

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 35444

BETTY JARVIS,

Plaintiff below, Appellee,

v.

**WEST VIRGINIA STATE POLICE,
D. M. NELSON, A. S. PERDUE, and
C. E. AKERS,**

Defendants below, Appellants.

WANDA CARNEY,

Plaintiff below, Appellee,

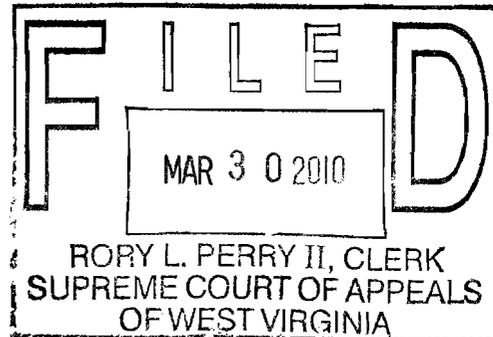
v.

**WEST VIRGINIA STATE POLICE,
D. M. NELSON, A. S. PERDUE, and
C. E. AKERS,**

Defendants below, Appellants.

Interlocutory Appeal from the Circuit Court of Kanawha County, West Virginia

APPELLEES' BRIEF



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APPELLEES' BRIEF

Challenging the State's reliance on the statements as proof of obstruction, Appellants argue that the speech at issue falls within the protections of the First Amendment. As we discussed in Wilmoth, constitutionally protected free speech cannot be relied upon as a basis for establishing the offense of obstruction.—State v. Carney and Jarvis, 222 W.Va. 152, 158, 663 S.E.2d 606, 612 (2008).

I.

Kind of proceeding and nature of ruling below

To the Honorable Justices of the

West Virginia Supreme Court:

In 2006, Appellees Betty Jarvis and Wanda Carney were convicted of obstructing a police officer and conspiracy to obstruct a police officer following a jury trial in the Circuit Court of Mingo County. Appellants West Virginia State Police, D. M. Nelson, A. S. Perdue, and C. E. Akers were

the critical law enforcement agency and officials involved in prosecuting Appellees on behalf of the State. As this Court noted in *State v. Carney and Jarvis*, 222 W.Va. 152, 663 S.E.2d 606 (2008), where these convictions were set aside due to the insufficiency of the evidence, one of the main contentions by the State was that Appellees had obstructed a police officer by asking witnesses questions prompted by the rampant rumors going around about some of these Appellants. Thus, the State attempted to criminalize Appellees' exercise of their First Amendment rights. Thanks to the *Carney-Jarvis* decision, Appellees were exonerated and for that, Appellees will be eternally grateful to this Court.

In an effort to seek a remedy for this violation of their First Amendment rights, Appellees filed a state constitutional tort action¹ against these Appellants. Appellants responded with a motion to dismiss, which was denied by the Honorable Judge Paul Zakaib, Jr., in an eighteen-page order entered on August 4, 2009. The present interlocutory appeal² was filed by Appellants to challenge this order.

This case raises two critical issues in civil rights litigation. First, the Court should decide whether to follow the United States Supreme Court's holding in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), which requires the plaintiff in a retaliatory prosecution case, in addition to proving a constitutional rights violation, **also** to prove the absence of probable cause, or whether this Court will continue to follow the *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and *Pickering v. Board of*

¹This cause of action was recognized by this Court in Syllabus Point 2 of *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

²This case is one of the first interlocutory appeals granted since the Court officially recognized this right in *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009).

Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), line of cases, where once the plaintiff proves a motivating factor in the prosecution was the plaintiff's exercise of his or her constitutional rights, the defendant can defeat the claim by showing that the prosecution would have proceeded anyway, based upon probable cause, even in the absence of the protected conduct. See Syllabus Point 3, *McClung v. Marion County Commission*, 178 W.Va. 444, 360 S.E.2d 221 (1987); Syllabus Points 4, 5, and 6, *Alderman v. Pocahontas County Board of Education*, 223 W.Va. 431, 675 S.E.2d 907 (2009); *Neely v. Mangum*, 183 W.Va. 393, 396 S.E.2d 160 (1990); *Freeman v. Poling*, 175 W.Va. 814, 338 S.E.2d 415 (1985); Syllabus Points 3 and 4, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996).

Second, this case provides the Court with the opportunity to clarify how the defense of qualified immunity should be applied in this State. Lawyers involved in litigating civil rights cases have struggled to figure out how the Court intends to apply this defense. This Court repeatedly has expressed its intent to follow the federal law of qualified immunity. However, in some cases, this Court has applied qualified immunity as a defense for the State or in response to a negligence claim, which is contrary to all existing federal law. Appellees welcome this chance to have this Court address these important civil rights issues.

II.

Statement of the facts

From the tone and substance of Appellants' factual summary, the reader might conclude that Appellees had engaged in a two-woman "Girls Gone Wild" crime spree the likes of which the citizens of Mingo County had never seen before. For example, in the Introduction section,

Appellants assert, “Appellees broke into the home of a suspect in a drug and murder investigation in Mingo County, West Virginia, and stole some of the suspect’s property. They also tampered with witnesses in the same investigation.” (Appellants’ Brief at 1).

This Court rejected the allegation that Appellants had broken into the house formerly rented by Valerie Friend by noting “Appellants [Carney and Jarvis] established that the entry in question **was not illegal** as the owner of the house, Mr. Burton, admitted Appellant Jarvis to the house.” (Emphasis added). *State v. Carney and Jarvis*, 222 W.Va. at 159, 663 S.E.2d at 613. Moreover, as to evidence being “stolen,” this Court noted any items removed from the house were provided to the United States Attorneys’ office, these items were acknowledged by the law enforcement officials involved, including Appellant Nelson, as having no significance, and Appellant Perdue admitted that Appellees had not tampered with any of the items removed. *Id.*

With respect to Appellants’ assertion that Appellees had “tampered” with witnesses, which is a reference to Appellees speaking to witnesses, discussing rumors of police misconduct with them, and assisting a frightened witness, this Court held, “Given **the protected nature of the speech** involved, as well as the clear lack of any showing that such speech served to statutorily hinder the investigation at issue, we do not find the evidence of the statements Appellants [Carney and Jarvis] allegedly made to Ms. Boseman sufficient to establish the offense of obstruction under *West Virginia Code § 61-5-17(a)*.” (Emphasis added). *Id.*

