*In the*

# Court of Appeals of Virginia

*At Richmond*

## Record No. 1436-25-4

DAVID C. GRUSCH,

*Appellant,*

– v. –

MICHAEL L. CHAPMAN; MARYELLEN CLARKE, and LOUDOUN COUNTY SHERIFF'S DEPARTMENT,

*Appellees.*

# BRIEF OF APPELLANT

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## INTRODUCTION & STATEMENT OF THE CASE

This is a negligence case arising out of the wrongful disclosure of confidential medical information by the Loudoun County Sheriff's Office in response to a Virginia Freedom of Information Act request by a news reporter. The documents disclosed pertained to an involuntary admission of Appellant related to a psychiatric episode. By law, they were "not [to] be subject to the Virginia Freedom of Information Act." VA Code § 37.2-818(B). Yet, the Sheriff's Office redacted some minimal biographical information – not enough to protect the sensitive medical information nor the identity of Appellant – and turned over the documents.

Even if the documents were not wholly barred from disclosure by statute, the paltry redactions equated to gross or willful negligence. The former because the redaction of some personal information highlighted the Appellees recognition of potential harm and then utter disregard of prudence, and the latter because the Appellees knew of Appellant's identity and the harm that would result from disclosure and willfully turned the documents over anyway.

Appellees first attacked the Complaint with a Plea in Bar on the basis of sovereign immunity. Though Appellees argued only that the Sheriff's Office exercised judgment in determining whether to abide by the statute on disclosure, which is a ministerial task not open to discretion, the lower court sua sponte found the statute's *themselves* provided Appellees discretion. Ultimately, the Court granted the Plea

and dismissed with prejudice Counts I and III (negligence claims premised on violation of the VFOIA) on this basis. This was error.

Next, the Court heard the Demurrer as to Counts IV (Gross Negligence) and V (Willful Negligence). Having found that the pertinent statutes provided the Sheriff discretion to determine what to disclose and/or redact, the Court found that because Appellees had exercised some discretion, by their minimal redactions, Appellant's gross and willful negligence claims must fail. This too was error.

With his case dismissed in full, Appellant filed this appeal. Appellant seeks reversal of the lower court's decision on Counts I, IV and V, as to Appellees liability in their individual capacity.

## ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting Appellees' Plea in Bar to Count I in Appellees' individual capacity based upon sovereign immunity, as the reports at issue were prohibited from disclosure under Va. Code § 2.2-3705.5(6) and, therefore, providing the documents in response to a VFOIA request was, at minimum, negligent. (Preserved at R. 120, 235-36, 241-42, 291-92, 297-313, 316).[1]

2. The Trial Court erred in ruling that as a matter of law, any redaction of the records produced implied a standard of care had been met, thus granting Appellees' Demurrer on Counts IV and V. (Preserved at R. 260, 344-56, 358-59).

3. The Trial Court erred in dismissing Counts IV and V with prejudice, denying Appellant the opportunity to re-plead newly discovered facts concerning Appellees' knowledge of existing circumstances and conditions that their conduct would cause injury to Appellant. (Preserved R. 250-52, 261-63, 351-53).

[1] Pursuant to the holding in *Sisco v. Holtzman*, 85 Va. App. 431 (2025), Grusch has made modifications to his preliminary assignments of error. Primarily, he has consolidated Assignments of Error I and II, dropping claims against Appellees in their official capacity and Count III.

## STATEMENT OF FACTS

### A. Appellees wrongly disclosed protected documents in response to a newspaper reporter's VFOIA request.

Appellant David Grusch is a former U.S. Air Force and U.S. Intelligence Officer who maintains a Top-Secret government security clearance. R. 111 (¶ 1). In July 2023, Grusch made national news when he testified before the U.S. House of Representatives regarding his whistleblower complaint related to classified information. *Id*. (¶ 16).

