Id.* at ¶¶2-3, 12, 16-17, 19, 32-35, 41-43, 48-49, 52-53, 57, 64-66 (JA 00015, 00017, 00019-21, 00023).

¹¹ *Id.* at ¶12 (JA00017).

¹² *Id.* at ¶13 (JA00017).

¹³ *Id.* at ¶¶14-16 (JA00017).

¹⁴ *Id.* at ¶¶20-23 (JA00017-18)

¹⁵ *Id.* at ¶31 (JA00019)

¹⁶ *Id.* at ¶24 (JA00018).

¹⁷ *Id.* at ¶29 (JA00018).

¹⁸ *Id.* at ¶26 (JA00018).

diseased.”¹⁹ Mr. May “was not overly thin, but he (Petitioner Secrist) noted that he (Mr. May) could use a few extra pounds”.²⁰

Petitioner Secrist obtained financial and contact information from Candace May.²¹ Without electricity powering it, the Petitioner Secrist told Candace May that they could not eat the food in the refrigerator.²² Petitioner Secrist advised her that they may need to remove Mr. May from the residence unless several problems were resolved: ie: assure hookup of electricity and more water, have cold food in an operational refrigerator, clear clutter to assure safety access into, and around, the home, and move clothes dryer which was blocking the toilet.²³ Since Candace May advised him that the power company was installing the electrical service on May 3, 2020, Petitioner Secrist stated that he would return to inspect on May 4th.²⁴ Petitioner Secrist told Candace May “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.”²⁵

Petitioner Secrist returned to Mr. May’s residence on May 4th to find some improvements made with access and clearing clutter, but the residence still lacked electricity and food was in a mini-fridge powered by a generator.²⁶ Although stairs had been added to the front porch, there were no handrails.²⁷ Mr. May was located in a small bedroom off the kitchen.²⁸ During this visit, Petitioner Secrist did not check to see if any more water outlets were hooked up, did not check Mr. May’s feet or the status of his prescription medications.²⁹ Despite these flaws, which he

¹⁹ *Id.* at ¶27 (JA00018).

²⁰ *Id.* at ¶28 (JA00018).

²¹ *Id.* at ¶34 (JA00019).

²² *Id.* at ¶23 (JA00018).

²³ *Id.* at ¶¶35-40 (JA00018-19).

²⁴ *Id.* at ¶¶36-37 (JA00018).

²⁵ *Id.* at ¶ 37 (J.A. 00019).

²⁶ *Id.* at ¶¶41-45 (JA00020).

²⁷ *Id.* at ¶42 (JA00020).

²⁸ *Id.* at ¶43 (JA00020).

²⁹ *Id.* at ¶46 (JA00020).

mandated to be corrected or Mr. May would be moved, Petitioner Secrist took no further action, except to say that he would return again to check on her progress.³⁰

After returning to the residence weeks later, Petitioner Secrist still found Mr. May residing in a home which was a “wreck”, and “the electrical service ‘still’ had not been connected to the home”.³¹ Yet, Petitioner Secrist still took no action.³² Moreover, despite these findings, Petitioner Secrist did not even revisit the residence again for over a month to personally check on status of Ms. May’s progress in complying with required home corrections. Petitioner Secrist merely telephoned Candace May on June 3, 2020, “to check on the status of the electrical service”.³³ The home still had no electricity.³⁴ He did not question her about other deficiencies, like water taps, or about Mr. May’s prescription status or health. Critically, Petitioner Secrist still took no action merely based on Ms. May’s claim that they were obtaining wiring from Lowes “as they were speaking” and she would call him when it is connected.³⁵

Ms. May never called him back and failed to return Petitioner Secrist’s calls over the several weeks.³⁶ Despite lack of confirmation that deficiencies had been corrected, Petitioner Secrist merely “closed the referral and refused to open an APS case” or take any further action to ensure that Mr. May’s physical health and safety was secured.³⁷ Thus, Mr. May remained in Candace May and Charles Adkins’ care for months, even though subject to neglect and abuse referral where deficiencies had not been confirmed as corrected. Mr. May endured severe trauma and injuries while in that care.³⁸

³⁰ *Id.* at ¶¶46-7 (JA00020).

³¹ *Id.* at ¶¶48-50 (JA00020-21).

³² *Id.* at ¶¶51-2 (JA00021).

³³ *Id.* at ¶53 (JA00021).

³⁴ *Id.* at ¶54 (JA00021).

³⁵ *Id.* at ¶¶54-55 (JA00021).

³⁶ *Id.* at ¶¶56-7 (JA00021).

³⁷ *Id.* at ¶¶56-7, 58 (JA00021-22).

³⁸ *Id.* at ¶¶64-5 (JA00022).

In sum, Ms. Watkins particularly alleged throughout her complaint that Petitioners Secrist and WV DHHR failed to remove Mr. May from an unsafe home situation, failed to refer his case to a prosecuting attorney and/or, seek court intervention.³⁹ Ms. Watkins also specifically asserted that the Petitioner, as an agent of WV DHHR, repeatedly took considerable time to check in with Ms. May and failed to assure that all deficiencies were corrected and concerns addressed, like obtaining electricity and water taps for the home and checking on Mr. May's prescriptions and feet health.⁴⁰ Based on the foregoing particular allegations as presented throughout Ms. Watkins' Complaint, Ms. Watkins asserted that Mr. May died on August 14, 2020, from those severe injuries and trauma, "which was proximately caused by and/or direct result of Defendant Secrist's willful and wanton misconduct and/or intentional misconduct."⁴¹ Such conduct is excepted from immunity from suit pursuant to West Virginia Code §9-6-2.⁴² "Further, Defendant Secrist's failure to report his findings to the prosecuting attorney were a direct violation of West Virginia Code §9-6-14."⁴³

Petitioner Secrist and DHHR filed Motions to Dismiss, and to strike, with the trial court on July 28, 2023, primarily based on the qualified immunity defense.⁴⁴ Petitioners-Defendants raised other issues regarding complaint failure to limit government recovery to insurance policy limits, redundancy theory against including Petitioner Secrist with the DHHR, and striking of punitive damages recovery against DHHR.⁴⁵ Respondent-Plaintiff responded challenging the

³⁹ *Id.* at ¶¶46-7,51-52, 58, 63. (JA00020, 22)

⁴⁰ *Id.* at ¶¶46-7,51-52, 56-58, 63. (JA00020, 22)

⁴¹ *Id.* at ¶¶64-6 (JA00022); See Death Certificate, (Pl. Compl. Exh. B, JA00027) and Obituary (Pl. Compl. Exh. C, JA00028).

⁴² *Id.* at ¶7 (JA00016).

⁴³ *Id.* at ¶60 (JA00022).

⁴⁴ 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).