For purposes of this appeal, Appellees will rely on the statement of facts already discussed by this Court in *State v. Carney and Jarvis* as well as the findings made by Judge Zakaib in his August 4, 2009 order. Since the allegations in the complaint must be taken as true, Appellees particularly rely on the following allegations:

29. Throughout the discovery in Plaintiff's criminal case, at various times, comments were made by Defendants or people associated with Defendants regarding Plaintiff's connection to West Virginia Wants to Know and that Plaintiff and Ms. Jarvis were in Mingo County just to make trouble for the police and public officials there.
30. Plaintiff and Ms. Jarvis maintained their innocence and filed multiple motions to have these false charges dismissed, but those efforts were unavailing.
31. At the trial, a significant part of the State's theory was based upon questions Plaintiff and Ms. Jarvis asked of various witnesses and the discussions they had with witnesses of the various rumors going around Mingo County, identified above.
32. On September 8, 2006, a jury in the Circuit Court of Mingo County convicted Plaintiff and Ms. Jarvis of obstructing a police officer and conspiracy to obstruct a police officer.
33. As a result of these convictions, Plaintiff and Ms. Jarvis were sentenced to one year for obstructing and one year for conspiracy, with the sentences to be served concurrently. Plaintiff's request for probation or alternative sentencing was granted, the sentences were suspended, and the trial court placed Plaintiff and Ms. Jarvis on 120 days of electronic home confinement, required each of them to complete 200 hours of community service, and required each of them to enroll and complete a higher education class in criminal justice/procedure. Furthermore, fines and costs also were assessed.
34. On April 25, 2008, the West Virginia Supreme Court issued a decision in *State v. Carney*, 222 W.Va. 152, 663 S.E.2d 606 (2008), setting aside the convictions obtained against Plaintiff and Ms. Jarvis as a matter of law, due to the insufficiency of the evidence.
35. In reaching this decision, the West Virginia Supreme Court specifically noted that several of the allegations made against Plaintiff and Ms. Jarvis in support of these convictions were protected speech under the First Amendment and could not be the basis for convictions of either obstructing a police officer or conspiracy to obstruct a police officer.

III.

Standard of review

The standard of review upon a motion to dismiss was stated by this Court in Syllabus Point 2 of *Holbrook v. Holbrook*, 196 W.Va. 720, 474 S.E.2d 900 (1996):

“The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 [102], 2 L.Ed.2d 80 (1957).” Syl. pt. 3, *Chapman v. Kane Transfer Company*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

In elaborating on this standard, this Court explained, 196 W.Va. at 726, 474 S.E.2d at 906:

As this Court acknowledged in *John W. Lodge Distributing Co., supra*, 161 W.Va. at 606, 245 S.E.2d at 159: “The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff’s burden in resisting a motion to dismiss is a relatively light one.”

Generally, a motion to dismiss should be granted only where “ ‘it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’ ” *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59, 65 (1984)) (additional citation omitted). For this reason, motions to dismiss are viewed with disfavor, and this Court has counseled lower courts rarely to grant such motions. *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605-06, 245 S.E.2d 157, 159 (1978); *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (1998). Furthermore, “[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true.” *Id.*

IV.

Issues presented

A.

Whether, in this retaliatory prosecution action, this Court should continue following *Mt. Healthy* in civil rights cases and should reject the holding in *Hartman*, which would require Appellees also to prove the absence of probable cause?

B.

Whether, in the event this Court follows *Hartman*, a fact question is presented for a jury to decide on the absence of probable cause?

C.

Whether the trial court correctly followed the jurisprudence developed by the federal courts in denying qualified immunity for the individual Appellants because: 1. the law addressing Appellees' constitutional rights was clearly established; 2. qualified immunity only applies to individual public officials and not to Appellant West Virginia State Police; and 3. qualified immunity is inapplicable to Appellees' negligence claim?

V.

Argument

A.

In this retaliatory prosecution action, this Court should continue following *Mt. Healthy* in civil rights cases and should reject the holding in *Hartman*, which would require Appellees also to prove the absence of probable cause

1.

Introduction

Appellants sought to be dismissed by the trial court on all theories asserted based upon qualified immunity. Because the trial court denied this motion, Appellants have opted to use the

interlocutory appeal procedure recently adopted by this Court to challenge this denial of qualified immunity.

The initial argument asserted by Appellants is they are entitled to qualified immunity because Appellees should be required, under *Hartman*, to prove an absence of probable cause in this retaliatory prosecution claim. Appellants further elaborate on this argument by asserting Appellees cannot meet this element because they were indicted by a grand jury, found guilty by a petit jury, and the trial court in the underlying criminal case denied all of their motions to dismiss the charges. Appellants contend these facts demonstrate, as a matter of law, that probable cause existed against these Appellees.

Appellees will address this issue separately from the remaining qualified immunity issues because this argument goes to the heart of what Appellees must prove in order to prevail in this case. Appellees respectfully submit the trial court was correct in holding this Court would continue to follow its *Mt. Healthy* line of cases, rather than adopt this additional element required by *Hartman*. Furthermore, even if this Court decides to follow *Hartman*, genuine issues of material fact still exist, which preclude resolution of this case as a matter of law.

2.

***Mt. Healthy* analysis permits jury to weigh constitutional rights violation as motivating factor over existence of probable cause**

Appellees alleged in their separately filed but virtually identical complaints that Appellants had impinged upon their free speech rights, in violation of the West Virginia and United States Constitutions, by criminalizing their protected speech. Historically, where a plaintiff asserts he or she suffered some adverse consequence for exercising free speech rights, this Court regularly has followed the burden-shifting formula outlined in *Mt. Healthy City School District Board of*

Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). This procedure is designed to protect the significant constitutional right at stake while, at the same time, recognizing there may be important governmental interests, which occasionally may require a constitutional rights claim to be defeated.

For example, in Syllabus Point 3 of *McClung v. Marion County Commission*, 178 W.Va. 444, 360 S.E.2d 221 (1987), this Court outlined the elements of a wrongful discharge action, based upon an alleged violation of constitutional rights:

In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct.

