In the

# SUPREME COURT OF VIRGINIA

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Record No. _____

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KENNETH L. WAGNER, II,

Petitioner-Appellant,

v.

CREIGHTON-BEY, SMITH, FRYE, HOLMS, HAMILTON, HUNT, BEARD, BRYANT, GRIFFIN, BOWERS, FAULK, PIERRE, KIBBLE, R. JOLLEY, JR., EDWARDS, LAMBERT, ZENTZ, CHARLES "SKIP" H. LAND, PETE MELETIS (ACTING SUPERINTENDENT OF THE PRINCE WILLIAM – MANASSAS REGIONAL ADULT DETENTION CENTER), PATRICK HURD (CHAIRMAN OF THE PRINCE WILLIAM – MANASSAS REGIONAL JAIL BOARD), DANA FENTON (VICE CHAIRMAN OF THE PRINCE WILLIAM – MANASSAS REGIONAL JAIL BOARD), HUGH BRIEN, STEPHEN COPELAND, CHARLIE DEANE, PAUL EBERT, ROBERT L. MARSH, REV. VICTOR RILEY, GLENDELL HILL, and RALPH THOMAS

Respondent-Appellees.

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## PETITION FOR APPEAL

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## TABLE OF CONTENTS

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW ..... 1

ASSIGNMENTS OF ERROR ..... 3

IDENTIFICATION OF THE APPELLEES ..... 4

STATEMENT OF FACTS ..... 6

STANDARD OF REVIEW ..... 11

ARGUMENTS AND AUTHORITIES ..... 12

1. The circuit court erred in dismissing Wagner's 42 U.S.C. §§ 1983 and 1988 claim on sovereign immunity grounds, as state sovereign immunity does not apply to claims brought under 42 U.S.C. §§ 1983 and 1988 against the state's subdivisions and their agents, and Defendants did not seek dismissal of this claim on those grounds. ..... 12

2. The Circuit Court erred in dismissing the intentional assault and battery claims on sovereign immunity grounds, as Virginia law does not immunize government agents when they commit intentional torts. ..... 15

3. The circuit court erred in dismissing the gross negligence claim and the willful and wanton negligence claim, as the complaint alleges sufficient facts to support a these claims, especially as such claims may be pled generally. ..... 18

4. The circuit court erred in dismissing the claims against the Respondents in their individual capacities, because sovereign immunity does not apply where the government agent was acting outside the scope of his employment, which is a jury question in this case. ..... 22

5. If this Court determines that the Order of 8/1/12 was not a final order, this case should be remanded for the entry of a final order ..... 24

CONCLUSION ..... 27

CERTIFICATE..... 28

## TABLE OF AUTHORITIES

*Constitutional Provisions*

Constitution of the United States, Amend. XI (1795) ..... 12, 13

*Federal Statutes*

42 U.S.C. § 1983 ..... 1, 3, 12-13

42 U.S.C. § 1988 ..... 1, 3, 12

*Virginia Code*

Va. Code, Title 53.1, Chapter III ..... 12

*Cases*

Ashcroft v. Iqbal, 556 U.S. 662 (2009) ..... 15, 17-19

Avery v. County Sch. Bd. of Brunswick County,
192 Va. 329, 64 S.E.2d 767 (1951) ..... 27

Bowles v. City of Richmond, 147 Va. 720, 129 S.E. 489 (1925) ..... 25

Commonwealth v. Huntington, 148 Va. 97, 138 S.E. 650(1927).... 17, 19-20

Comcast of Cheterfield County, Inc., v.
Bd. Of Supers. of Chesterfield County,
277 Va. 293, 672 S.E.2d 870 (2009) ..... 25

David White Crane Serv. v. Howell,
282 Va. 323, 714 S.E.2d 572 (2011). ..... 11

Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987) ..... 15-16, 22

Frye v. Commonwealth, 231 Va. 370; 345 S.E.2d 267 (1986)..... 17, 19-20

Ghameshlouy v. Commonwealth,
279 Va. 379, 689 S.E.2d 698 (2010) ..... 26

Gina Chin & Assocs. v. First Union Bank,
260 Va. 533, 537 S.E.2d 573 (2000). ..... 22-23

Howatt v. Rose, 496 U.S. 356 (1990) ..... 12

James v. Jane, 221 Va. 43, 282 S.E.2d 864 (1980) ..... 18, 22

Kitchen v. Upshaw, 286 F.3d 179 (4th Cir. 2002) ..... 13

Leggett v. Caudill, 247 Va. 130, 439 S.E.2d 350 (1994) ..... 25, 26

Niese v. City of Alexandria, 264 Va. 230, 564 S.E.2d 127 (2002) ..... 16

Quern v. Jordan, 440 U.S. 332 (1979) ..... 12

Station # 2, LLC v. Lynch,
280 Va. 166, 695 S.E.2d 537 (2010). ..... 11, 17-20, 22