⁴⁵ *Id.*

dismissal and Petitioners replied.⁴⁶ The Respondent-Plaintiff also moved to amend the complaint to correct a scrivener's error which failed to include language that the claim against DHHR was "up to insurance limits", and to address any issues if the court grants dismissal without prejudice.⁴⁷

The Honorable Judge Kelly Codispoti, from Logan County Circuit Court held a hearing on October 12, 2023. On October 9, 2024, Judge Codispoti entered an "Integrated Order Granting Plaintiff's Motion to Amend Complaint and Denying Defs.' Mot. to Dismiss."⁴⁸ The focus of the Petitioners' appeal is Judge Codispoti's denial of the Petitioners-Defendants' Motion to Dismiss based on qualified immunity due to jury question whether the allegations fall within the immunity exception provided in W.Va.Code §9-6-2(d).⁴⁹ Judge Codispoti also denied the Petitioner's-Defendant's Secrist's Motion to Strike based on redundant theory as this theory is not accepted by West Virginia courts.⁵⁰ Judge Codispoti struck punitive damages claim against DHHR, pursuant to W.Va.Code §55-17-2(2), and granted Respondent-Plaintiff's motion to amend complaint to address insurance assertions.⁵¹

SUMMARY OF ARGUMENT

The Respondent-Plaintiff has presented sufficient particular allegations which outline the elements of a negligence cause of action of against the Petitioners-Defendants' in their investigation of a neglect or abuse of the decedent, Mr. May, who was entrusted to their care as a vulnerable or incapacitated individual. Their failure to act in a willful, wanton and intentional manner, left Mr. May in home conditions of substantial risk of serious harm to his health and

⁴⁶ See Plaintiff's Integrated Response to Defendant Secrist's and Defendant DHHR's Motion to Dismiss and Motion to Strike (JA00206-217), and Defendants' Integrated Reply (JA 00219-00248)

⁴⁷ JA00197-202)

⁴⁸ See "Integrated Order Granting Pl.'s Mot. to Am. Compl. and Denying Defs.' Mot. to Dismiss" (Oct. 9, 2024) (J.A. 00001-00008)

⁴⁹ See *id.* at ¶¶7-24, Conclusion after ¶30 (J.A. 00003-00007).

⁵⁰ See *id.* at ¶¶ 25-28 (J.A. 00006-00007).

⁵¹ See *id.* at ¶¶ 1-2, 29-30 (J.A. 00002, 00007).

safety. Qualified immunity does not shield their actions from liability because their willful, wanton and intentional conduct are specifically excepted from immunity by W.Va.Code §9-6-2(d). Moreover, their conduct violated the decedent's clear statutory rights when the Petitioner-Defendant Secrist failed to investigate reports of abuse and neglect, coordinate with prosecuting attorneys or law enforcement officers by reporting alleged conduct or take any further action, like remove him from the home, before the risk was fully ameliorated. This conduct created serious risk of harm and ultimately led to Mr. May's injuries and his wrongful death. Any factual issues in doubt underlying the claims must be resolved by a jury. The trial court correctly denied the Petitioners-Defendants' Motion to Dismiss.

STATEMENT ON ORAL ARGUMENT AND DECISION

Petitioners seek oral argument before this court pursuant to Rule 19(a)(1) as the issues concern the application of qualified immunity, which is settled law within West Virginia. Respondent asserts that oral argument is unnecessary here because the trial judge's order presents a thorough legal analysis of the issue after a robust presentation at a hearing and through pleadings by the parties. However, the Respondent does not object if the Court wants to grant the Petitioners' request, and if granted, will seek to rebut the Petitioner's arguments orally as well.

STANDARD OF REVIEW

The Appellate Court reviews a circuit court's order granting a motion to dismiss de novo. *Workman v. Logan Cnty. Bd. of Educ.*, 247 W. Va. 463, 469, 881 S.E.2d 374, 380 (2022)(citing *Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)). "On de novo review, the Court 'give[s] a new, complete and unqualified review to the parties' arguments and the record before the circuit court.'" *Id.* (citing *Doe v. Logan Cnty. Bd. of Educ.*, 242 W. Va. 45, 48, 829 S.E.2d 45, 48 (2019)).

"In West Virginia practice, motions to dismiss are generally viewed with disfavor". *Id.* (citing *Fass v. Newsco Well Serv., Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 563 (1986)).

Moreover, the Appellate Courts test the sufficiency of the complaint by the same rubric applied by the circuit courts in a motion to dismiss. *Monongalia Cnty. Comm'n v. Stewart*, No. 22-765, 2024 W. Va. LEXIS 497, *12 (September 17, 2024) (Exhibit, "Exh.", A) (citing *W. Va. Dep't of Hum. Servs. v. A.R.*, 249 W. Va. 590, 596, 900 S.E.2d 16, 22 (2024)). Thus, in deciding a motion to dismiss in a Rule 12(b)(6) motion, the court "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Syl. Pt. 3, Chapman v. Kane Transfer Company*, 160 W. Va. [530], 236 S.E.2d 207 (1977) (other internal citations omitted); See also *Judy v. E. W. Va. Cnty. & Tech. Coll.*, 246 W. Va. 483, 486-487; 874 S.E.2d 285, 288-289 (2022)) Critically, courts must construe "the factual allegations in the light most favorable to the plaintiff." *Judy v. E. W. Va. Cnty. & Tech. Coll.*, 246 W. Va. at 486-487; 874 S.E.2d at 288-289; *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996).

Generally, complaints are to be read liberally under the West Virginia Rules of Civil Procedure. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995); citing, *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978). As set forth in W. Va. R.C.P., Rules 8(a)(2) and (e)(1), which underlies Rule 12(b)(6), a complaint must provide clarity and notice, but in most cases, not necessarily complete details." *Workman*, 247 W. Va. at 469, 881 S.E.2d at 380 (citing *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995)). "To survive a motion under Rule 12(b)(6), '[t]he complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist.'" *Id.* (citing *Mountaineer*

Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va., 244 W. Va. 508, 521, 854 S.E.2d 870, 883 (2020) (quoting Fass, 177 W. Va. at 52, 350 S.E.2d at 563)).

ARGUMENT

I. The Circuit Court correctly concluded that the Watkins Complaint presented particular allegations which could establish to a jury that Secrist is not entitled to qualified immunity on Ms. Watkins' claim against him.