See also Syllabus Points 4, 5, and 6, *Alderman v. Pocahontas County Board of Education*, 223 W.Va. 431, 675 S.E.2d 907 (2009); *Neely v. Mangum*, 183 W.Va. 393, 396 S.E.2d 160 (1990); *Freeman v. Poling*, 175 W.Va. 814, 338 S.E.2d 415 (1985); Syllabus Points 3 and 4, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996).

Based upon these cases, the trial court concluded:

Thus, as applied in this case, under *Mt. Healthy*, to establish a criminal prosecution in violation of Plaintiffs' free speech rights, Plaintiffs will be required to prove the following, by a preponderance of the evidence:

1. Plaintiffs exercised her constitutionally protected free speech rights;
2. A substantial or motivating factor for Defendants to pursue the criminal prosecution of Plaintiff was based upon Plaintiffs was based upon Plaintiffs' exercise of her free speech rights;
3. As a proximate cause of Defendants' actions, Plaintiff suffered damages.

To defend against this claim, Defendants may attempt to show Plaintiffs would have been prosecuted in the absence of the protected conduct. (August 4, 2009 Order at 7-8).

Appellants seek to convince the Court that Appellees also should be required to prove an absence of probable cause, in addition to the foregoing elements, based upon the United States Supreme Court decision in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), which was a five to two decision, with Chief Justice Roberts and Justice Alito not participating.

In *Hartman*, the plaintiff, who owned a business which manufactured a multi-line optical character reader that could be used in sorting mail, publicly had criticized some of the plans by the United States Postal Service to use a single-line reader. Eventually, the Postal Service decided to switch to multi-line readers, but chose to give its contracts to companies other than this plaintiff. Adding insult to injury, this plaintiff and his company later were criminally prosecuted, at the urging of several postal inspectors, but the criminal case was dismissed after a six week trial due to the insufficiency of the evidence. As observed by the dissenting Justices, "The Court of Appeals, reviewing the record so far made, determined that '[t]he evidence of retaliatory motive [came] close to the proverbial smoking gun.'" 363 U.S. App.D.C. 350, 388 F.3d 871, 884 (CADDC 2004)." *Hartman*, 547 U.S. at 266, 126 S.Ct. at 1707, 164 L.Ed.2d at 458.

In reviewing these facts, the majority in *Hartman*, 547 U.S. at 263, 126 S.Ct. at 1705, 164

L.Ed.2d at 455, noted:

Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another....

Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise. Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the long-standing presumption of regularity accorded to prosecutorial decision-making....And this presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal....

In formulating a new element for a retaliatory prosecution claim, the majority in *Hartman*, 547 U.S. at 263, 126 S.Ct. at 1706, 164 L.Ed.2d at 456, concluded:

Some sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity. And at the trial stage, some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff. The connection to be alleged and shown, is the absence of probable cause.

The majority in *Hartman* acknowledged the possibility that in some cases, a "prosecutor's disclosure of retaliatory thinking on his part, for example, would be of great significance in addressing the presumption [of regularity] and closing the gap." *Hartman*, 547 U.S. at 264, 126 S.Ct. at 1706, 164 L.Ed.2d at 456.³ Finally, "Probable cause or its absence will be at least an

³Appellees believe discovery in the present case may reveal that the prosecutor actually shared the unconstitutional animus with Appellants. In paragraph 29 of Appellees' respective

evidentiary issue in practically all such cases.” *Hartman*, 547 U.S. at 265, 126 S.Ct. at 1707, 164 L.Ed.2d at 457. Thus, the absence of probable cause ordinarily will be a fact issue that cannot be resolved by a motion to dismiss or motion for summary judgment.

The competing views expressed by the majority and dissenting opinions in *Hartman* demonstrate that whether or not this Court decides to follow *Hartman* is not required as a matter of constitutional law, but rather is a public policy decision to be made by this Court. At the time this brief was written, only a couple of state courts in New York and California have issued decisions making any reference to *Hartman*. Whether the highest appellate courts in other states will adopt

complaints, Appellees specifically allege, “Throughout the discovery in their criminal case, at various times, comments were made by Defendants or people associated with Defendants regarding either Ms. Carney’s connection to West Virginia Wants to Know and that Plaintiff and Ms. Carney were in Mingo County just to make trouble for the police and public officials there.”

For example, in the brief filed by the State in the appeal of *State v. Carney and Jarvis*, Mingo County Prosecuting Attorney C. Michael Sparks concluded in a revealing and fiery condemnation of Appellees’ exercise of their First Amendment rights:

Each of the Appellants [Carney and Jarvis] had a motive to obstruct First Sergeant Nelson, Trooper First Class Perdue and First Lieutenant Akers in the Carla Collins murder investigation. Appellant Carney has become a pseudo-celebrity in the Charleston area as a frequent guest of a local tabloid radio show that appears to focus on sensationalism and scandalous innuendo. Appellant Carney appears to thrive on the controversy created by her **tabloid radio show appearances and West Virginia Wants To Know shenanigans**. It is clear that Appellant Carney irresponsibly attempted to expand Appellant Carney’s provocative footprint into Mingo County at the expense of the criminal justice system and highly respected police officers. **Appellant Jarvis appears to have also thrived on controversy and attempted to utilize scandalous innuendo to prevent the prosecution of her nephew and first cousin.** (Emphasis added). (State’s brief, *State v. Carney and Jarvis*, at 12).

the holding in *Hartman* to be applied in retaliatory prosecution claims remains to be seen. Thus, this Court will be the first state appellate court to decide whether this holding in *Hartman* will be incorporated into state law in a retaliatory prosecution claim.

The majority in *Hartman* decided that adding the absence of probable cause as an element in a retaliatory prosecution claim addressed the causation problem inherent in these cases. While this holding no doubt will make it impossible for some retaliatory prosecution claims to be proven and, therefore, will eliminate redress for some constitutional rights violations, the majority believed this change in the law was necessary.

The dissenting justices contended the retaliatory prosecution claim as defined by the D.C. Circuit Court of Appeals, which was consistent with the *Mt. Healthy* line of cases, was more protective of free speech, and, therefore, preferable. Under the *Mt. Healthy* approach, the defendant still has the right to convince the jury that the existence of probable cause to prosecute the case was sufficient to overcome any underlying unconstitutional motivation of the law enforcement officers involved.