Steward v. Holland Family Props., LLC,
284 Va. 282, 726 S.E.2d 251 (2012) ..... 11, 17-18, 20, 22

Walton v. Commonwealth, 256 Va. 85, 501 S.E.2d 134 (1998) ..... 24-25

Wells v. Whitaker, 207 Va. 616, 151 S.E.2d 422 (1966) ..... 25

*Supreme Court*

Rule 3:18(b) ..... 19

Rule 5:8A ..... 24, 26

## NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

In this case, Plaintiff-Appellant Kenneth L. Wagner, II ("Wagner") brings a claim against various defendants under 42 U.S.C. §§ 1983 and 1988, alleging that the defendants and others violated Wagner's Fourth and Fourteenth Amendment rights, and state claims against the various defendants for assault and battery, gross negligence, and willful and wanton negligence.

Wagner originally filed this case in federal district court, but he later voluntarily dismissed it.[1] He then filed it in the Circuit Court for Stafford County. (Complaint at 1).[2] All of the defendants except Jordan J. Kinard ("Kinard") jointly filed a demurrer ("Demurrer") and a memorandum in support of the demurrer ("Demurrer Memo"), a plea in bar asserting sovereign immunity on the state tort claims ("Plea in Bar") and a memorandum in support of the plea in bar ("Plea in Bar Memo"), and other

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[1] Wagner v. Prince William/Manassas Regional Adult Detention Center et al., Case No. 1:08cv66 (U.S. District Court for the Eastern District of Virginia, Alexandria Division)

[2] Counsel for Wagner spoke to the Office of the Clerk for the Circuit Court for Stafford County concerning the record in this case on October 31, 2012, and it indicated that due to circumstances beyond its control it was unable to prepare the record in this case in advance of the filing of this petition, and the record would be submitted as soon as feasible.

motions. Wagner opposed the motions with pleadings[3] and the circuit court heard the arguments on the motions on December 15, 2008.[4] The circuit court issued a letter opinion on June 28, 2012 ("Opinion of 6/28/12"), granting the plea in bar on the grounds of sovereign immunity. The circuit court later clarified its Opinion of 6/28/12 orally through his clerk via telephone in response to counsel's questions, and it entered an Order on August 1, 2012 ("Order of 9/1/12") dismissing all of Wagner's claims against the Respondent-Appellees ("Respondents"). Wagner filed a motion for reconsideration ("Motion to Reconsider") with a supporting memorandum ("Motion to Reconsider Memo"), which the circuit court denied by order dated August 9, 2012 ("Order of 8/9/12"). This appeal was noted August 14, 2012 ("Notice of Appeal"). Following this notice of appeal the claims against Kinard, the sole remaining defendant in the assault and battery and negligence claims (but not in the § 1983 claim), who is not an appellee here, were nonsuited by order dated August 20, 2012 ("Order of 8/20/12").

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[3] Wagner's opposition to the plea in bar will be cited herein as "Plea in Bar Opposition."

[4] The transcript of this hearing has been filed and will be cited herein as "Trans. 12/15/08."

## ASSIGNMENTS OF ERROR

1. The circuit court erred in dismissing Wagner's 42 U.S.C. §§ 1983 and 1988 claim on sovereign immunity grounds, as state sovereign immunity does not apply to claims brought under 42 U.S.C. §§ 1983 and 1988 against the state's subdivisions and their agents, and Defendants did not seek dismissal of this claim on those grounds. This issue was preserved at Motion to Reconsider Memo at 5, Order of 8/9/12.

2. The circuit court erred in dismissing the intentional assault and battery claims on sovereign immunity grounds, as Virginia law does not immunize government agents when they commit intentional torts. This issue was preserved at Plea in Bar Opposition at 1-3, Trans. 12/15/08 at 36-37, Motion to Reconsider Memo at 5, Order of 8/9/12.

3. The circuit court erred in dismissing the gross negligence claim and the willful and wanton negligence claim, as the complaint alleges sufficient facts to support a these claims, especially as such claims may be pled generally. This issue was preserved at Trans. 12/15/08 at 19-29, 37-40, 47-50, Motion to Reconsider Memo at 5-7, Order of 8/9/12.

4. The circuit court erred in dismissing the claims against the Respondents in their individual capacities, because sovereign immunity does not apply where the government agent was acting outside the scope of his employment, which is a jury question in this case. This issue was preserved at Plea in Bar Opposition at 2, Motion to Reconsider Memo at 2-4, Order of 8/9/12.

5. If this Court determines that the Order of 8/1/12 was not a final order, this case should be remanded for the entry of a final order.