On July 30, 2023, just days after his public testimony and news coverage, a reporter submitted a Virginia Freedom of Information Act ("VFOIA") request to the Loudoun County Sheriff's Office for "all CADs, Calls for service, Call Detail Records, incident History Reports, and related police reports." *Id*. (¶ 18). The request sought information related to Grusch himself and his two previous addresses from the dates March 2014 through November 2019. *Id*.

In response to the reporter's VFOIA request, Maryellen Clarke, on behalf of the Sheriff Michael Chapman ("Sheriff" or "Chapman") and the Loudoun County Sheriff's Office, released reports generated by the Sheriff's Office created on or about October 1, 2018. *Id*. (¶ 19) ("Reports"). The Reports detailed an incident in which Grusch was admitted to Loudoun Adult Medical Psychiatric Services ("LAMPS"), subject to an Emergency Custody Order ("ECO") and Temporary Detention Order ("TDO"). *Id*. (¶ 20). While Appellant's name, date of birth, age (on

one page), sex, race, and phone number were redacted, the report contained highly sensitive personal and medical information and was linked to Grusch's publicly known address at the time of the incident. *Id*. (¶ 19); see Reports, R. 127-134.

On August 9, 2023, the reporter published an article sharing the details of Grusch's involuntary admission and medical treatment at LAMPS in 2018, as covered in the released Reports. *Id*. (¶ 21). Due to the release of this highly sensitive information, Grusch has suffered significant personal and professional harm. *Id*. (¶ 22). At no time did Grusch waive confidentiality of the records associated with his 2018 involuntary admission into LAMPS. *Id*. (¶ 13).

### B. The Court wrongly granted Appellees Plea in Bar based upon Sovereign Immunity.

On July 16, 2024, Grusch filed his Complaint against Appellees, which was ultimately amended simply to add Clarke's name, alleging Violations of the VFOIA (Counts I and II), Violation of the Virginia Behavioral Health and Development Services Act ("VBHDSA") (Count III), Gross Negligence (Count IV), and Willful Negligence (Count V). R. 1, 111.

In response, Appellees filed a Motion Craving Oyer along with a Plea in Bar and Demurrer to all Counts. R. 135. The Court granted the Motion Craving Oyer, incorporating the Reports into the Complaint. R. 194. Having violated Va Sup. Ct. Rule 3:18's requirement to delineate their pleadings, the Court mandated that

Appellees refile separate pleadings for the Demurrer and Plea in Bar, which they did on May 15, 2025. R. 192, 207, 214.

With the renewed Plea, Appellees sought to dismiss all Counts based solely on the argument that both Appellees were immune from suit, in their individual and corporate capacity.[2] R. 208. The Plea was heard on June 2, 2025. R. 241. It was on the pleadings and no evidence was presented. R. 280, 288.

At the outset of the hearing, Grusch withdrew Count II. *Id*. The Court heard argument on the remaining Counts and dismissed with prejudice all Counts against Appellees in their official capacities and Counts I and III, *in toto*, on grounds of sovereign immunity. *Id*. The Court dismissed Counts I and III because it found Appellees' actions were discretionary under the pertinent statutes, while permitting Counts IV and V to proceed because sovereign immunity did not bar claims of gross or willful negligence. *Id*.; R. 313.

### C. The Court granted the Demurrer to the remaining Counts on the incorrect view that some care negated gross or willful negligence.

The Demurrer to Count IV (Gross Negligence) and Count V (Willful Negligence) was heard on August 6, 2025. R. 261. The Court found that Clarke had exercised some care, because she had redacted pieces of biographical information

[2] The argument was primarily one of sovereign immunity, but Appellees also argued they should be immune from suit under the VFOIA itself. R. 211. They basically abandoned this argument at the Hearing, and the Court did not reach it. R. 316.

from the Reports. R. 358-359. Thus, the Court wrongly reasoned, claims of gross and willful negligence must fail. *Id*.

Grusch raised with the Court that additional information related to gross and willful negligence had been found in discovery, and he requested leave to amend his Complaint. R. 250, 263, 352. Though it recognized the request, the Court ultimately denied it. R. 358. In the end, the Court dismissed Counts IV and V with prejudice. *Id*.; R. 261.