In considering these competing views, Appellees respectfully submit the trial court was correct in concluding:

This Court finds that it should follow the *Mt. Healthy* burden-shifting model in cases involving alleged violations of constitutional and civil rights, consistent with the West Virginia Supreme Court's approach in the employment setting. Applying this burden-shifting approach in the present case is more protective of a person's constitutional rights, whereas under *Hartman*, the claim is defeated completely, regardless of the constitutional violation; if it can be shown there was any probable cause for the prosecution. (August 4, 2009 Order at 10).

B.

In the event this Court follows *Hartman*, a fact question is presented for a jury to decide on the absence of probable cause

Appellants assert if this Court adopts *Hartman*, Appellees cannot prove an absence of probable cause “because it is not only beyond dispute but in fact *undisputed* that probable cause existed to support Appellant’s role in Appellees’ convictions. A grand jury indicted Appellees. The trial court—more than once—denied Appellees’ dispositive motions. And most importantly, a jury convicted Appellees. There was, thus, undisputedly probable cause.” (Appellants’ Brief, at 17-18). A very similar argument was accepted by the United States District Court for the District of Columbia in *Hartman* following the reversal and remand by the United States Supreme Court.

In *Moore v. Hartman*, 569 F.Supp.2d 133, 141 (D.C.D.C. 2008), the District Court granted summary judgment to the defendants and concluded:

Because the plaintiff has presented no evidence that causes the court to question the validity of the grand jury proceeding, the indictment conclusively establishes that the government had probable cause to bring the charges against him. And because absence of probable cause is an element of both the plaintiff’s *Bivens* retaliatory prosecution claim and his malicious prosecution claim under the FTCA, the court grants the defendants’ motion for summary judgment as to both claims.

However, on appeal, the D.C. Circuit Court of Appeals **reversed** the District Court’s ruling. In *Moore v. Hartman*, 571 F.3d 62 (D.C.Cir. 2009), the D.C. Circuit concluded that in the context of a civil retaliatory prosecution claim, an indictment merely was prima facie evidence of probable cause, which may be rebutted:

We have not previously decided what presumption a grand jury indictment is afforded in a *Bivens* retaliatory prosecution claim. Appellant points out, however, that several of our sister circuits have held that a grand jury indictment is prima facie evidence of probable

cause which may be rebutted. *See, e.g., White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988) ("[T]hough an indictment by a grand jury is generally considered prima facie evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence."); *see also Gonzalez Rucci v. INS*, 405 F.3d 45, 49 (1st Cir. 2005) (generally an indictment establishes probable cause, but there is an exception if law enforcement officers knowingly presented false testimony to the grand jury); *Rothstein v. Carriere*, 373 F.3d 275, 282-83 (2d Cir. 2004) (grand jury indictment creates presumption of probable cause; may be rebutted if plaintiff "establish[es] that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith"); *Riley v. City of Montgomery, Alabama*, 104 F.3d 1247, 1254 (11th Cir. 1997) ("[A]n indictment is prima facie evidence of probable cause which can be overcome by showing that it was induced by misconduct."); *Rose v. Bartle*, 871 F.2d 331, 353 (3d Cir. 1989) (grand jury indictment "constitutes prima facie evidence of probable cause to prosecute, but . . . may be rebutted by evidence that the presentment was procured by fraud, perjury or other corrupt means"); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988) ("obtaining an indictment is not enough to insulate state actors from an action for malicious prosecution under § 1983" when "finding of probable cause remained tainted by the malicious actions of the government officials"); *Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997) (same; explicitly adopts reasoning of Hand). *Cf. Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (in a later civil action for malicious prosecution, a judicial finding of probable cause in a criminal proceeding is prima facie evidence of probable cause which may be rebutted by a "showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith"); *Hinchman v. Moore*, 312 F.3d 198 (6th Cir. 2002) (a judicial finding of probable cause in a criminal proceeding does not bar a future malicious prosecution claim where plaintiff alleges the police officer supplied false information to establish probable cause); *DeLoach v. Bevers*, 922 F.2d 618, 620-21 (10th Cir. 1990) (despite judicial determination of probable cause, police officer "cannot hide behind the decisions of others involved in [plaintiff's] arrest and prosecution if she deliberately conceals and mischaracterizes exculpatory evidence"). We join these other circuits in their unanimous holding.

The D.C. Circuit, 571 F.3d at 68, further held:

The standard we adopt today is also consistent with the Supreme Court's opinion in *Moore IV*. Indeed, in *Moore IV*, the Court held that appellant need only show "some evidence" of a lack of probable cause. *Moore IV*, 547 U.S. at 263. The Court recognized that "it would be unrealistic to expect a prosecutor to reveal his mind." *Id.* at 264. Accordingly, the Court noted that appellant may satisfy his burden by looking to "a distinct body of highly valuable circumstantial evidence available...showing whether there was or was not probable cause to bring the criminal charge." *Id.* at 261. These statements support our interpretation that the Court viewed the indictment as prima facie—not conclusive—evidence of probable cause.

This most recent decision issued in the *Hartman* litigation clearly holds that the absence of probable cause is a fact issue that cannot be not resolved as a matter of law simply because an indictment was returned by a grand jury. If the issuance of an indictment resolved the probable cause issue as a matter of law in a retaliatory prosecution claim, then the United States Supreme Court would not have found it necessary to remand the case to the District Court because there is no dispute the plaintiff in that case was indicted.

If this Court adopts the holding in *Hartman*, Appellees would have to develop "enough evidence to create a genuine issue of material fact as to the legitimacy, veracity, and sufficiency of the evidence presented to the grand jury. Given the presumption, to carry his burden he must present evidence that the indictment was produced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Id.*, at 69.

In the present case, there are at least two critical reasons why Appellees should be permitted to present their case to a jury. First, based upon *State v. Carney and Jarvis*, this Court determined, after reviewing all of the evidence presented by the State against Appellees, that the evidence was insufficient as a matter of law to support a charge of obstructing a police officer. Asking questions

of witnesses involved in a criminal investigation, even questions about derogatory rumors circulating about the police officers involved, is protected speech, which could never form the basis for an obstructing a police officer charge, regardless of what burden of proof is applied. Second, the State attempted to criminalize Appellees' protected speech, as opposed to simply charging them in retaliation for comments they made.