## IDENTIFICATION OF THE APPELLEES

For the convenience of the Court, the Respondents in this matter are:

1. Creighton-Bey; Smith, Frye; Holmes; Hamilton; Hunt; Beard; Bryant; Griffin; Bowers; Faulk; Pierre; Kibble; R. Jolley, Jr.; Edwards; Lambert; Zentz; Charles "Skip" H. Land; and Pete Meletis, in his individual and official capacity as Acting Superintendent of the Prince William – Manassas Regional Adult Detention Center (hereinafter known as "**Detention Center**"). *Consistent with the Complaint, the foregoing are hereinafter referred to as* "**Detention Defendants**." *Consistent with the Complaint, Defendants Lambert, Zentz, Pierre, Jolley, Edwards, and Kibble are collectively referred to herein as* "**Medical Defendants**."

2. Patrick Hurd, Chairman; Dena Fenton, Vice Chairman; Hugh Brien; Stephen Copeland; Charlie Deane; Paul Ebert; Robert L. Marsh; Rev. Victor Riley; Glendell Hill; and Ralph Thomas, both in their individual capacities and their official capacities as the Prince William – Manassas Regional Jail Board members. *Consistent with the Complaint, the foregoing defendants are referred to herein as* "**Jail Board Defendants**."

Two additional Defendants were named in the Complaint but are not Appellees in this appeal: Jordan J. Kinard (hereinafter known as "**Kinard**") and the Detention Center itself. Wagner non-suited his claims against

Kinard on August 20, 2012, and the circuit court in its opinion of June 28, 2012 determined the Detention Center was not a legal entity capable of being sued. That determination is not being appealed.

## STATEMENT OF FACTS

Petitioner's claims against the Respondents were dismissed prior to the Respondents filing an answer in this case, and therefore this statement of facts is based on the allegations made in Wagner's complaint.

In January 2006, Wagner was a pre-trial detainee in the Detention Center. (Complaint ¶ 45). Wagner, a Caucasian, was placed by the Detention Defendants in a jail block otherwise housing only African American inmates, including an inmate Kinard. (Complaint ¶¶ 41, 52). Wagner made numerous demands and complaints, including at least two written requests, informing the Detention Defendants that he was concerned for his safety especially with respect to Kinard, whom the Detention Defendants knew to be a violent inmate. (Complaint ¶¶ 39-44). Detention Defendants knew Kinard posed a threat and substantial risk of serious harm to Wagner but failed to take reasonable precautions to abate the risk of serious harm from Kinard, being deliberately indifferent to such risk. (Complaint ¶¶ 39-44).

On January 24, 2006, Kinard struck Wagner, resulting in a physical altercation between the two of them. (Complaint ¶ 52). Officials from the Detention Center did not arrive until after the altercation had ended. (Complaint ¶ 53).Some of the Detention Defendants, including but not

limited to Smith, Hunt, Frye, Bryant and Creighton-Bey, then removed a potential witness from the Wagner's cell and staged an altercation between themselves and Wagner. (Complaint ¶¶ 53-56). Wagner protested their treatment of him. (Complaint ¶ 56). Smith has admitted that Wagner stated, "Don't fucking punk me" and "Get the fuck out of my face." (Complaint ¶ 56). In response to these protests, Smith and other Detention Defendants then attacked Wagner with the intent to punish him and to provide an excuse to further confine Wagner. (Complaint ¶ 57). They injured him, slamming his head onto a concrete bunk with potentially fatal force. (Complaint ¶ 57). They then placed Wagner in isolation after the Medical Defendants reviewed his injuries and cleared him. (Complaint ¶¶ 58-60).

Wagner was later found unconscious with dried blood in his mouth, evidencing that he had been unconscious for a significant amount of time. (Complaint ¶ 66). A medical emergency was called. (Complaint ¶ 66). This unconsciousness was either the result of (1) the Medical Defendants' failure to provide adequate medical attention, and the Detention Defendants failure to properly monitor Wagner after his earlier injuries (Complaint ¶ 65), (2) the Detention Defendants attacking Wagner a second time, including possibly slamming his head into a concrete bunk and severely injuring him with potentially fatal force, in unjustified retaliation for

Wagner causing his toilet to overflow in protest of his treatment (Complaint ¶¶ 61-63), and/or (3) the Detention Defendants using excessive force in placing Wagner in Detention, including possibly slamming his head into a concrete bunk and severely injuring him with potentially fatal force (Complaint ¶ 64).[5]

Several of the Detention Defendants then embarked in a plan to cover up and prevent the details of the incident from being known. (Complaint ¶ 68). Legal letters and papers were removed from witnesses, and Kinard was threatened. (Complaint ¶ 68). Specifically (Defendant) Creighton-Bey told Kinard, "You know what happened to Wagner, don't be next." (Complaint ¶ 68).