This appeal followed on August 22, 2025. R. 267.

## SUMMARY OF THE ARGUMENT

The Trial Court erred in granting Appellees' Plea in Bar to Count I on the basis of sovereign immunity for two reasons. First, Appellees limited their argument in the Plea solely to the question of whether Clarke's decision to comply with the pertinent disclosure statutes was an exercise of judgment and discretion, which it patently is not. Second, even if Appellees had properly argued that the statues provided them discretion over what to disclose, Va. Code § 2.2-3705.5(6) did not grant Appellees discretion to release the Reports. Therefore, providing the documents in response to a VFOIA request was, at minimum, negligent, and Appellees are not immune from liability.

In dismissing Counts IV (Gross Negligence) and V (Willful Negligence), the Court erred in ruling that, as a matter of law, any redaction of the produced records

implied a standard of care had been met. Under controlling Virginia case law, an irrelevant act of care is not determinative of the issue of gross or willful negligence, and it should be a matter of fact for a jury to decide. Here, Grusch pled sufficient facts to show that the redactions were irrelevant; meaning a reasonable jury, looking at the totality of the circumstances, could conclude that Appellees' deliberate actions constituted gross, or even willful, negligence.

Finally, the Trial Court abused its discretion in denying Grusch an opportunity to amend his Complaint. Grusch showed good cause for amending the Complaint based on newly discovered facts, and all relevant factors for evaluating the trial court's exercise of discretion weigh in Grusch's favor.

## ARGUMENT

### I. The Trial Court erred in granting Appellees' Plea in Bar to Count I in Appellees' individual capacity based upon sovereign immunity, as the reports at issue were prohibited from disclosure and, therefore, providing the documents in response to a VFOIA request was, at minimum, negligent.

#### A. Standard of Review

"[W]here no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's complaint are deemed true." *Massenburg v. City of Petersburg,* 298 Va. 212, 216 (2019) (internal citations and quotation marks omitted). "This approach results in functionally de novo review." *Id*. "The party asserting the plea in bar bears the burden of proof." *Id*. at 216.

### B. The Court erred in granting the Plea on the basis of Sovereign Immunity.

The lower court wrongly dismissed Count I on the basis of sovereign immunity. Since Clarke was barred by law from producing the Reports, there was no judgment or discretion in the act and Appellees cannot possess immunity.

"[A]n employee of a [government] agency who performs duties which do not involve judgment or discretion but which are purely ministerial, is liable for injury which results from his negligence." *Lawhorne v. Harlan*, 214 Va. 405, 407 (1973) (overruled on other grounds by *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 78-79, (1983)). "A ministerial act is 'one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.'" *Moreau v. Fuller*, 276 Va. 127, 135 (2008) (quoting *Richlands Medical Ass'n. v. Commonwealth of Virginia*, 230 Va. 384, 386 (1985) (quoting *Dovel v. Bertram*, 184 Va. 19, 22 (1945))). See, also, *First Va. Bank-Colonial*, 225 Va. at 80 (Finding ministerial that "[t]he clerk is required to index recordings alphabetically 'in the names of all parties ….'") (quoting VA Code § 17-79).

Moreover, a Sheriff is responsible for the performance of the duties of his office. See, *White v. Chapman*, 119 F. Supp. 3d 420, 430 (E.D. Va. 2015). "The acts

and defaults of the deputy, colore officii,[3] are considered in law as the acts and defaults of the sheriff, who is liable therefor in the same form of action as if they had been actually committed by himself." *Mosby's Adm'r v. Mosby's Adm'r*, 50 Va. 584, 603 (1853). While some government officials may be exempt under sovereign immunity from respondeat superior liability, constitutional officers generally are not. See, *First Va. Bank-Colonial*, 225 Va. at 80-81 (holding "respondeat superior applies to a clerk of court in the performance of the duties of his office"). This is because, with Sheriffs and other constitutional officers, "the interests of the public in the faithful performance of official duties outweigh the interests of those entrusted to perform them." *Id*.