Furthermore, at this stage in the proceedings, Appellees do not know what additional evidence of wrongful conduct will be revealed in discovery. Clearly, based upon the most recent decision in the *Hartman* case, even if this Court requires Appellees to prove an absence of probable cause, Appellees should be permitted to develop all relevant facts to prove there was no probable cause justifying the criminal prosecution in this case.

C.

The trial court correctly followed the jurisprudence developed by the federal courts in denying qualified immunity for the individual Appellants because: 1. the law addressing Appellees' constitutional rights was clearly established; 2. qualified immunity only applies to individual public officials and not to Appellant West Virginia State Police; and 3. qualified immunity is inapplicable to Appellees' negligence claim

1.

Introduction

In their motion to dismiss, the individual Appellants as well as Appellant West Virginia State Police sought to be dismissed based upon qualified immunity. Their initial argument, that qualified immunity is required under *Hartman*, has been addressed above. The remaining arguments for qualified immunity are based upon the following assertions:

1. Because the elements of a retaliatory prosecution claim have not been recognized by this Court, the contours of this claim will not be clearly established until after this Court resolves this case.

2. Although qualified immunity only applies to a public official or individual defendant, Defendant West Virginia State Police claims it is entitled to qualified immunity; and
3. Although qualified immunity is only a defense to constitutional rights violations, Appellants claim they are entitled to qualified immunity on Appellees' negligence claim.

Appellees respectfully submit these remaining arguments for qualified immunity are without merit and should be rejected by this Court.

2.

The history of qualified immunity in West Virginia

This Court repeatedly has asserted that the development of qualified immunity under state law must conform to and follow the federal law of qualified immunity. In this Court's most recent qualified immunity decision, *Robinson v. Pack*, 223 W.Va. 828, 834, 679 S.E.2d 660, 666 (2009), the Court once again reiterated its reliance on federal law in the development of qualified immunity in state actions:

In reviewing the development of immunity law with regard to public officials in *Chase Securities*, Justice Miller discussed the need for our state law in this area to conform with federal law. One reason for having a uniform approach to immunity law stems from the fact that federal law is controlling when public officials are sued in state court for violations of federal rights under 42 U.S.C. § 1983.

In *State v. Chase Securities, Inc.*, 188 W.Va. 356, 359, 424 S.E.2d 591, 594 (1992), this Court further explained that the federal law on qualified immunity for public officials needed to be followed because states may not create an immunity greater than the immunity available in federal courts, citing *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).

While this Court has strived through the years to follow federal law in this area, doing so has proven to be challenging because the qualified immunity defense has been an ever evolving and

moving target. Periodically, the United States Supreme Court will issue a decision adopting a new and different standard for analyzing qualified immunity and it has been difficult to keep abreast of all these changes. Furthermore, this area of the law is very complex and in some of the decisions discussed below, this Court may not have had the benefit of briefs and arguments addressing the critical issues specifically addressed in this case.

Until this Court's more recent history, there was no law developed on the qualified immunity defense available to public officials accused of violating constitutional rights because for most of this State's history, the State, counties, and municipalities were immune from civil liability. *Pittsburgh Elevator Co. v. The West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983)(Suits against State not barred by State's constitutional immunity to the extent the claim is covered by applicable insurance policy); *Gooden v. County Commission of Webster County*, 173 W.Va. 130, 298 S.E.2d 103 (1982)(Abolished common law immunity for county commissions); *Long v. The City of Weirton*, 158 W.Va. 741, 214 S.E.2d 832 (1975)(Abolished common law immunity for municipalities).⁴

⁴In *Long*, Justice Haden engaged in a scholarly and extended discussion of immunity law in this State and concluded, in Syllabus Point 9:

Inasmuch as a common-law rule of municipal governmental immunity from tort liability was not adopted and operable within the Commonwealth of Virginia prior to the formation of this State, that supposed rule was not incorporated by Constitution in the common law of West Virginia.

As a result of *Long*, a multitude of decisions by this Court, specifically identified in Syllabus Point 12, were expressly overruled to the extent that these decisions recognized and applied some form of common law governmental immunity for municipalities.

Although this Court in *Long* specifically held that governmental immunity for municipalities was never incorporated into West Virginia law, which decision also prompted this Court in *Gooden* to apply the same holding to counties, nevertheless, in 1989, the Court grafted into the State's common law something called the public duty doctrine, which was recognized without citing a single previous West Virginia decision where this doctrine was even mentioned. *Benson v. Kutsch*, 181 W.Va. 1, 380 S.E.2d 36 (1989). There also is no discussion in *Benson* addressing whether or not the public duty doctrine existed in the common law of Virginia and, therefore, was incorporated into the common law of this State, which is how this Court analyzed governmental immunity in *Long*.

In *Benson*, 181 W.Va. at 3, 380 S.E.2d at 38, this Court acknowledged, "The public duty doctrine is a principle independent of the doctrine of governmental immunity, although in practice it achieves much the same result." The Court's explanation was that until *Long* was decided, "municipal governmental immunity foreclosed suit, and there was little occasion to utilize the doctrine." *Benson*, 181 W.Va. at 6, 380 S.E.2d at 41.

The same point can be made with respect to qualified immunity. Prior to this Court's decisions in *Pittsburgh Elevator*, *Gooden*, and *Long*, most claims filed against any governmental entity necessarily would have been dismissed, based upon the general governmental immunity recognized by this Court at that time. Therefore, this Court never had an opportunity to recognize qualified immunity. Consequently, the only source of authority for this Court to develop and apply the qualified immunity defense is to refer to federal law.

The first decision by this Court to discuss qualified immunity as that defense is used today in constitutional tort actions is *Powers v. Gooden*, 170 W.Va. 151, 291 S.E.2d 466 (1982), where this Court applied the qualified immunity standard in existence at that time to a situation involving

a governmental official seeking to be reimbursed for attorneys' fees incurred for defending himself in his capacity as a public official. Although *Powers* was not a qualified immunity case, the Court decided to incorporate the qualified immunity analysis to resolve the question of attorneys' fees reimbursement requested by a public official, who was required to defend himself based upon actions he took in his capacity as an elected official.