The amount of force used by the Respondents in the battery or batteries was not reasonable at the moment it was applied and exceeded the force reasonably related to maintaining jail security, managing the detention facility, and securing the detainee's presence at trial, or any other legitimate objective. (Complaint ¶¶ 2, 46, 71-72, 80,116-17, 127, 133). It

[5] As stated in the Complaint, the allegations on this point are necessarily vague and are pled in the alternative, because Wagner's injuries left him partially brain damaged and unable to recollect completely the surrounding events. Moreover, as stated in the Complaint, evidence relevant to this incident had been requested under the Freedom of Information Act, but it was not available or not provided prior to the filing of the Complaint. (Complaint ¶ 49).

was in fact intended to punish the plaintiff. (Complaint ¶¶ 2, 46-48, 57, 62, 64, 70, 72-73, 83-84, 95, 98-99, 116-17). The Detention Defendants and the Jail Board Defendants had reason to know that excessive force was being used against Wagner by an officer or officers for the purpose of punishment. (Complaint ¶¶ 73, 93). The Detention Defendants and the Jail Board Defendants had a realistic opportunity to intervene to prevent the harm from occurring to Wagner, and they intentionally failed to intervene. (Complaint ¶ 73). The force used against Wagner by the Respondents caused Wagner severe injuries with deliberate indifference to Wagner's rights. (Complaint ¶¶ 2, 64, 84-85, 95, 97, 120). At the time that the excessive force was used, plaintiff was unarmed, helpless, and he in no way imposed a threat to the Respondents or any other person. (Complaint ¶ 79). The attack or attacks were unjustified and unwarranted. (Complaint ¶¶ 80, 85).

This violent behavior of the Detention Defendants was in accordance with the policy and practice of the Detention Center, but contrary to the widely accepted standards promulgated by correctional associations such as the American Correctional Association. (Complaint ¶¶ 35, 84, 95-106). The Jail Board and Defendant Land failed to train or to insure that the officers were trained in such a manner as to discourage them from

engaging in acts of violence during the course and scope of their employment and to take appropriate action upon learning of their conduct, thereby encouraging the behavior that caused injury to Wagner. (Complaint ¶¶ 107-114). The Jail Board Defendants had final policy making authority for all matters relating to the management of the Detention Center. (Compaint ¶ 11). The Jail Board Defendants had reason to know that excessive force was being used by its employees and had a realistic opportunity to intervene to prevent harm from occurring. (Complaint ¶ 73). Their failure to intervene was intentional. (Complaint ¶ 73).

This lack of training and supervision, this violent and unjustified conduct of the Detention Defendants, and this willingness to cover-up the wrongdoings of the Detention Defendants is further evidenced by the death of a Detention Center inmate approximately two weeks later as a result of stress-induced heart failure due to acute restraint-induced asphyxia and blunt trauma. (Complaint ¶ 114). Two cameras were allegedly not working on the day the deceased inmate was shacked to his bed and restrained by guards to the point of suffocation. (Complaint ¶ 114).

## STANDARD OF REVIEW

Because no evidence was taken on the plea in bar, this Court reviews the circuit court's ruling upon the pleadings, supplemented by the facts as stipulated by the parties. David White Crane Serv. v. Howell, 282 Va. 323, 326, 714 S.E.2d 572, 575 (2011). The standards of review for a defensive plea in bar and a demurrer are substantially similar,[6] but the plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. Station # 2, LLC v. Lynch, 280 Va. 166, 175, 695 S.E.2d 537, 542 (2010). The moving party has the burden of proof on that issue. Id. A circuit court's judgment that a party has met his burden of proof will be upheld unless it is plainly wrong or without evidence to support it. Id. Where there are no disputed facts relevant to the plea in bar and it presents a pure question of law, this Court applies a *de novo* standard of review. David White Crane Serv., 282 Va. at 327, 714 S.E.2d at 575.

[6] "A demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts. The purpose of a demurrer is to determine whether the pleading and any proper attachments state a cause of action upon which relief can be given. The decision whether to grant the demurrer is a question of law, which we review *de novo*." Steward v. Holland Family Props., LLC, 284 Va. 282, 286, 726 S.E.2d 251, 253-54 (2012) (citations omitted).

## ARGUMENTS AND AUTHORITIES

6. **The circuit court erred in dismissing Wagner's 42 U.S.C. §§ 1983 and 1988 claim on sovereign immunity grounds, as state sovereign immunity does not apply to claims brought under 42 U.S.C. §§ 1983 and 1988 against the state's subdivisions and their agents, and Defendants did not seek dismissal of this claim on those grounds.**

The United States Supreme Court has long ago determined that *subdivisions of the state* and their agents cannot benefit from a state's sovereign immunity when the plaintiff brings a claim under 42 U.S.C. § 1983. In Howatt v. Rose, 496 U.S. 356 (1990), the unanimous U.S. Supreme Court established this principle based on the Supremacy Clause.

While *states* and their agents may benefit from the protections of sovereign immunity in § 1983 actions, whether those actions are brought in state or federal court, this is a consequence of the Eleventh Amendment to the Constitution of the United States. The Eleventh Amendment does not apply to *subdivisions of the state* and their agents. Id. at 365-76; see also Quern v. Jordan, 440 U.S. 332 (1979). Subdivisions of the state and their agents are subject to § 1983 actions without the benefit of state sovereign immunity. Howatt, 496 U.S. at 356.