Applying the law to the facts here, Chapman is liable for all actions taken by Clarke because the execution of her duties related to VFOIA were all done in colore officii. R. 112 (¶¶ 3, 6). Appellees never argued, nor could they, that Clarke's actions were not taken on behalf of the Sheriff's Office. Yet, her actions, as pled by Grusch, were unauthorized by law. R. 120 (¶ 48). Accordingly, the Sheriff is equally liable under respondeat superior for all misfeasance and/or negligence of Clarke.

[3] "Acts taken colore officii are an 'officer's acts unauthorized by his position, though done in form that purports that acts are done by official duty and by virtue of office.'" *Westmoreland v. Brown*, 883 F. Supp. 67, 79 (E.D. Va. 1995) (quoting Black's Law Dictionary 241 (5th Ed. 1979)).

### i. A government actor has no discretion in following the law.

For the Plea in Bar, Appellees relied solely on the pleadings and presented no further evidence. R. 280 ("we're [] just doing a legal argument… [no] witnesses.") and R. 288 ("we're dealing with a plea in bar without evidence"). At the hearing, they argued simply that Count I should be dismissed because "Ms. Clark[e's decision] whether or not to produce this document [] involves judgment and discretion." R. 283. Meaning, they did not argue at the hearing, likely because they had only raised the argument in their Demurrer (see, R. 144, 223), that VA Code § 2.2-3705.5(6) and § 37.2-818 did not apply. See, R. 286 ("the statute that they're alluding to here…is really an issue of the demur…") and R. 287 ("the further analysis is really under the demur with respect to that code section….") Instead, they based their Plea solely on the argument that the Appellees' *decision* to comply with the law, or not, involved "judgment and discretion." R. 283.

In essence, Appellees' Plea in Bar argument was that Clarke's decision to comply with the law, VA Code § 2.2-3705.5(6) or § 37.2-818, was discretionary. But, complying with the law is by definition a ministerial action; therefore, there can be no discretion in deciding to comply or not with controlling legal authority. *Moreau*, 276 Va. at 135; *First Va. Bank-Colonial*, 225 Va. at 75 ("there is no sovereign tort immunity [for] misfeasance of a ministerial duty")

Importantly, the Appellees and the Court were bound by the arguments raised by Appellees in their Plea. "[A] litigant's pleadings are as essential as his proof . . . . Thus, a court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed." *Dabney v. Augusta Mut. Ins. Co*., 282 Va. 78, 86 (2011). Yet, the lower court went further and analyzed at the Plea in Bar hearing whether Va. Code § 2.2-3705.5(6) and/or § 37.2-818 provided discretion to the Appellees. R. 313 (finding, "it's statutorily discretionary"). This was error since Appellees did not plead this argument, nor make it orally at the Plea in Bar hearing. R. 283, 286-287. In the end, Grusch's Counsel was caught by surprise by the argument and Appellees gained an inappropriate advantage. R. 295. The court's action was error.

Accordingly, on this basis alone, the ruling on Count I should be reversed.

**ii. Appellees failed to carry their burden of proof on the Plea.**

To the extent the trial judge, and this Court, may be willing to consider arguments not found in Appellees' pleading, Grusch should still prevail because the Reports are barred from disclosure by Va. Code § 2.2-3705.5(6).

The primary dispute in this case is over which VFOIA statute should control Clarke's actions. Grusch's position is that Va. Code § 2.2-3705.5(6), incorporating language from § 37.2-818, should control. By contrast, Appellees argue that their actions were governed by Va. Code § 2.2-3706(B) or § 2.2-3706(D). In short, § 2.2-

3706 pertains to records kept by the Sheriff's Office, § 37.2-818 generally to records created for a TDO hearing kept by the Court, and § 2.2-3705.5 to health records.