Initially, qualified immunity was determined based upon the application of an objective and subjective test. Syllabus Points 1 and 2 of *Martin v. Mullins*, 170 W.Va. 358, 294 S.E.2d 161 (1982).⁵ The objective test for qualified immunity was established by the United States Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), which was recognized by this Court in the Syllabus of *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992):

A public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va.Code, 29-12A-1, *et seq.*, is entitled to qualified immunity from personal liability for official acts **if the involved conduct did not violate clearly established laws of which a reasonable official would have known**. There is no immunity for an executive official whose acts are fraudulent, malicious or otherwise oppressive. To the extent that *State ex rel. Boone National Bank of Madison v. Manns*, 126 W.Va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled. (Emphasis added).

While the very action in question need not have previously been held unlawful, the **"contours of the right** must be sufficiently clear that a reasonable official would understand that

⁵At the time *Martin* was decided, the United States Supreme Court had adopted an objective and subjective test for qualified immunity. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1973). As noted above, the United States Supreme Court adopted an objective test only for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Because *Harlow* changed the applicable standard, the Court may want to consider noting this change in the law by reversing Syllabus Point 2 of *Martin* to the extent it still applies the objective **and** subjective test.

what he is doing violates that right." (Emphasis added). *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, ___ (1986). As fleshed out by the federal circuit courts of appeal, to meet the burdens established in *Harlow* and *Anderson* and, in particular, the burden of showing the "contours" of the right at issue:

(1) A plaintiff does not need to produce a controlling precedent in case law, *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir.1989); *Bieregu v. Reno*, 59 F.3d 1445,1459 (3rd Cir.1995).

(2) Nor does a plaintiff need "to cite cases in which the specific sort of conduct complained of was found to be unlawful." *Germany v. Vance*, 868 F.2d 9,16 (1st Cir.1989).

(3) It is enough "...that there exists case law sufficient to clearly establish that, if a court **were** presented with such a situation, the court would find that plaintiff's rights were violated", *Hall v. Ochs*, 817 F.2d 920, 925 (1st Cir.1987)(emphasis in original) or that "there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Cleveland-Perdue, supra*.

(4) Public official "may not rely on their ignorance of even the most esoteric aspects of the law to deny individuals" their rights. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991), quoting *Wentz v. Klecker*, 721 F.2d 244 (8th Cir.1983).

In determining whether the contours of a right have been established, it is appropriate to look first to the decisions of the United States Supreme Court and then to decisions from other state or federal jurisdictions. *Long v. Norris, supra*. A plaintiff may also point to statutes, regulations or policy statements that were allegedly violated. *Beiregu v. Reno*, 59 F.3d 1445 (3rd Cir.1995); *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994).

The most recent significant decision addressing clearly established law is *Safford Unified School District #1 v. Redding*, 555 U.S. ___, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009), where school officials were sued for doing a strip search of a student, who allegedly had an over the counter drug in her possession. As the trial court correctly noted, the United States Supreme Court in *Safford* makes the counterintuitive point that “there can be clearly established law, even where the courts addressing a particular issue are not in agreement as to what the law actually is.” (August 4, 2009 Order at 11).

In 2001, the United States Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), developed a two-part test for deciding whether an individual defendant is entitled to qualified immunity. To determine if a defendant in his individual capacity is entitled to qualified immunity, “courts are required to resolve a threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.” *Scott v. Harris*, 550 U.S. 372, 377, 127 S.Ct. 1769, 1774, 167 L.Ed.2d 686 (2007), quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, ___ (2001). Under this test, only if the court “finds a violation of a constitutional right” does the court proceed to the next step, “whether the right was clearly established...in light of the specific context of the case.” *Id.* quoting *Saucier*, 522 U.S. at 201, 121 S.Ct. at 2156, 150 L.Ed.2d at ___.

This two-step analysis required by *Saucier*—first, was there a violation of a constitutional right, and second, was this right clearly established—was modified in *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). In *Pearson*, the United States Supreme Court held that district courts need not address both steps if a determination is made that there was no violation of

a constitutional right. However, district courts still are free to answer both questions, even if it is not required.

From the foregoing summary, it cannot be disputed that this Court's intent has been to follow federal law, particularly decisions by the United States Supreme Court, in applying the qualified immunity defense. Because most governmental entities were immune from civil liability under the common law for most of this State's history, this Court does not have any qualified immunity decisions based upon anything other than federal law. With this understanding of the qualified immunity defense as it presently exists, Appellees will now address the specific arguments asserted by Appellants.

3.

Constitutional right prohibiting the criminal prosecution of someone based upon protected speech is clearly established

Appellants first argue they are entitled to qualified immunity because the elements of a retaliatory prosecution claim—whether this Court follows *Hartman* or *Mt. Healthy*—will not be “clearly established” until this case is decided. The clearly established right that is the focus of the qualified immunity defense is the constitutional right allegedly violated, **not** the elements of the cause of action. Thus, Appellants have misapplied the qualified immunity analysis to the cause of action alleged, rather than the constitutional right they are alleged to have violated.

The trial court correctly focused on determining whether “there existed at the time these individual Defendants allegedly had Plaintiffs criminally prosecuted in violation of their constitutionally protected free speech rights clearly established law that such actions constituted a violation of Plaintiffs’ federal and State constitutional rights to free speech?” (August 4, 2009 Order at 11).

In reviewing the applicable case law, the trial court relied upon *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), and this Court's decision in *State ex rel. Wilmoth v. Gustke*, 179 W.Va. 771, 373 S.E.2d 484 (1988), and found these cases clearly established the constitutional right of all persons to be free from criminal prosecution, based upon protected speech. In fact, Appellants never seriously suggest that this constitutional right was not clearly established:

In reversing Plaintiffs' criminal convictions in the present case, the West Virginia Supreme Court cited *City of Houston* in *Wilmoth* for the proposition that constitutionally protected free speech cannot be criminalized under this State's obstructing a police officer statute, W.Va.Code §61-5-17. Defendants do not dispute that *City of Houston* and *Wilmoth* clearly established that constitutionally protected speech cannot be criminalized.... (August 4, 2009 Order at 13).

Appellees respectfully submit the trial court properly applied the two-part objective test for qualified immunity and that based upon *City of Houston* and *Wilmoth*, the law was clearly established that a person's protected speech cannot be criminalized. Consequently, Appellants' argument on this first point, which focused on the elements of the cause of action rather than whether the constitutional right at issue was clearly established, should be rejected and the trial court affirmed.