As stated in the Complaint (a statement that was not denied or rebutted in any manner), the Detention Center and its governing board operated under Title 53.1, Chapter III of the Code of Virginia. (Complaint ¶

8). This makes the Detention Center a *local* jail operated by subdivisions of the Commonwealth, not by the Commonwealth itself. As such, it is not immune from § 1983 actions under the Eleventh Amendment, and the Supremacy Clause precludes the Virginia from allowing sovereign immunity to apply to the Detention Center, its governing board, or their agents. Howatt, 496 U.S. at 356; see also Kitchen v. Upshaw, 286 F.3d 179, 184-85 (4th Cir. 2002). In light of this the circuit court erred in dismissing the § 1983 claim in the Plea in Bar.

It is also significant that Plea in Bar did not challenge the § 1983 claims. Rather, the Plea in Bar pled sovereign immunity only to the state tort claims of assault and battery. (Plea in Bar Memo at 1-8). Counsel for the Respondents admitted as much in the December 15, 2008 hearing. (Trans. 12/15/08 at 32, lines 14-15), and the court and the parties in the hearing agreed that sovereign immunity does not apply to the federal claims. (Trans. 12/15/08 at 35-36). In light of this the circuit court erred in dismissing the § 1983 claim through the plea in bar, because no such plea was made.

It is true that the Respondents also demurred, arguing that the Detention Center is not capable of being sued, that Wagner failed to state a claim against the Jail Board, and that intracorporate immunity precluded

any conspiracy claim. (Demurrer Memo at 1-4). The circuit court in its June 28, 2012 opinion agreed that the Detention Center was not a proper defendant (and that decision is not being appealed), but found that the Jail Board Members were proper defendants. (Opinion of 6/28/12 at 2). It found, however, the demurrer to be moot in light of the circuit court's dismissal of Wagner's claims on sovereign immunity grounds. (Opinion of 6/28/12 at 3).

The demurrer, however, did not challenge the sufficiency of § 1983 action except as it applied to the Detention Defendants. (Demurrer Memo at 1-4). Thus, even if the circuit court had granted the demurrer in whole (which it did not), the § 1983 action could not be entirely dismissed. As argued by Wagner, though, he stated sufficient grounds to support his § 1983 action against the Detention Defendants and the Jail Board Defendants.

For the foregoing reasons, this Court on *de novo* review should reverse the circuit court's dismissal of the §§ 1983 and 1988 claim against the Respondents.

7. **The Circuit Court erred in dismissing the intentional assault and battery claims on sovereign immunity grounds, as Virginia law does not immunize government agents when they commit intentional torts.**

In this case, the circuit court dismissed Wagner's intentional assault and battery claims on the grounds that Wagner failed to plead gross negligence sufficiently, citing Ashcroft v. Iqbal, 556 U.S. 662 (2009). (Opinion of 6/28/12 at 2). This misconstrues Virginia law, which does not immunize government agents for their intentional torts, and it fails to consider the allegations of intentional tortious conduct by various defendants and complicity and vicarious liability of the Jail Board Defendants.

The Respondents' plea in bar relied primarily on the case law concerning sovereign immunity as it applies to claims of *simple negligence*, which the circuit court apparently adopted. (Plea in Bar Memo at 2-5). This Court, however, has adopted distinct rules for sovereign immunity as it applies the liability of government agents for their own *intentional* torts. These rules are summarized in Fox v. Deese, 234 Va. 412, 424, 362 S.E.2d 699, 706 (1987):

> The defendants are not immune if the evidence establishes that (1) they committed intentional torts, irrespective of whether they acted within or without the scope of their employment, Elder v. Holland, 208 Va. 15, 19, 155 S.E.2d 369, 372-73 (1967), or (2)

they acted outside the scope of their employment, see Messina v. Burden, 228 Va. 301, 311, 321 S.E.2d 657, 662 (1984).

This precedent is distinct from Niese v. City of Alexandria, 264 Va. 230, 564 S.E.2d 127 (2002), where this Court examines whether a *municipality* was immune when sued for the intentional torts of *its agent* and for negligent retention. In that case, where the municipality is sued for the intentional torts of its agents, the Court relies on the familiar governmental-proprietary analysis. That governmental-proprietary analysis has no place, however, in suits against *the agents themselves* for their intentional torts. See Fox v. Deese, 234 Va. at 424, 362 S.E.2d at 706.

Wagner alleges in this case, and these allegations are unrebutted, that several of the Respondents intentionally assaulted him, possibly repeatedly. This is supported by fact-specific allegations, both pled directly and others pled in the alternative. (Complaint ¶¶ 53-57, 61-64). He alleges that Defendants Smith, Hunt, Frye, Bryant and Creighton-Bey attacked and injured him after removing potential witnesses from the cell block. (Complaint ¶¶ 53-57). He further alleged (as an alternative to some of his theories of gross negligence) that he was intentionally attacked again later. (Complaint ¶¶ 61-64). During one of these attacks (or potentially when he was placed in isolation, either intentionally or grossly negligently), one or more of the Respondents slammed Wagner's head against concrete with

potentially fatal force, causing him brain damage. (Complaint ¶¶ 49, 53-57, 61-64).