Usually, the Sherriff's disclosure obligations under VFOIA are covered by VA Code § 2.2-3706.[4] See, subsection A ("All public bodies engaged in criminal law-enforcement activities shall provide the following records…") However, VA Code § 2.2-3705.5 carves out – for all agencies, including the Sheriff - the disclosure of TDO records. The statute bars disclosure of certain health "information … prohibited by law [from] disclosure," and specifically includes in its reach all "[r]eports and court documents relating to involuntary admission required to be kept confidential pursuant to § 37.2-818." VA Code § 2.2-3705.5 (preamble) and (6).

Turning to § 37.2-818, subsection (B) details items that must be kept confidential; it includes all "recordings…, relevant medical records, reports and court documents pertaining to the hearings…." The last line of subsection (B) then mandates: "Such recordings, records, reports and documents shall not be subject to the Virginia Freedom of Information Act." *Id*. Importantly, the Statute covers all "reports…pertaining to the hearings," and is focused not on the entity holding the documents – for example, not stating: "the *court's* recordings, records, reports, etc." –

[4] Subsection (B) pretty clearly does not apply, as this action was not part of a "Criminal investigation." Though not entirely clear, subsection (D) might have applied to the Reports, if not superseded by § 2.2-3705.5(6).

but on the documents themselves, stating: "*Such* recordings, records, reports, [etc.]." *Id*. (emphasis added).

Here, the Reports span eight pages and are made up primarily of an Incident Report capturing the events undergirding and leading to the TDO. R. 196-203; see, e.g., 197 ("I EXECUTED THE TDO AND TRANSPORTED HIM UPSTAIRS TO LAMPS.") According to Black's Law Dictionary, to pertain means "to relate to; to concern." 1165 (7th Ed. 1999). Unquestionably, therefore, the Reports pertain to the TDO process.

Not only does the text of the statute support Grusch's position, but so does the lack of evidence in this case. Having brought the Plea, Appellees bore the burden of proving it. *Massenburg*, 298 Va. at 216. Worse for Appellees, the Amended Complaint expressly pleads that the Reports were "relating to involuntary admission" and "were incorporated into court documents/reports related to Grusch's ECO and TDO." R. 120, ¶ 49. Despite needing to rebut this evidence to carry their burden, **Appellees put on no evidence** in support of their position that the Reports were not part of the court's TDO file nor, more importantly, that they did not "pertain[] to the hearings." VA Code § 37.2-818(B). Meaning, even if the Reports did not "pertain[] to the hearings," Appellees failed to prove that fact. *Id*.

Since the Reports, on this record, did relate to the TDO hearings, the Reports should have been kept confidential pursuant to VA Code § 37.2-818(B). By

extension, the Reports should have been found by the court to "not be subject to the Virginia Freedom of Information Act." *Id*. Accordingly, since the Reports – held by the Sheriff – were "prohibited by [VA Code § 37.2-818(B) from] disclosure," Clarke did not in fact have discretion to turn them over, redacted or otherwise. VA Code § 2.2-3705.5.[5] In doing so, Clarke was negligent and the Court erred in dismissing Count I.

For the above reasons, this Court should reverse and remand Count I.

## II. The Trial Court erred in ruling that, as a matter of law, any redaction of the records produced implied a standard of care had been met, thus granting Appellees' Demurrer on Counts IV and V and denying a jury the opportunity to decide the question.

### A. Standard of Review

The grant of demurrer involves a matter of law, which this Court reviews *de novo*. *AGCS Marine Ins. Co. v. Arlington Cnty.*, 293 Va. 469, 473 (2017). In reviewing a lower court's decision on demurrer, this Court must "accept as true all factual allegations expressly pleaded in the complaint" and interpret them "in the light most favorable to the plaintiff." *Taylor v. Aids-Hilfe Koln e.V.*, 301 Va. 352, 357 (2022) (quoting *Coward v. Wellmont Health Sys*., 295 Va. 351, 358 (2018)).

[5] To be clear, since the Report was not subject to disclosure at all, Clarke did not have the right or ability to decide on redactions under VA Code § 2.2-3704.1, and the statute should have no application here.