4.

**Under federal law, qualified immunity is a defense available
only to individual public officials**

Appellant West Virginia State Police seeks to be dismissed, based upon its claim of qualified immunity. Ignoring for purposes of this argument that the constitutional right at issue was clearly established, as discussed in the preceding section, this claim should be rejected because under federal law, qualified immunity is a defense only available to individual public officials.

Once again, in relying upon applicable federal law, it cannot be disputed that in a federal constitutional tort action, qualified immunity is **only** applicable to an individual defendant and not the employer, agency, or State. *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (4th Cir. 2006); *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

In *Owen*, the United States Supreme Court specifically rejected "a construction of section 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations." 445 U.S. at 650, 100 S.Ct. at 1415, 63 L.Ed.2d at _____. To permit a public body "to disavow liability for the injury it has begotten," said the United States Supreme Court in *Owen*, 445 U.S. at 651, 100 S.Ct. at 1415, 63 L.Ed.2d at _____, runs counter to the very purpose of §1983:

A damage remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, [citation omitted], many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.

Moreover, the personal financial risk reasons for allowing individuals to invoke qualified immunity, the United States Supreme Court held, "are less compelling, if not wholly inapplicable" when liability of a public institution is at issue. 445 U.S. at 652, 100 S.Ct. at 1416, 63 L.Ed.2d at _____.

This Court, in following the federal law of qualified immunity, similarly has discussed the qualified immunity defense as being applied to individual public officials. See Syllabus Point 3, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009); *Pruitt v. West Virginia Department of*

Public Safety, 222 W.Va. 290, 664 S.E.2d 175 (2008); *Kelley v. City of Williamson*, 221 W.Va. 506, 655 S.E.2d 528 (2007); *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996); *Goines v. James*, 189 W.Va. 634, 433 S.E.2d 57 (1993); *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992); *Bennett v. Coffman*, 178 W.Va. 500, 361 S.E.2d 465 (1987).

However, as noted by the trial court, there is some apparent confusion in the cases decided by this Court over this very issue. For example, in Syllabus Point 9 of *Parkulo v. West Virginia Board of Probation*, 199 W.Va. 161, 483 S.E.2d 507 (1996), this Court held:

In cases arising under *W.Va.Code* § 29-12-5, and in the absence of express provisions of the insurance contract to the contrary, **the immunity of the State is coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case.** However, on occasion, the State will be entitled to immunity when the official is not entitled to the same immunity; in others, the official will be entitled to immunity when the State is not. The existence of the State's immunity of the State (sic) must be determined on a case-by-case basis. (Emphasis added).

Similarly, in *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995), this Court follows *Parkulo* and applies qualified immunity to the State, rather than simply to an individual defendant. In *Clark*, a DNR officer accidentally shot the plaintiff while checking for the plaintiff's hunting license. Appellees respectfully submit that under *Pittsburgh Elevator*, this case should have been a straightforward negligence action covered by insurance, using the same negligence analysis that would be applied if the DNR officer had negligently wrecked his State vehicle into the plaintiff.

There is some discussion in *Parkulo* and *Clark* suggesting the Court was recognizing common law immunity "for acts or omissions in the exercise of a legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy." Syllabus Point 6, in part, *Parkulo*. The source for this legislative, judicial,

or administrative function immunity discussed in *Parkulo* and *Clark* is not clear and the test for applying this immunity is not stated. Furthermore, whether this legislative, judicial, or administrative function immunity somehow is different from the governmental immunity specifically abolished by this Court in *Long* and *Gooden* because it was never incorporated into the common law of this State also is unclear. Regardless of the source or what this Court meant by legislative, judicial, or administrative function immunity, clearly whatever that immunity is should not be confused with the qualified immunity developed in the federal courts in constitutional tort cases, which is the defense asserted by Appellants in this case.

If the Court in *Parkulo* and *Clark* actually was referring to the qualified immunity defense recognized in federal courts, the Court never explains how the objective test for qualified immunity, which was adopted previously in *Chase Securities*, would be applied to the State or any political subdivision. Using the language from the Syllabus in *Chase Securities*, if qualified immunity were applicable to the State or any political subdivision, the trial court would have to evaluate whether the State or political subdivision is entitled to “qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable [State or political subdivision] would have known.” Rather than applying a “**reasonable man**” standard, the trial court would have to apply a “**reasonable State**” or “**reasonable political subdivision**” standard. To be respectfully blunt, it simply is nonsensical trying to apply qualified immunity, which was designed to protect public officials from personal liability under certain circumstances, to the State or any political subdivision.

If this Court has decided, contrary to all existing federal law, that the State as well as any political subdivision should have the right to assert qualified immunity as a defense, what is the basis

for that decision? Since federal law only applies qualified immunity to individual defendants, the Court will not have any federal law to support such a holding. Because historically there is no developed qualified immunity law under the common law of West Virginia, the Court will not be able to rely upon any of its earlier precedents for support.

Counsel for Appellees recognizes this area of the law is very complex and further that these precise issues may not have been brought to the Court's attention in *Parkulo*, *Clark*, or any subsequent cases relying on these decisions. However, now that these issues are directly before the Court, Appellees respectfully submit the time has come for this Court to clarify the law in this area by holding, consistent with federal law, that qualified immunity is a defense available only to individual public officials alleged to have violated someone's constitutional rights. Such a holding would require this Court to reverse *Parkulo*, *Clark*, and any cases relying on those decisions which hold that qualified immunity is a defense available to the State or any political subdivision.

5.

Under federal law, qualified immunity only applies to individual defendants who allegedly violated someone's constitutional rights

Appellants finally assert that they are entitled to qualified immunity as to the negligence claim asserted against them by Appellees. Again, for purposes of this argument, Appellees will ignore the fact that the constitutional right violated by Appellants was clearly established, as discussed above. Similar to some of their earlier arguments, Appellants are seeking to have qualified immunity applied to a claim where it is completely inapplicable under federal law.