Cases where an immunity defense is implicated, the court may exercise a closer review of the complaint⁵² due to the preference for early consideration of the issue. *Hutchison v. City of Huntington*, 198 W. Va. 139, 149-150; 479 S.E.2d 649, 659-660 (1996); See also *Monongalia Cnty. Comm'n v. Stewart*, 2024 W. Va. LEXIS 497, *27-30 (Exh. A); *Doe v. Logan Cty. Bd. of Educ.*, 242 W. Va. 45, 49-50; 829 S.E.2d 45, 49-50 (2019); *Workman*, 247 W. Va. at 471, 881 S.E.2d at 382. In conducting this review, the court recognizes that a “plaintiff is not required to anticipate the defense of immunity in his complaint. *Doe v. Logan Cty. Bd. of Educ.*, 242 W. Va. 45, 49-50; 829 S.E.2d 45, 49-50 (2019) (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923-24, 64 L.Ed.2d 572 (1980)). The court also understands that the public officials should be entitled to immunity unless there are particular allegations which “inform its conclusions” underlying the claim’s elements, including any inferences drawn therein. *W. Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W. Va. 515, 527, 889 S.E.2d 88, 100, See fn 52 (2023) Thus, the court must undertake some examination or analysis of the “qualified immunity framework” *Id.* (“This contrasts with the order we recently deemed insufficient in *West Virginia Regional Jail & Correctional Facility Authority v. Est. of Grove*, 244 W. Va. 273, 852 S.E.2d 773 (2020)”, where there was no such examination).

⁵² Courts refer to this closer review as a “heightened pleading” review. However, this is considered to be a “misnomer” because plaintiffs are not required to counter immunity defense in a complaint. *W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W. Va. 273, 281-282; 852 S.E.2d 773, 781-782 (2020); *Doe v. Logan Cty. Bd. of Educ.*, 242 W. Va. 45, 49-50; 829 S.E.2d 45, 49-50 (2019); *Hutchison v. City of Huntington*, 198 W. Va. 139, 149-150; 479 S.E.2d 649, 659-660 (1996)

“When weighing a proper course, the goal of the trial court should be the same as that espoused by the Rules of Civil Procedure: to have the case heard on the merits and not on the pleadings of the parties' lawyers.” *Gable v. Gable*, 245 W. Va. 213, 222; 858 S.E.2d 838, 847; (2021). This assessment must be done on a case-by-case basis. *W. Va. Dep't of Health, Off. of the Chief Med. Exam'r v. Cipoletti*, 902 S.E.2d 133, 138 (W.Va. Sup. Ct., 2024)(citing *Syl. Pt. 9, in part, Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996)). “I(i)f the individual circumstances of the case indicate that the plaintiff has pleaded his or her best case, there is no need to order more detailed pleadings. If the information contained in the pleadings is sufficient to justify the case proceeding further, the early motion to dismiss should be denied.” *Hutchison v. City of Huntington*, 198 W. Va. 139, 149-50, 479 S.E.2d 649, 659-60 (1996) (emphasis added). *Accord Portee v. City of Mount Hope*, No. 17-0546, 2018 WL 3203157, at *2 (W. Va. June 29, 2018) (memorandum decision); See also *W. Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W. Va. 515, 520; 889 S.E.2d 88, 92 (2023).

If such particular allegations are not present, other procedural mechanisms such as requiring a more definite statement or allowing the plaintiff to amend the complaint, should be ordered, before granting the drastic remedy of dismissal. *Gable v. Gable*, 245 W. Va. 213, 222; 858 S.E.2d 838, 847 (2021) (“*Hutchison* makes clear that there is a panoply of procedural tools available to trial courts and practitioners to ensure that the claims in a plaintiff's complaint are clear to all, tools far gentler than the punitive act of dismissal”); *Hutchison v. City of Huntington*, 198 W. Va. 139, 149-150; 479 S.E.2d 649, 659-660 (1996); See also *Robbins*, 248 W. Va. at 515, 889 S.E.2d 88; *Workman*, 247 W. Va. at 471-472; 881 S.E.2d at 382-383.

A. West Virginia Code 9-6-2(d) limits immunity for APS caseworkers dealing with vulnerable adults.

“Qualified immunity is an immunity from suit afforded to public officials and State agencies under certain conditions. It flows not from constitutional, sovereign immunity but *is a judge-made doctrine* intended to allow officials to do their jobs and to exercise judgment, wisdom, and sense without worry of being sued.” *Robbins*, 248 W. Va. at 524, 889 S.E.2d at 97 (internal citation, quotation and footnotes omitted)(Emphasis added). W.Va.Code §9-6-2 falls under Article 6 which governs public services for vulnerable or incapacitated adults. The immunity provision in W.Va.Code §9-6-2(d) states in pertinent part, “(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 ... for any loss caused by willful and wanton misconduct or intentional misconduct.*” (Emphasis added).

"A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 530, 782 S.E.2d 223, 225 (Syl. Pt. 6)(2016), Citing, *Syl. Pt. 2, State v. Epperly*, 135 W.Va.877, 65 S.E.2d 488 (1951). Additionally, "In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." *White v. Wyeth*, 227 W. Va. 131, 133, 705 S.E.2d 828, 830 (Syl. Pt. 2)(2010) Citing, *Syl. Pt. 2, Smith v. State Workmen's Compensation Commissioner*, 159 W. Va.108, 219 S.E.2d 361 (1975).⁵³ See also *Eldercare of Jackson Cnty., LLC v. Lambert*, 902 S.E.2d 840, 843 (W.V. Sup. Ct., 2024)("The trial court did not err by denying petitioner's motion to dismiss respondents' action alleging fraud and elder

⁵³ *Integrated Order Granting Pl. 's Mot. to Am. Compl. and Denying Defs. ' Mot. to Dismiss*" (Oct. 9, 2024), at ¶¶8-9 (JA0003-4)

abuse pursuant to W. Va. Code § 55-19-7 because the complaint sufficiently pled that petitioner engaged in intentional conduct with actual malice and therefore petitioner was not entitled to immunity.”)

The plain reading of this statute indicates that the legislature recognized government immunity but chose to limit it for Adult Protect Services officers if a loss is caused by his or her willful, wanton, or intentional misconduct. There is no ambiguity here. It must be given full force and effect. This is exactly what the court appropriately found below:

10. The case at hand asserts claims against DHHR and its agent, Defendant Secrist. Thus, the plaintiff points to W.Va.Code §9-6-2(d) in opposition to defendants’ Motion to Dismiss.⁵⁴

After examining the complaint allegations which showed that the decedent met the definition of a vulnerable adult needing protection, and asserted specific conduct by Petitioner Secrist, acting under his authority as an APS officer which could fall under the statute, the court also determined that:

15. The plaintiff alleges that some of Defendant Secrist’s actions were ministerial functions which are violative of statutory duties pursuant to W.Va.Code §9-6-14; thus, the plaintiff asserts that Defendant Secrist’s ministerial actions are not qualifiedly immune.

16. Additionally, the plaintiff asserts allegations that Defendant Secrist’s conduct was done in a willful, wanton and/or intentional manner.

17. W.Va.Code §9-6-2(d) specifically excepts adult protective service workers from liability protections; thus, a worker cannot be immune if the loss was caused by the worker’s “willful and wanton misconduct or intentional misconduct.”