Wagner also alleges that the Jail Board was liable for this conduct, not only because of *respondeat superior* liability, but also because the Jail Board Defendants were themselves complicit in this conduct as they had reason to know that excessive force was being used for punishment purposes in the Detention Center and intentionally condoned and encouraged such conduct implicitly or explicitly. (Complaint ¶¶ 35, 73, 84, 95-114). These allegations of unnecessary violence and condoning and encouragement were further supported by the fact-specific allegation that another incident had occurred within two weeks of the incident complained of when an inmate died from the excessive force and restraint. (Complaint ¶ 114).

Additionally, Virginia pleading requirements are procedural in nature and differ from the federal pleading requirements. Steward v, 284 Va. at 286, 726 S.E.2d at 253-54; Station # 2, LLC, 280 Va. at 175, 695 S.E.2d at 542; Frye v. Commonwealth, 231 Va. 370, 376; 345 S.E.2d 267, 272-73 (1986) (collecting authorities); Commonwealth v. Huntington, 148 Va. 97, 107, 138 S.E. 650, 654 (1927).The circuit court's reliance on the Iqbal (Opinion of 6/28/12 at 2) is therefore misplaced, especially for this plea in

bar concerning Virginia tort claims. In Virginia, the facts alleged are taken as true and the reasonable inferences from those facts are taken in the light most favorable to Wagner. Steward, 284 Va. at 286, 726 S.E.2d at 253-54; Station # 2, LLC, 280 Va. at 175, 695 S.E.2d at 542.

Given the clear precedent that Virginia sovereign immunity does not protect government agents from liability for their intentional torts, and the sufficiency of the pleadings on this issue, this Court should reverse the circuit court's dismissal of Wagner's assault and battery claims.

8. **The circuit court erred in dismissing the gross negligence claim and the willful and wanton negligence claim, as the complaint alleges sufficient facts to support a these claims, especially as such claims may be pled generally.**

In this case, the circuit court dismissed Wagner's intentional gross negligence claim and his willful and wanton negligence claim on the grounds that Wagner failed to plead gross negligence sufficiently, citing Ashcroft v. Iqbal, 556 U.S. 662 (2009). (Opinion of 6/28/12 at 2-3). This ruling misevaluates the pleadings filed and the Virginia pleading requirements for these state claims.

In Virginia, it is well established that sovereign immunity does not protect government agents from liability for their gross or for their willful or wanton misconduct. As this court stated in James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980): "A state employee who acts wantonly, or in a

culpable or grossly negligent manner, is not protected. And neither is the employee who acts beyond the scope of his employment, who exceeds his authority and discretion, and who acts individually."

Additionally, in Virginia, "[a]n allegation of negligence or contributory negligence is sufficient without specifying the particulars of negligence." Rule 3:18(b). Thus, these state claims for negligence cannot properly be dismissed by a Virginia court on the grounds that they fail to plead specific facts, whether on a demurrer or on a plea in bar, as the circuit court did. (Opinion of 6/28/12 at 2-3). The only way in which these claims for negligence and gross negligence can be dismissed on the plea in bar based on sovereign immunity is if the Respondents *affirmatively proved* that no such negligence took place, and there is simply no evidence supporting a finding to that effect. Station # 2, LLC, 280 Va. at 175, 695 S.E.2d at 542.

The sole case the Circuit Court cites, Ashcroft v. Iqbal, is a federal case involving federal claims decided under federal substantive and procedural law. It is simply inapplicable to this state claim brought in state court alleging negligence, where the Virginia Supreme Court Rules permit negligence to be pled generally. For pleading requirements, the law of the forum (*lex fori*) applies, and in Virginia, the *lex fori* permits negligence to be

pled generally. Rule 3:18(b); Frye, 231 Va. at 376; 345 S.E.2d at 272-73 (collecting authorities); Huntington, 148 Va. at 107, 138 S.E. at 654.

Wagner, however, did provide fact specific allegations, and the court is obliged to view the pleadings in the light most favorable to the non-moving party (Wagner) and to afford to the plaintiff all reasonable inferences. Any factual disputes are issues for the jury to decide. Steward, 284 Va. at 286, 726 S.E.2d at 253-54; Station # 2, LLC, 280 Va. at 175, 695 S.E.2d at 542.