### B. Argument

If Grusch prevails in his argument under Count I that the Appellees had no right to disclose the Reports, then Counts IV and V should necessarily be reversed, as Appellees' actions would on their face equate to gross or willful negligence. But even if this Court were to find Appellees maintained discretion over disclosure of the Reports, the Court should still reverse because the exercise of any act of care at all, no matter how irrelevant, does not negate gross or willful negligence as a matter of law.

#### i. Even if Appellees had discretion under VFOIA, they still violated a duty of care to Appellant

To begin, Counts IV and V were never rooted solely in the VFOIA but also explicitly relied upon general negligence principles. As cited in the Amended Complaint, "whenever the circumstances are such that an ordinary prudent person could reasonably apprehend that, as a natural and probable consequence of his act, another person rightfully there will be in danger of receiving an injury, **a duty to exercise ordinary care to prevent such injury arises**." R. 124 (¶¶ 70(i)), 76(i)) (emphasis added) (quoting *RGR, LLC v. Settle*, 288 Va. 260, 279 (2014)).

In a slightly different context (i.e., protection from third party physical harm), this general principle has been expressly applied to public officials. *Burdette v. Marks*, 244 Va. 309, 312 (1992). In these cases, Courts have held that when an official has a "special duty owed to a specific, identifiable person or class

of persons" (*id*.), "then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages." *Commonwealth v. Burns*, 273 Va. 14, 17 (2007) (quoting Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independently of Contract § 300 (D. Avery Haggard ed., 4th ed. 1932)). To make out such a claim, "it is important to consider whether [the defendant] reasonably could have foreseen that he would be expected to take affirmative action to protect [the plaintiff] from harm." *Burdette,* 244 Va. at 312.

While *Burdette* involved gross negligence related to a Deputy Sheriff's failure to intervene in an observed physical attack, the factual situation parallels this case. Here, under Appellees' argument, Clarke had discretion to turn over the Reports or, at least, to determine redactions. See, Va. Code Ann. § 2.2-3705.5 ("may be disclosed by the custodian in his discretion, … [r]edaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01"); Va. Code § 2.2-3706(D) ("may withhold those portions of noncriminal incident … reports or materials that contain identifying information of a personal, medical, or financial nature"). She knew or should have known the reporter intended to utilize the requested information to harm Grusch. R. 121 (¶ 56); R. 352. While Clarke had the power to withhold or seriously redact the Reports,

she did virtually nothing. R. 196-203. Her failure to "to take affirmative action to protect [the plaintiff] from harm" led to his injuries. *Burdette* at 312.

Just like in *Burdette*, the circumstances here give rise to a special duty between Appellees and Grusch. The lower court erred in not finding such a duty outside of the VFOIA.

**ii. Whether Appellees' release of the Record was discretionary or non-discretionary, Appellees violation of their duty of care constituted gross or willful negligence.**

Under the facts of this case, a reasonable jury could have found Appellees acted with gross or willful negligence.

"[G]ross negligence, is a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness." *Doe v. Baker*, 299 Va. 628, 652 (2021). By contrast, willful and wanton negligence "is defined as 'acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.'" *Id*. (quoting *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 486 (2004)). Between the two, "gross negligence involves conduct that 'shocks fair-minded people,' and willful and wanton negligence

involves such recklessness that the actor is aware that his conduct probably would cause injury to another." *Id*.

Here, the trial court erred in concluding that these heightened negligence claims failed as a matter of law. In their Demurrer, Appellees relied solely on *Elliott v. Carter* for the proposition that "a claim for gross negligence must fail as a matter of law when the evidence shows that the defendant exercised some degree of care." *Elliott v. Carter*, 292 Va. 618, 623; R. 188. Accepting this argument, the trial court sustained the demurrer, reasoning that "the fact that Clarke redacted a multitude of items on the document before it was released…is indicative of some exercise of care." R. 358-359.