18. Accordingly, as plaintiff asserts that Defendant Secrist’s actions were willful, wanton and/or intentional, such actions particularly are excepted from immunity pursuant to W.Va.Code §9-6-2(d).⁵⁵

⁵⁴ See *Integrated Order Granting Pl. ’s Mot. to Am. Compl. and Denying Defs. ’ Mot. to Dismiss*” (Oct. 9, 2024), (JA0004)

⁵⁵ *Id.* at JA0005.

Therefore, the court then appropriately determined that these allegations, when taken as true, “give rise prima facie case of negligence”, which cannot be dismissed without jury resolution.⁵⁶ *Kizer v. Harper*, 211 W. Va. 47, 52, 561 S.E.2d 368, 373 (2001), citing, *Simmons v. City of Bluefield*, 159 W.Va.451, 225 S.E.2d 202, 88 A.L.R.3d 105 (Syl. Pt. 3)(1975); *Jones v. Two Rivers Ford, Inc.*, 171 W.Va.561, 301 S.E.2d 192 (Syl. Pt. 3, in part)(1983). The Petitioners-Defendants’ Motion to Dismiss were correctly denied.

B. Even if not initially statutorily excepted, allegations support bar of qualified immunity defense to be presented to the jury.

Generally, the court will impose qualified immunity defense for a public official or state agency when the acts or omissions involve discretionary government functions which do not violate clearly established statutory or constitutional rights or laws of which a reasonable person would have known, and are not otherwise fraudulent, malicious, or oppressive. *Robbins*, 248 W. Va. at 524, 889 S.E.2d at 97. (citing *Syllabus Point 1, West Virginia Board of Education. v. Marple*, 236 W. Va. 661, 783 S.E.2d 75, 82 (2015)); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)(internal notation excluded) Syl. Pt. 10, in part, A.B., 234 W. Va. at 492, 766 S.E.2d at 751 (Internal citations omitted). Whether he has discharged these imposed duties is generally “a question of fact for the jury on the evidence adduced before them.” *State v. Chase Sec.*, 188 W. Va. 356, 363; 424 S.E.2d 591, 598 (1992) (citing *Clark v. Kelly*, 101 W. Va. 650, 661, 133 S.E. 365, 369 (1926). A complete court analysis is laid in a six-part test:

[The court should determine] 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 Insurance Reform Act, W. Va. Code § 29-12A-1 et seq. would apply; (4) the matter involves discretionary

⁵⁶ *Id.* at 20 (JA0005)

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 [**12] of employment.

W. Va. Dep't of Health, Off. of the Chief Med. Exam'r v. Cipoletti, 902 S.E.2d 133, 139 (2024) (citing *W. Va. Reg'l Jail & Corr. Facility Auth. v. Est. of Grove*, 244 W. Va. 273, 283, 852 S.E.2d 773, 783 (2020)).

1. Discretionary-Ministerial Distinction.

In presenting its case to establish qualified immunity by the court at this early stage, the Petitioner-Defendants centrally focused on the determination that Petitioner-Secrist's alleged actions were *discretionary* government actions versus ministerial.⁵⁷ (Emphasis added) Notably, as noted by the lower court, the Watkins' Complaint alleged APS conduct actions at issue were ministerial acts.⁵⁸ "Ministerial acts, by definition, are official acts which, under the law, are so well prescribed, certain, and imperative that nothing is left to the public official's discretion." *State v. Chase Sec., Inc.*, 188 W. Va. 356, 364, 424 S.E.2d 591, 599 (1992). As ministerial acts are so well-defined and proscriptive, they are essentially "clearly established," and thus a public officer would not be entitled to qualified immunity and be liable for "nonperformance or misperformance of such acts." See *id.* In contrast, discretionary functions are those acts performed by a public official which require the use of their discretion, judgements and decisions informed by their knowledge, experience, values and emotions." *Heckman v. Jividen*, 249 W. Va. 734, 742, 901 S.E.2d 297, 305 (2024) [citing *W. Virginia Reg'l Jail & Corr. Facility*

⁵⁷ Petitioners' Appellate Brief, pp. 1, 5, 7, 13, 14; Petitioner-Defendants Memorandum in Support of Motion to Dismiss, pp. 6-10 (JA00160-164)

⁵⁸ Integrated Order Granting Pl.'s Mot. to Am. Compl. and Denying Defs.' Mot. to Dismiss", ¶15 (Oct. 9, 2024) (JA0005)

Auth. v. A.B., 234 W. Va. 492, 509, 766 S.E.2d 751, 768 (2014); *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)].

We referred to the definition of "ministerial act" in *City of Fairmont v. Hawkins*, 172 W. Va. 240, 304 S.E.2d 824 (1983). There, the mayor had settled a property damage claim filed against the city and had signed the check. This action was expressly contrary to provisions of the city charter, [***25] which gave no authority to the mayor to draw checks on the city treasury and required approval from city council. We quoted Syllabus Point 4 from *Clark v. Kelly*, 101 W. Va. 650, 133 S.E. 365 (1926):

In many cases, the court merely refers to “broad” categories generally considered well-established, and undisputed, as discretionary. *Robbins*, 248 W. Va. at 529; 889 S.E.2d at 101 (It is well-established that 'the broad categories of training, supervision, and employee retention . . . easily fall within the category of "discretionary" governmental functions.). In one unpublished decision, the court stated that, based on the statutory language, the circuit court found that the APS' broad investigatory powers and duties are discretionary government functions. *Markham v. W. Va. Dep't of Health & Human Res.*, No. 19-0163 2020 W. Va. LEXIS 312, *15-16; 2020 WL 2735435 ((W.Va. Sup. Ct., May 26, 2020)(Memorandum Decision)(Exh. B)⁵⁹.

Notably, public officials can be charged with ministerial or nondiscretionary, duties within their broad category of discretionary powers, which can be especially determined by the reading of the statute and implementing regulations. See *Hodge v. Ginsberg*, 172 W. Va. 17, 23; 303 S.E.2d 245, 251 (1983); *Clark v. Kelly*, 101 W. Va. 650, 660-661; 133 S.E. 365, 369 (1926). “The same officer may be charged with both judicial and ministerial duties. When he is in the exercise of the latter, that is, purely ministerial functions, he is of course not protected by the

⁵⁹

judicial privilege. He is liable for negligence, like any other ministerial officer." *Clark*, 101 W. Va. at 660-661; 133 S.E. at 369. Thus, such public officers can still be found liable for ministerial actions within their broad discretionary powers. See *Hodge*, 172 W. Va. 17, 23; 303 S.E.2d 245, 251 (1983).