As alleged in the Complaint, the Detention Defendants received multiple demands and complaints from Wagner concerning his safety, specifically concerning the substantial risk of harm posed to Wagner by Kinard, whom the Detention Defendants knew to be violent and whom the Detention Defendants knew posed a substantial risk of harm to Wagner, the only Caucasian in the cell block. (Complaint ¶¶ 39-41). The Detention Defendants knew of the risk of harm and were deliberately indifferent to it, and failed to take reasonable measures to abate it. (Complaint ¶¶ 42-43). This led to the assault and battery of Wagner by Kinard. (Complaint ¶ 44). The Detention Defendants or some of the Detention Defendants also attacked Wagner, including slamming his head onto the concrete bunk with potentially fatal force. (Complaint ¶¶ 57, 62, 64). Alternatively, the Medical

Defendants showed reckless indifference to Wagner's health, safety, and well-being by failing to provide to Wagner adequate medical attention and monitoring after Wagner suffered injuries by Kinard and/or Detention Defendants. (Complaint ¶¶ 65, 67). The force used against Wagner by the Detention Defendants was unreasonable and excessive, done with deliberate indifference to Wagner's rights, and was malicious and sadistic toward Wagner, causing Wagner severe injuries leaving him brain damaged and severely disabled for life. (Complaint ¶¶ 70-83, 84-89).

Moreover, the question of liability on the part of the Jail Board Defendants is determined by whether or not the Detention Defendants acted in accordance with an actual unlawful and improper policy or practice of the Jail Board and with its knowledge, approval, and/or encouragement. (Complaint ¶¶ 84, 95-114). This is properly a jury question, as the facts alleged sufficient support for these allegations, and the allegations of the negligence of the Jail Board Defendants can be pled generally.

For the foregoing reasons, this Court should reverse the circuit court's dismissal of the gross negligence and the willful and wanton negligence claims against the Respondents.

9. **The circuit court erred in dismissing the claims against the Respondents in their individual capacities, because sovereign immunity does not apply where the government agent was acting outside the scope of his employment, which is a jury question in this case.**

As noted above, government agents are not protected by sovereign immunity where their conduct was outside the scope and course of their employment, whether that conduct was negligent or intentional. Fox, 234 Va. at 424, 362 S.E.2d at 706; James, 221 Va. at 53, 282 S.E.2d at 869. Scope and course of employment is a fact-specific question, and such questions are to be resolved in Wagner's favor, insofar as reasonably possible based on the pleadings, on this plea in bar where no evidence was presented at the hearing. Steward, 284 Va. at 286, 726 S.E.2d at 253-54; Station # 2, LLC, 280 Va. at 175, 695 S.E.2d at 542.

As this Court has said, determining if something was done within the scope of employment is particularly difficult, especially in cases involving intentional tortious acts that the employer would not contemplate as being within the scope of the employment, but which were performed incident to the employment. Gina Chin & Assocs. v. First Union Bank, 260 Va. 533, 542-543, 537 S.E.2d 573, 578 (2000).

> Such cases invoke consideration of whether the employee deviated from the scope of his employment because of an external, independent, and personal motive to do the act upon his own account. In that regard, we have distinguished

> between the motive of the employee and the relevant question whether the service performed was within the scope of employment. In making this distinction, we have held that the motive of the employee in committing the act complained of is not determinative of whether it took place within the scope of the employment relationship. Rather, the issue is whether the service itself, in which the tortious act was done, was within the ordinary course of such business.
>
> . . . .
>
> We emphasize that the employee's improper motive is not irrelevant to the issue whether the act was within the scope of employment. Rather, it is merely a factor to be considered in making that determination, and, unless the deviation from the employer's business is slight on the one hand, or marked and unusual on the other, but falls instead between those two extremes, the question is for the jury.

Id. at 543-544, 537 S.E.2d at 578.

In this case the conduct of the Respondents based on the pleadings suggests that the deviation was more than slight, which precludes the circuit court from concluding as a matter of law, as it necessarily must in sustaining the claim of sovereign immunity, that the conduct of the Respondents was within the scope of the Respondents' employment. The brutality of the force involved to cause Wagner brain damage when Wagner, as alleged, was unarmed and helpless strongly suggests a personal motive. Also, as alleged, Defendant Land (the superintendent at the time) had personal animosity toward Wagner because of an earlier matter involving Wagner's father. (Complaint ¶ 38). Additionally, if the

allegations that the Jail Board Defendants knew and condoned the violence of the other Defendants proves to be true—and it is presumed to be true for purposes of this plea in bar—then such behavior was more than a slight a deviation from their employment or agency as board members.

10. **If this Court determines that the Order of 8/1/12 was not a final order, this case should be remanded for the entry of a final order.**

Plaintiff has previously moved this Court to remand the matter on the grounds that the Order of 8/1/12 prepared by counsel for Respondents, which Wagner appeals from, was erroneously labeled a "FINAL ORDER" while defendant Kinard remained in the suit, and the order did not comport with the requirements of Rule 5:8A for partial final orders. This confusion led to the notice of appeal in this case being filed on August 14, 2012, prior to the motion for nonsuit of Kinard on August 20, 2012.