As noted earlier, to determine if a defendant in his individual capacity is entitled to qualified immunity, "courts are required to resolve a threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct **violated a**

constitutional right? This must be the initial inquiry.” (Emphasis added). *Scott v. Harris*, ___ U.S. ___, ___, 127 S.Ct. 1769, 1774, 167 L.Ed.2d 686 (2007), quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, ___ (2001). Under this test, only if the court “finds a **violation of a constitutional right**” does the court proceed to the next step, “whether the right was clearly established...in light of the specific context of the case.” (Emphasis added). *Id.* quoting *Saucier*, 522 U.S. at 201, 121 S.Ct. at 2156, 150 L.Ed.2d at ___. Based upon the foregoing analysis, the trial court concluded, “Therefore, qualified immunity is not a defense to a claim of negligence.” (August 4, 2009 Order at 17).

The fact that qualified immunity can be asserted only where a constitutional rights violation has been asserted is obvious, under federal law, because an action filed under 42 U.S.C. §1983 cannot be maintained where the plaintiff asserts that the governmental defendants were negligent. *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). Thus, if the plaintiff in a §1983 case only alleged that the governmental defendants were negligent, the case would be dismissed, not based upon qualified immunity, but because the plaintiff had failed to allege a violation of constitutional rights.

In practice, when a district court is faced with a complaint containing allegations of constitutional rights violations as well as asserting a separate negligence claim, the qualified immunity defense will be discussed with respect to the constitutional rights allegations only, and the negligence action will be treated separately, without any analysis of qualified immunity. Thus, defendants who are successful in asserting qualified immunity with respect to the constitutional violations may still be held liable under the negligence theory. See, e.g., *Robertson v. Elliott*, 2009 U.S. Dist. LEXIS 60934 (D.C.S.W.V. 2009); *District of Columbia v. Evans*, 644 A.2d 1008, 1019

(D.C.App. 1994)(“[Q]ualified immunity from §1983 does not preclude a suit based on common law negligence.”).

However, once again, this Court’s decisions in *Clark* as well as *J.H. v. West Virginia Division of Rehabilitation Services*, ___ W.Va. ___, 680 S.E.2d 392 (2009), *Chase Securities*, and *Yoak v. Marshall University Board of Governors*, 223 W.Va. 55, 672 S.E.2d 191 (2008), suggest that qualified immunity may be available in a negligence action. These holdings mean, carried to their logical conclusion, that any time an agent or employee of the State or any political subdivision was negligent and caused a car accident, that governmental defendant could claim qualified immunity.

In light of *Pittsburgh Elevator*, where sovereign immunity included in the West Virginia Constitution is considered to be inapplicable where insurance money is available to pay the claim against the State, what is the basis for incorporating into West Virginia law a qualified immunity defense that is unavailable in federal court and which has no historical basis in any of this Court’s prior decisions?

The trial court demonstrated the fallacy of the holdings in *Clark*, *J.H.*, *Chase Securities*, and *Yoak* by applying the objective qualified immunity test to a situation where negligence has been alleged:

Negligence is based upon the basic concepts of duty, breach of that duty, and such breach as a proximate cause of the injury. How could any court ever conclude that the general concepts of negligence do not constitute clearly established law? Is the concept of negligence so novel that Defendants or any other reasonable official could not have known about it? Therefore, the Court holds specifically that qualified immunity is not available as a defense to Defendants in response to Plaintiffs’ negligence claims. (August 4, 2009 Order at 17-18).

In *Clark, J.H., Chase Securities*, and *Yoak*, this Court does not apply this objective test for qualified immunity. Furthermore, Appellants in this case have not presented any argument to this Court demonstrating that negligence is not clearly established law. If by now the essential elements of a negligence claim have not been clearly established, how many more years of negligence jurisprudence would be required before negligence was clearly established?

Thus, although Appellants are correct in citing *Clark, Chase Securities*, and *Yoak* in support of their argument that qualified immunity is available where negligence is alleged, Appellants never carry out the analysis and apply the objective test under *Chase Securities*. If the objective test is applied, then clearly qualified immunity is not available as a defense for Appellants on this negligence claim.

Once again, Appellees respectfully submit in this very confusing area of the law, the Court should take this opportunity to hold, consistent with federal law, that qualified immunity is not a defense to a negligence claim. Such a holding would require the Court to reverse *Clark, J.H., Chase Securities, Yoak*, and any other decision by this Court, which suggests qualified immunity can be asserted as a defense to a negligence claim.

With the changes suggested in this brief, the Court will bring West Virginia law on qualified immunity in line with the way this defense is applied by the federal courts. By clarifying the law, these types of cases will be easier to evaluate and the trial courts will have some additional bright line rules to apply when faced with these same issues in future cases. These changes are consistent with this Court's goal, stated in *Robinson*, 223 W.Va. at 834, 679 S.E.2d at 666, that the qualified immunity defense in State court be applied in conformity with federal law.

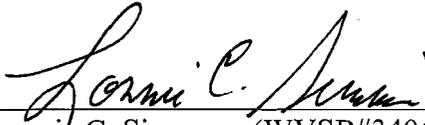
VI.

Conclusion

For the foregoing reasons, Appellees Betty Jarvis and Wanda Carney respectfully asks this Court to affirm the August 4, 2009 order denying Appellants motion to dismiss, to clarify the law of qualified immunity discussed in this brief, and to remand this case so that a jury can decide the genuine issues of material fact presented in this retaliatory prosecution case.

BETTY JARVIS and WANDA CARNEY,
Plaintiffs below, Appellees,

–By Counsel–



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 35444

BETTY JARVIS,

Plaintiff below, Appellee,

v.

**WEST VIRGINIA STATE POLICE,
D. M. NELSON, A. S. PERDUE, and
C. E. AKERS,**

Defendants below, Appellants.

WANDA CARNEY,

Plaintiff below, Appellee,

v.

**WEST VIRGINIA STATE POLICE,
D. M. NELSON, A. S. PERDUE, and
C. E. AKERS,**

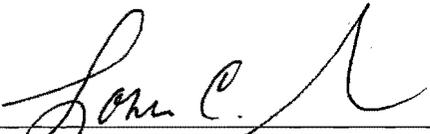
Defendants below, Appellants.

Interlocutory Appeal from the Circuit Court of Kanawha County, West Virginia

Certificate of Service

I, Lonnie C. Simmons, do hereby certify a copy of the foregoing **APPELLEES' BRIEF** was hand-delivered to counsel of record on March 29, 2010, to the following:

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