In *Hodge*, "Petitioner homeless citizens filed a petition for a writ of mandamus to compel respondent commissioner to provide adult protective services to incapacitated individuals such as themselves and other similarly situated people pursuant to the Social Services For Adults Act (Act), W. Va. Code §§ 9-6-1 to 9-6-8 (Cum. Supp. 1982)." (parts of act since repealed, especially regarding legislative purpose to provide continuing welfare assistance to those "who are subject to the recurring misfortunes of life "). 172 W. Va. at 19, 303 S.E.2d at 247. The Commissioner opined, that as part of his broad discretionary powers, he found that homeless individuals did not meet the definition of "incapacitated" individuals. *Id.* at 21. However, the court held that the Social Services For Adults Act was remedial legislation which had a beneficial purpose prescribed by the legislature that the Commissioner could not overly restrict through its interpretation of the statute (despite deference ordinarily given to agency interpretation). *Id.* at 22. In short, "The Act is designed to provide protective services to incapacitated adults. See generally W. Va. Code § 9-6-2." *Id.* at 19. Moreover, Mandamus was appropriate remedy even though the statute stated that the Department "may develop a plan for a comprehensive system of adult protective services". *Id.* at 22. The Hodge Court opined:

However, the statute relied upon by the respondent further provides that any plan developed by the Department of Welfare "shall offer such services as are available and appropriate in the circumstances to adults who may request and be entitled to such protective services" W. Va. Code § 9-6-7 (emphasis added). "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." *Syllabus Point 1, Nelson v. Public*

Employees Insurance Board, 171 W.Va. 445, 300 S.E.2d 86 (1982). Thus, the plan which the Department of Welfare has developed, see W. Va. Dept. of Welfare, Social Services Manual, ch. 29, must offer such adult protective services [***16] "as are available and appropriate in the circumstances"

Id. at 22.

Moreover, the court stated:

the respondent has exercised his discretion in the promulgation of regulations found at Chapter 29 of the Department of Welfare's Social Services Manual. These regulations establish the duty of the department to provide assistance to incapacitated adults who are the victims of neglect, abuse, or exploitation. See W. Va. Dept. of Welfare, Social Services Manual, Regs. 29010; 29100; 29120. The Commissioner therefore has a duty to provide assistance to those petitioners who meet these criteria. The assistance provided must be such as "will meet the individual's needs with the least necessary restrictions on his liberty and civil rights." W. Va. Dept. of Welfare, Social Services Manual, Reg. 29120.

The petitioners are individuals who are unable to provide for themselves adequate shelter necessary to sustain life and reasonable health. They seek adult protective services in the form of shelter, food and medical care as incapacitated adults from the Department of Welfare. *The lack of shelter, food and medical care which poses a substantial and immediate risk of death or serious permanent injury to an incapacitated adult is a valid reason for intervention by the Department [***18] of Welfare through the provision of adult protective services.* W. Va. Code § 9-6-1(5)⁶⁰; W. Va. Dept. of Welfare, Social Services Manual, Regs. 29020; 29100. The department is required to provide such services as are "appropriate in the circumstances," W. Va. Code § 9-6-7, and which "meet the individual's needs." W. Va. Dept. of Welfare, Social Services Manual, Reg. 29120. (Emphasis added)

Id. at 23.

In this case, the Department of Human Services is tasked with providing services to vulnerable or incapacitated adults within and beyond their officials' broad discretionary powers

⁶⁰ W. Va. Code § 9-6-2(3) currently states that one of the goals in the Social Services for Adults Act is: Preventing, reducing, and eliminating neglect, abuse, and exploitation of adults who are unable to protect their own interests,

to investigate abuse and neglect referrals. The statutory provisions must not be read in isolation, but in congruence with one another to achieve the over-all required goals.

First, one of the main general goals for providing services and granting broad discretionary powers is: Preventing, reducing, and eliminating neglect, abuse, and exploitation of adults who are unable to protect their own interests. W. Va. Code § 9-6-2(c)(3). *Markham v. W. Va. Dep't of Health & Human Res.*, 2020 W. Va. LEXIS 312, *15-16; 2020 WL 2735435 (Exh. B) (“this statute's plain language makes clear that Adult Protective Services ‘is charged with preventing, reducing, eliminating and investigating the exploitation and abuse and/or neglect of protected persons in this State.’”)

Second, the Secretary *shall* provide rules to carry out its goals like preventing neglect which could result in risk of substantial harm to those vulnerable adults. W. Va. Code § 9-6-2(c)

Third, the Adult Protective Services is tasked with duties to carry out those legislative goals, such as: receiving and investigating abuse and neglect reports, case planning, monitoring, evaluation, and other case work and services; and providing, arranging for, or facilitating the provision of medical, social service, economic, legal, housing, law enforcement, or other protective, emergency, or support services. W. Va. Code § 9-6-1.

Fourth, “If any employee or officer of the department shall by direct observation of a vulnerable adult not in the immediate care, custody, or control of another, have reasonable cause to believe that such vulnerable person is then and there in an emergency situation, then such officer or employee may offer transportation to a hospital or other safe place, other than a jail, to such vulnerable adult for immediate remedial treatment to reduce or avoid the risk of death or serious injury.

Immediately upon delivery of any vulnerable person to such hospital or other safe place, such officer or employee shall apply to the circuit court for and the court shall appoint, and in the case of an attachment the court shall contemporaneously with its issuance appoint, a guardian ad litem who shall not be an employee of the state, nor be an interested party, nor be selected by, nor in the employ of, any interested party, to represent the interests of such vulnerable adult, and the court shall fix a time, not later than one judicial day later, to determine if such remedial treatment shall continue or such vulnerable adult should be released.” W. Va. Code § 9-6-5

Fifth, while exercising the above duties, coordination among government officials *during an investigation* is required to fulfill the purposes of the Act. W. Va. Code § 9-6-3 provides:

The secretary *shall direct the coordination of the investigation of complaints* of abuse, neglect, or financial exploitation made pursuant to this article, and the various agencies of the department, the adult protective services system, the state and regional long-term care ombudsmen, administrators of nursing homes or other residential facilities, *county prosecutors*, and any other applicable state or federal agency shall cooperate among each other for the purposes of observing, reporting, investigating, and acting upon complaints of abuse, neglect, or financial exploitation of any vulnerable adult or facility resident in this state. (Emphasis added).

To facilitate this necessary coordination, the statute permits sharing of the personal information underlying the reports to certain agency officials, like law enforcement officers and prosecuting attorneys. W. Va. Code § 9-6-8. W. Va. Code § 9-6-11 also details reporting procedures which includes sharing the abuse or neglect reports with law enforcement or prosecuting attorneys.

Sixth, W.Va.Code §9-6-2(d) excepts immunity for APS officials who carry out their duties in a willful, wanton, or intentional manner which ultimately results in harm to those vulnerable adults.

Seventh, West Virginia Code §9-6-14 also makes any failure to file a mandated report will be guilty of a misdemeanor.