However, "*Elliott* does not stand for the proposition that a plaintiff's gross-negligence claim must fail so long as the defendant identifies any acts of care at all, no matter how remote or irrelevant those acts were in relation to ensuring the victim's safety." *Howard v. Harris*, 80 Va. App. 365, 381-82 (2024). Instead, a defendant's actions must be scrutinized in their totality – no single act, even if appearing on its face to be indicative of care, is necessarily dispositive. See *Green v. Ingram*, 269 Va. 281, 290-91 (2005); *Chapman v. City of Virginia Beach*, 252 Va. 186, 191 (1996) (holding that the "cumulative effect of [the] circumstances" may constitute gross negligence).

*Green*, for example, involved a law enforcement officer who harmed an individual while purporting to follow protocols for breaching a door with frangible shotgun rounds. *Green*, 269 Va. at 290-91. Although the evidence on its face was indicative of some level of care (e.g., the officer angled shots downward and conducted visual checks after each shot), the Supreme Court held that a reasonable jury could still conclude that the officer's actions "departed from instruction and training" and, given the officer's knowledge, constituted gross negligence. *Id.*; see also *Howard*, 80 Va. App. at 382-83 (agreeing with plaintiff that "the 'some degree of care' standard from *Elliott* did not supplant the broader principles in Virginia's gross-negligence law as applied by the Supreme Court in *Green*" and concluding that a reasonable jury could find that defendant failed the "some degree of care" standard despite initial acts of care).

Here, viewing the totality of facts and inferences in a light most favorable to Grusch, a reasonable jury could conclude that Clarke's redactions were not merely inadequate or ineffectual, but were irrelevant given the circumstances. R. 359. Moreover, contrary to the lower court's findings, a jury could believe that the deliberate act of releasing the sensitive records actually constituted "indifference and utter disregard of prudence," regardless of the redactions. *Green*, 269 Va. at 291.

After all, the VFOIA requests at issue named Grusch and his known addresses for a given period of time, making the limited redactions irrelevant; the

records produced self-evidently pertained to Grusch even with the redactions. R. 196-203. Further, if there was any question as to identity, sufficient personally identifiable information was left unredacted to overcome any doubts, such as Appellant's prior military service (R. 201 ("was active duty Airforce")), his age and gender (R. 199 ("27 year old, Male")) and, of course, address. R. 196.

As well, the released records on their face contained highly sensitive personal and medical information directly relating to Grusch's mental health and involuntary admission for psychiatric care – a red flag that the entire record, or at least most of its substance, should be protected from disclosure. R. 197-203. In fact, Appellees' limited redactions, if anything, show that Appellees knew the document contained highly sensitive information that should be protected, yet Appellees deliberately released the substantive information regardless. *Id*.

Finally, the VFOIA request pertained to an individual making national news at the time for a controversial position. R. 114 (¶ 16). This should have led to the natural inferences that (1) the reporter submitting the request was trying to dig up dirt on Grusch and (2) release of any sensitive and protected information would cause immediate and extensive reputational and professional harm. R. 121 (¶ 56); R. 352.

In short, a fact-finder could conclude that the fact that Clarke redacted some biographical information but not enough to protect Grusch's "personal [or] medical

[] information [to prevent] jeopardiz[ing his] privacy," actually highlights the grossly negligent nature of her actions. Va. Code § 2.2-3706(D). Regardless of any futile and grossly inadequate redactions, a jury could find Appellees "departed from instruction and training" and that the ultimate release of the records constituted gross negligence. *Green*, at 291; R. 112-13 (¶¶ 6, 7).

Moreover, given the deliberate nature of the record release and foreseeability and probability of harm to Grusch, a jury could find that Appellees "act[ed] with reckless indifference to the consequences, with the [Appellees] aware, from [their] knowledge of existing circumstances and conditions, that [their] conduct probably would cause injury to another," satisfying the standard for willful misconduct. *Cowan*, 268 Va. at 486. As argued below, Grusch obtained new information through limited discovery directly relevant to his claim of willful misconduct and should have been permitted to amend his complaint. See R. 348, 352.

At minimum, reasonable minds could differ, and the lower court erred in dismissing Counts IV and V on demurrer rather than allowing the matter to be decided by a jury.