It appears, based on Walton v. Commonwealth, 256 Va. 85, 95, 501 S.E.2d 134, 140 (1998), that if this Court determines the Order of 8/1/12 was not a final order, the circuit court lacked jurisdiction to enter the Order of 8/20/2012 because of the intervening Notice of Appeal filed on or about August 14, 2012. In Walton, the Court wrote:

> We do not consider this purported order because the trial court was divested of jurisdiction once the defendant filed his notices of appeal. We have stated that the "orderly administration of justice demands that when an appellate court

> acquires jurisdiction over the parties involved in litigation and the subject matter of their controversy, the jurisdiction of the trial court from which the appeal was taken must cease." Greene v. Greene, 223 Va. 210, 212, 288 S.E.2d 447, 448 (1982).

In light of the foregoing principle, the circuit court would have lacked jurisdiction to enter the purported Order of 8/20/12 nonsuiting Kinard. If the Order of 8/1/12 (or alternatively the Order of 8/9/12), is not a final order, there was no final order entered in this case.

As stated, Wagner previously sought to remedy this by moving this Court to remand the matter to the circuit court for entry of a final order nonsuiting defendant Kinard. No action was taken on the motion. Wagner requests the motion be granted at this time if the Court determines that this appeal is premature. See Comcast of Cheterfield County, Inc., v. Bd. Of Supers. of Chesterfield County, 277 Va. 293, 307, 672 S.E.2d 870, 877 (2009) (dismissing an appeal without prejudice for lack of a final order).

This Court, may, however, determine that the Order of 8/1/12 was a final order in this case, creating a severable judgment from the interests of Kinard. See Leggett v. Caudill, 247 Va. 130, 134, 439 S.E.2d 350, 352 (1994) (quoting Wells v. Whitaker, 207 Va. 616, 629, 151 S.E.2d 422, 432-33 (1966)); Bowles v. City of Richmond, 147 Va. 720, 725, 129 S.E. 489, 490 (1925). While it is true that the Order of 8/1/12 prepared by counsel for

Respondents and entered by the circuit court did not strictly comply with the requirements for a partial final judgment under Rule 5:8A, the purposes of the Rule were satisfied in this case.[7] The trial court based its ruling on grounds of sovereign immunity and issues of pleading particular to the defendants other than Kinard. Those issues do not affect Kinard. Under prior case law, the judgment against these defendants is severable from any claims against Kinard. See, e.g., Leggett, 47 Va. at 134, 439 S.E.2d at 352. This Court has "consistently held that most statutory and rule-based procedural prerequisites for the valid exercise of jurisdiction by a court may be waived, even when couched in mandatory terms by the language of the statute or rule." Ghameshlouy v. Commonwealth, 279 Va. 379, 391, 689 S.E.2d 698, 704 (2010). While this Court does strictly enforce the time requirements for filing a notice of appeal in order to protect the appellee, id., the Rule does not aim for "a mechanical application of a technical rule

[7] Rule 5:8A prescribes the requirements for appeal of a partial final order. The Rule states the order must be styled "Partial Final Judgment" and contain express findings that (1) the interests of the parties affected by the order are separate from those unaffected, (2) the outcome of an appeal from the partial final order will not affect the remaining parties, and (3) the decision on the remaining litigation will not affect the parties subject to the partial final order. In this case, the order prepared by the Respondent's counsel and entered by the trial court did not label its order as a "Partial Final Judgment" and make the necessary express findings. Nonetheless, under the unique facts of this case, this Court should find Rule 5:8A satisfied.

to deprive a litigant of the right to appeal" or "to penalize the appellant," Avery v. County Sch. Bd. of Brunswick County, 192 Va. 329, 333, 64 S.E.2d 767, 770 (1951). The issues determined by the trial court in this case are separate and distinct from any issues involving defendant Kinard.

## CONCLUSION

For the foregoing reasons, Wagner asks this court to reverse the circuit court's dismissal of his claims against the Respondent-Appellees and overrule the Respondent-Appellees' plea in bar, or in the alternative to grant his motion to remand the case to the circuit court for entry of a final order to permit Wagner to note his appeal.

**Respectfully Submitted,**

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## CERTIFICATE

I hereby certify, that pursuant to Rule 5:17(i):

I represent appellant in this matter, Kenneth L Wagner. My contact information is as follows:

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Mr. Jack L. Gould appeared as counsel for the Respondents in this matter, and his contact information is as follows:

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We certify that seven (7) printed copies of the Petition for Appeal were hand-filed with the Clerk of this Court. A true copy of the foregoing Petition for Appeal was sent via U.S. Mail, first class, postage prepaid, to Jack L. Gould, Esq.at the address previously stated, as counsel for the Appellees on November 1, 2012.

I further certify that the foregoing petition does not exceed 35 pages, as calculated pursuant to Virginia Supreme Court Rule 5:17(f), and that I

have otherwise complied with Rule 5:17 of the Rules of the Virginia Supreme court and its various subparts.

Appellant desires to state orally to a panel of this Court the reasons the Petition for Appeal should be granted. Appellant desires to make such oral argument in person, by and through counsel.

By: _____
Counsel

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