Eighth, assuring that these adults are provided services to prevent harm is so critical under the Act, the Department, *or any person*, may bring an action to abate or prevent a vulnerable adult from falling into an emergency situation in which he is at risk of suffering substantial or serious harm, or even death. W. Va. Code § 9-6-4 (Emphasis added)

The Petitioners-Defendants err in their claim that the Respondents-Plaintiff did not provide facts sufficient to sustain a claim to defeat qualified immunity; also, the Petitioners-Defendants wrongly argue that Petitioner-Defendant Secrist's actions were discretionary. These provisions show ministerial acts which are well prescribed, certain and imperative to meet the goal of the Act to prevent abuse or neglect leading to the risk of harm. The Watkins Complaint presented particular allegations of such ministerial actions not being executed during the APS investigation like: 1) failing to report to any law enforcement agency or prosecuting attorney or take court action, Ms. May's repeated failures to comply with APS mandates⁶¹—mandates presumably necessary to assure that Mr. May, the vulnerable adult, was not left in a possible emergency condition, or at risk of substantial or serious harm; and 2) closing the case and failing to remove Mr. May without even assuring in-person that deficiencies were corrected, Mr. May was in good health and had properly refrigerated food, and electricity and water in his home.⁶² Thus, the allegations rebuff any immunity defense.

⁶¹ Pl. Compl. at ¶¶46-7,51-52, 58, 63. (JA00020, 22)

⁶² *Id.* at ¶¶46-7,51-52, 58, 63. (JA00020, 22)

2. Discretionary Acts not absolutely immune-- Violation of clearly established statutory rights.

Even if the issue is debatable here, the West Virginia Supreme Court determined long ago that “the discretionary-ministerial act distinction highly arbitrary and difficult to apply.”⁶³ ⁶⁴ *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 574; 746 S.E.2d 554, 565 (2013) (citing *State v. Chase Securities, Inc.*, 188 W. Va. 356, 364, 424 S.E.2d 591, 599 (1992)); *Kerner v. Lewis*, No. 11-C-666, 11-1783, 2011 W.V. Cir. LEXIS 3385, *12-13 (November 28, 2011) (Exh. C) (.Reversed by, (on other grounds than discretionary/ministerial distinction), Remanded by *Fucillo v. Kerner*, 231 W. Va. 195, 744 S.E.2d 305 (2013). In effect, this evaluation may not be needed “to apply the general qualified immunity standard”. *Parkulo v. West Virginia Bd. of Probation & Parole*, 199 W. Va. 161, 175; 483 S.E.2d 507, 521 (1996) (citing *State v. Chase Sec.*, 188 W. Va. 356, 364, 424 S.E.2d 591, 599 (1992)). .As shown in the six-part test, even discretionary acts can still be denied immunity:

[t]o 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.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State

⁶³ “Courts that use the ministerial act concept hold that a public official has no immunity for his ministerial acts. However, commentators acknowledge that it is virtually impossible to make any clear distinction between a public official's discretionary and ministerial acts.” *State v. Chase Sec.*, 188 W. Va. 356, 363-364, 424 S.E.2d 591, 598-599 (1992)

⁶⁴ “This is acknowledged in Comment f to Section 895D of the Restatement (Second) of Torts: “It should thus be apparent that in a tort action against a public officer the court has the responsibility of determining not only whether he was engaged in exercising a discretionary function but also, if he is, how extensively this circumstance should work in his defense. There is no single test. Attempts to solve the problem by setting forth a precise definition of the term, discretionary function, have been less than helpful. The expression is not only a standard (see Comment d); it is also a legal conclusion whose purport is only somewhat incidentally related to the definitions of the two words composing it.” See Prosser & Keeton, *supra*.” (on Torts § 132 at 1062) (5th ed. 1984). *Id.*

and its officials or employees charged with such acts or omissions are immune from liability.

Markham v. W. Va. Dep't of Health & Human Res., No. 19-0163, 2020 W. Va. LEXIS 312, *13; 2020 WL 2735435 (Exh. B) (May 26, 2020) (quoting *Syl. Pt. 11, W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014)). Accordingly, at this early stage of the proceeding, the court may forego a substantial debate over the distinction and focus on establishing whether the complaint allegations may establish the other elements in dispute, especially when a statutory or constitutional law was alleged to be violated. See *State v. Chase Sec.*, 188 W. Va. at 363, 424 S.E.2d at 598 (“In *Hawkins*, we did not turn our decision on whether the mayor's act was ministerial or discretionary, but concluded that because the ‘long standing charter provision regarding disbursement of funds was a provision that Hawkins should reasonably have known[,] . . . he was acting in violation of law. He is not entitled to the good faith defense.’ 172 W. Va. at 247, 304 S.E.2d at 831”). At a minimum, the jury should be allowed to determine whether the underlying facts establish the issue. This is, and was in the court’s decision below, the situation in this case.

“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,(citing *Hutchison v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). Therefore, a plaintiff can pierce the shield of qualified immunity for even discretionary government acts when “‘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.” *Robbins*, 248 W. Va. at 524; 889 S.E.2d at 97 (citing *Syl. Pt. 11, in part, A.B.*, 234 W. Va. at 492, 766 S.E.2d at 751); *State v. Chase Securities, Inc.*, 188 W.Va. 356, 362, 424 S.E.2d 591, 595 (1992). “West Virginia's qualified immunity jurisprudence mirrors federal law”. *Robbins*, 248 W. Va. at 524; 889 S.E.2d at 97 (citing *Harlow v.*

Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Additionally, under West Virginia immunities law, qualified immunity does not shield a public official from suit whose acts are "fraudulent, malicious, or otherwise oppressive." *Syl. Pt., in part, State v. Chase Sec., Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992).

The West Virginia Supreme Court's legal analysis in the *Robbins* case is very instructive here. 248 W. Va. 515. Damein Robbins was seriously injured while incarcerated in "the Potomac Highlands Regional Jail on July 20, 2018, for forty-eight hours". *Id.* at 521. The following are some of the allegations of the incident which appeared in his original and amended complaint.

Robbins claims that within earshot of other inmates, an unnamed correctional officer elicited from Robbins that he was a sex offender, violating the Prison Rape Elimination Act (PREA).¹ According to Robbins, this substantially increased the possibility that other inmates would harm him. Robbins asserts that other inmates in the misdemeanor pod threatened him, so he asked to be transferred. Robbins claims that jail officials moved him to an interview room, then to felony pod A-6, a segregated housing unit. Robbins alleges that he was told that he would not be allowed out of his cell, nor would other inmates be allowed in it.

Robbins claims that early in the morning of July 22, 2018, Officer Byron Whetzel permitted three inmate-occupants of felony pod A-6 to enter Robbins's cell. The inmates closed the cell door behind them, covered the cell door window and the exterior window with paper, then turned off the lights. According to Robbins, the inmates then began to sexually assault him.