## III. The Trial Court erred in dismissing Counts IV and V with prejudice, denying Appellant the opportunity to replead newly discovered facts concerning Appellees' knowledge of existing circumstances and conditions that their conduct would cause injury to Appellant.

### A. Standard of Review

"The decision whether to grant leave to amend a complaint rests within the sound discretion of the trial court." *Baker*, 299 Va. at 656 (citing *Kimble v. Carey*, 279 Va. 652, 662 (2010)). "In evaluating the circuit court's exercise of discretion, we consider, among other things, whether the court previously granted leave to amend, how long the case has been pending, and the extent to which the other side would be prejudiced by allowing amendment." *Id*. (citing *Ogunde v. Prison Health Servs., Inc.*, 274 Va. 55, 67 (2007)). Further, "[i]t is true that amendments are not a matter of right, but a trial court's decision refusing leave to amend after a showing of good cause is, in ordinary circumstances, an abuse of discretion." *Ford Motor Co. v. Benitez*, 273 Va. 242, 252 (2007).

### B. The Trial Court abused its discretion in denying Appellant an opportunity to amend his Complaint to plead newly discovered facts.

Here, Appellant showed good cause for amending his Complaint, and the Court should have granted the request.

Rule 1:8 "takes into account that new evidence may come to light during discovery, warranting the assertion of new claims or defenses." *Ford Motor Co*., 273 Va. at 252. At the Demurrer hearing, Appellant clearly argued that new evidence

had been discovered that would directly impact the negligence claims. R. 348 ("I will say that, in discovery, we also did get more information that would change [paragraphs 14 to 21 of the Complaint]"; R. 352 ("…in discovery, it came out that [Appellees] knew full well who [Appellant] was, what he was doing").

However, the trial court erred in ignoring the proffered facts on the grounds that the facts would not affect the outcome. R. 358-359. But as argued above, the Trial Court misapplied the gross negligence standard in *Green*, concluding that the mere fact that Appellees made some redactions satisfied the "some degree of care" standard. *Id*. This led the court to wrongly find that the claim for gross negligence failed as a matter of law. *Id*. To the contrary, Grusch's newly discovered facts go to the heart of the willful negligence claims. Therefore, Appellant showed good cause for requesting to amend the Complaint to plead the newly discovered facts.

Further, all other factors weigh in favor of granting Grusch leave to amend to plead newly discovered facts. First, while the Trial Court previously granted leave to amend on February 21, 2025, this amendment was for the sole purpose of naming Clarke in the Complaint, after Appellant discovered her identity. R. 1, 103. The substance of the Complaint had never been amended when Appellants claims were dismissed. R. 1, 111.

Regarding pendency of the case, the Trial Court ruled on the Demurrer and dismissed the final claims on August 6, 2025, just over a year after the Complaint

was filed on July 16, 2024. R. 1, 261. To the extent the case was delayed, the fault rested with Appellees. They improperly filed a consolidated Demurrer and Plea in Bar, requiring a Removal Order and time for defendants to properly file amended responsive pleadings. R. 192.

Further, Appellees would not have been unduly prejudiced by an amended complaint, as no trial date had been set. R. 68 (order only for Plea hearing). Furthermore, the amendments would not fundamentally have changed the complaint but only would have bolstered facts relevant to Counts already pled. R. 348, 352. Meaning, the limited amendments would have caused Appellees no undue prejudice.

In sum, the lower court abused its discretion in rejecting Grusch's request to amend his complaint on Counts IV and V, and this court should reverse and remand.

## CONCLUSION

For the foregoing reasons, the judgment of the circuit court as to Counts I, IV and V should be reversed and the case remanded to the lower court for further proceedings.

Respectfully submitted,

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## CERTIFICATE

I hereby certify that:

1. A copy of the foregoing Brief was served on counsel via electronic email as follows:

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2. The undersigned counsel does not desire to waive oral argument.

3. This Brief includes 5,747 words (inclusive of headings, footnotes, and quotations).

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