Robbins claims that Whetzel saw him being "show[n] off" but did not intervene. Robbins alleges that Officer Isaiah Blancarte was the "rover" in felony pod A-6 during the assault, and that he and Whetzel permitted inmates to roam around the pod together and enter his cell.²

Robbins was processed out of the jail late in the afternoon of July 22, 2018. He said nothing when other corrections officers inquired about his injuries, he alleges, because his assailants threatened to kill him should he report the assault. Robbins's wife collected him from the jail then took him to the hospital in Romney, West Virginia. Hours later, Robbins was transferred to a trauma ward at Winchester Medical Center. Robbins alleges that he was hospitalized until July 25, 2018. He claims that his ribs were broken and his orbital bone shattered in the assault.³

Id. at 520-1.

The complaint included details of the prisoner's assaulting behavior while in the cell.

Based on the allegations, Robbins sued two DOC Correctional Officers and the DOC. The primary basis for his claims under 42 U.S.C. § 1983, and vicarious liability, was a violation of his clearly established right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution, and its counterpart under the West Virginia Constitution. Robbins' claims included noting the officers' deliberate indifference and failure to protect, as well as the DOC's failure to train, and vicarious liability. Lastly, Robbins asserted claims based on the Officers' "fraudulent, malicious, or oppressive" acts or omissions.

The DOC and Officers moved for dismissal based on qualified immunity. The Circuit Court denied the motion, and the Appellate Court affirmed all denials of dismissal of all claims (except for failure to train and supervise), since the above allegations provided "sufficient 'particularized' facts to satisfy such requirement on the matter of a clearly established right in this instance and at this stage of the proceedings". In short, "the circuit court correctly concluded that the amended complaint contains factual allegations demonstrating that the Officers violated his Eighth Amendment right to freedom from cruel and unusual punishment", as asserted by Robbins on appeal. *Id.* at 524-5. The court found the claims even withstood the heightened pleading requirement asserted by the defendants as a basis to dismiss. *Id.* at 522 (citing *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 n.11, 479 S.E.2d 649, 659 n.11 (1996)). Lastly, "the court concluded that, if taken as true, the allegations in the amended complaint demonstrated that the Officers' acts or omissions had occurred within the scope of their employment with DOC so that dismissal of the vicarious liability claim was inappropriate under Rule 12(b)(6)." *Id.*

Most critically, the West Virginia Supreme Court determined that the plaintiff's allegations pierced the qualified immunity defense because the plaintiff's allegations could show that the defendants violated a clear, well-established constitutional right. In other words, the complaint sufficiently alleged the defendants' actions could establish before a jury that they violated the prisoner's established rights

under the Eighth Amendment, even though the defendants possess discretionary powers in their decision-making regarding managing prisoners and the prison facilities.

“[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.” *Id.* at 525 (citing *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 31, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993))). “In its prohibition of ‘cruel and unusual punishments,’ the Eighth Amendment ‘imposes duties on [prison] officials,’ including the particular ‘duty to protect prisoners from violence at the hands of other prisoners.’” *Id.* (citing *Farmer*, 511 U.S. at 832-3). The inmate could establish such a violation by establishing he was “incarcerated under conditions posing a substantial risk of serious harm,” and the culpable “prison official acted (or failed to act) with the mental state of ‘deliberate indifference.’” *Id.* (internal quotation omitted). The “deliberate indifference” state of mind “entails something more than mere negligence,” but “something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Robbins*, 248 W. Va. at 525. (citing *Farmer*, 511 U.S. at 835); See also *Johnson v. Quinones*, 145 F.3d 164, 167 (4th Cir. 1998) (quoting *Farmer*, 511 U.S. at 837).

The defendants in *Robbins* had asserted that the plaintiff’s allegations to establish the state of mind above were insufficient because he did not include expressed allegations showing “facts that plausibly suggest that [they] knew of and disregarded a substantial risk of serious harm to [him] by allowing inmates to roam around in the A-6 lockdown pod.” However, the court found that the inferences can be drawn from the allegations to establish knowledge of the risk of harm.⁶⁵

⁶⁵ Basically, a prison official ‘must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’”³⁷ That said, “an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.” (Emphasis added) *Robbins*, 248 W. Va. at 525; 889 S.E.2d at 98 (citing *Farmer*, 511 U.S. at 842.); “Robbins responds that his complaint contains clearly articulated allegations from which inferences may be drawn that the Officers acted (or failed to act) with sufficiently culpable states of mind during the alleged assault. We reject Whetzel and Blancarte’s take on the allegations in Robbins’s complaint and their refusal to acknowledge the inferences that those allegations support when the amended complaint is construed in Robbins’s favor” *Id.* at 525-6

“In sum, Robbins's amended complaint ” set[s] forth enough information to outline the elements of [a violation of his Eighth Amendment right to be free from sexual assault by other inmates] or permit inferences to be drawn that [those] elements exist.”” *Id.* at 527. Any question on whether those factual allegations establish knowledge or acts for such a violation must be resolved by the jury. *Id.* at 526-527 (citing *Farmer*, 511 U.S. at 842) (“[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”). The court resolved that it was not significant, nor contrary to the holding in *Hutchinson v. City of Huntington*, 198 W.Va. 139, and other cases cited by the defendants, that the trial court order did not provide extensive analysis of the subjective knowledge of the Eighth Amendment violation. *Id.* at 527. Those cases either dismissed the case because the order provided no substantial findings of fact or conclusions of law on qualified immunity, or involved summary judgment motions. *Id.* This was not the case in Robbins.⁶⁶

Moreover, the court rebuked the Defendants’ invoking of the holding in *West Virginia State Police v. J.H. by & through L.D.*, 244 W. Va. 720, 856 S.E.2d 679 (2021). (Court found circuit court erred by deferring a ruling on a motion to dismiss even though the court also found that the plaintiff had not pleaded a violation of his clearly established, substantive due process rights). In that case, “the complaint lacked factual allegations as to the circumstances of the plaintiff's arrest, so it did not allow for the inference that law enforcement officials' actions during the arrest were unreasonable—an inference necessary to demonstrate plaintiff's claim of excessive force. As detailed above, the amended complaint contains numerous factual allegations from which a factfinder may infer that the Officers knew of the substantial risk of harm posed to Robbins by exposure to other inmates—a different *kettle of fish* from the amended complaint in J.H., which was “barebones . . . [with] no facts asserted . . . explaining in even

⁶⁶ “Here, we review an order denying the Officers' motion to dismiss on qualified immunity grounds. The order is adequate to permit our review under applicable law.” *Id.* at 527.

a skeletal way. . . the circumstances" of the plaintiff's arrest." *Id.* at 527 (citing *J.H. by & through L.D.*, 244 W. Va. at 738-39, 856 S.E.2d at 697-8).

In this case, as discussed in Section IB, *surpa*, and in line with the Robbins and Hodge case, the established right to certain proper action by APS officials to prevent harm to vulnerable adults, was established in the Public Services for Adults Act, within the right to judicial action by any person, and the mandated reporting requirements and necessary coordination to meet its goal to prevent risk of harm. These are bright line rules which mandate careful action by agency officials entrusted with the care of vulnerable adults. Mandating their compliance do not punish "bad guesses in gray areas".

Moreover, the Watkins' allegations are not "skeletal assertions" of liability. As in Robbins, in evaluating the Defendants' motion to dismiss, the Watkins' Complaint sufficiently sets forth particular allegations showing a violation of his clear legal right to be protected from risk of substantial harm by the willful, wanton and intentional actions and/or omissions of the Petitioner-Defendants. See discussion IB *supra*, discretionary-ministerial distinction. Most critically, the Petitioners wrongly claimed that Secrist's actions, as an agent of DHHR, fell within his discretionary duties "to not begin the removal process of Mr. May after noting compliance with DHHR recommendations and improved living conditions at the home".⁶⁷ The Petitioner Secrist not only failed to remove him, he closed the referral before the DHHR mandates (as he said they would remove him if not corrected) were not remedied or even before conducting a final in-person check to assure that Mr. May was not in an emergency situation or at risk of harm. In short, he did nothing. He failed to abide by his duties under the act to prevent neglect or abuse which placed him at risk of serious harm. Reasonably, an APS officer should

⁶⁷ Petitioners' Brief, pp. 17-18.

have been aware, that there was a substantial risk of serious harm, after witnessing the caregiver's repeated failure to comply, and after leaving a vulnerable individual in a home where there is no electricity, refrigerator only operated by generator (was that adequate to cool food properly), water taps not checked, and Mr. May's health and care not re-evaluated in-person. In fact, the lack of action did lead to harm--Mr. May's injuries and death. Especially when viewed at this early stage, such allegations necessarily would negate any assertion of qualified immunity defense by the government officials entrusted with that duty to protect him from that risk of harm.

The court's legal conclusions based on the facts in the memorandum decision in *Markham v. W. Va. Dep't of Health & Human Res.*, 2020 W. Va. LEXIS 312, *20-23, 2020 WL 2735435, (Exh. B), do not control or change the conclusions in this case. This memorandum decision was an appeal from the granting of summary judgment, not a motion to dismiss of a complaint against the DHHR and the APS, after a case investigation. In *Markham*, the plaintiffs sued as subjects in an APS investigation in which there was some evidence of financial exploitation. APS took all necessary action to protect the vulnerable adult. APS referred the potential financial exploitation report to law enforcement. Law enforcement opened a criminal investigation which validated the evidence. *Id.* at *5. Ultimately, the protected person passed away and a witness refused to speak. The plaintiffs claimed damages to their business and reputation from the investigation. *Id.* at *8-9. The plaintiffs claimed that their rights, based on APS policy, or rules, were violated because they did not receive appropriate notice documents allegedly required to be given to suspected perpetrators during an investigation. *Id.* at *16. These particular rules or policies could not be considered statutory violations needed to bar immunity of discretionary decisions. *Id.* Additionally, unlike the case here, the *Markham* case did not concern the APS' officials' failure to fulfill their ministerial duties to investigate abuse or neglect which left the protected person in a condition of risk of harm, and ultimately led to his death from that neglect or abuse.

C.

- I. The Circuit Court correctly concluded that the Watkins Complaint presented sufficient particular allegations which could establish to a jury that WV DHHR is not entitled to qualified immunity on Ms. Watkins' claim against it.**

“If the plaintiff identifies a clearly established right or law which has been violated by the acts or omissions of the State, its agencies, officials, or employees, or can otherwise identify fraudulent, malicious, or oppressive acts committed by such official or employee, the court must determine whether such acts or omissions were within the scope of the public official or employee's duties, authority, and/or employment. To the extent that such official or employee is determined to have been acting outside of the scope of his duties, authority, and/or employment, the State and/or its agencies are immune from vicarious liability, but the public employee or official is not entitled to immunity in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992) and its progeny. If the public official or employee was acting within the scope of his duties, authority, and/or employment, the State and/or its agencies may be held liable for such acts or omissions under the doctrine of respondeat superior along with the public official or employee.” *Syllabus Point 12, West Virginia Regional Jail & Correctional Facility Authority v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).” *Robbins*, 248 W. Va. at 520, 889 S.E.2d at 92-93.

Moreover, “An act specifically or impliedly directed by the master, or any conduct which is an ordinary and natural incident or result of that act, is within the scope of the employment.” *Syllabus, Cochran v. Michaels*, 110 W.Va. 127, 157 S.E. 173 (1931).” *Syllabus Point 6, Courtless v. Jolliffe*, 203 W. Va. 258, 507 S.E.2d 136 (1998). *Id.* at 520; S.E.2d at 93. Critically, even intentional or reckless acts can be imputed to the employer, so long as the employee is acting within the general scope of his authority and for the benefit of the employer.” *Id.* at 531, 889 S.E.2d at 104.

The Petitioner-Defendants have not asserted in any way that the Seskrit's alleged acts were outside the scope of his employment. The Respondent-Plaintiff asserts with particularity allegations of

conduct against Petitioner-Defendant Secrist, who was acting as an agent, servant and/or employee of Defendant DHHR, but that such conduct was done in a willful, wanton and/or intentional manner.

Ultimately, public policy interests demand denial of a qualified immunity defense at this early stage for Seskirt and the DHHR in such cases where an official exercises power irresponsibly and in willful disregard of risk of serious harm to those vulnerable individuals entrusted to their care or specific prevention from harm. *Heckman v. Jividen*, 249 W. Va. 734, 741; 901 S.E.2d 297, 304 (2024)(the threat of liability “serves some deterrent purpose, its imposition would seem particularly useful where willful or wanton misconduct is concerned.”); *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, No. 13-0037, 2014 W. Va. LEXIS 253, *33; 2014 WL 1272850 (February 4, 2014)(Exh. D)(“Much like the negligent performance of ministerial duties for which the State enjoys no immunity, we believe that situations wherein State actors violate clearly established rights while acting within the scope of their authority and/or employment, are reasonably borne by the State.).

The Circuit appropriately denied the Petitioners-Defendants’ Motion to Dismiss. This Court should affirm that decision as proper.

CONCLUSION

Wherefore, Respondent-Plaintiff, Tammy Watkins (formerly Mounts), Administratrix of the Estate of William McKinsey May respectfully requests that the Court affirm the Circuit Court’s denial of their respective motions to dismiss and hold that qualified immunity does not bar Ms. Watkins’ claim against the Petitioners.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2025, I served a true and exact copy of the foregoing “Respondent’s Brief” by electronically filing the same via the Court’s electronic filing system, which will provide electronic notification to all counsel of record.

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