

**RECORD NO. 18-1575**

***In The  
United States Court Of Appeals  
For The Fourth Circuit***

**JIMMY GIANATO AND GALE GIVEN**  
***Defendants - Appellants,***  
**v.**

***CITYNET, LLC***  
***Plaintiff - Appellee.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON**

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**RESPONSE TO MOTION TO DISMISS APPEAL**

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## INTRODUCTION

Appellants filed an interlocutory notice of appeal in this case based upon the long held policy that a right to immunity is a right to be free from suit over and above a right to be free from liability. By deferring its ruling on the qualified immunity of the Appellants, the District Court denied the Appellants a dismissal based on grounds of immunity. Such denials are subject to interlocutory appeal. Moreover, the District Court's finding that there is a question of fact to be litigated is in error.

## BACKGROUND

The underlying case concerns the 2010 award of a Broadband Technology Opportunities Program (BTOP) federal grant to the State of West Virginia, and the implementation of the projects funded by said grant. In 2014, Appellee Citynet filed its Qui Tam Complaint asserting violations of the False Claims Act. The United States, after thorough review of the allegations and the evidence, declined to intervene in the Qui Tam suit.

Once the seal on the suit was lifted, Jimmy Gianato, Gale Given, and Kelley Goes (State Defendants)<sup>1</sup> filed their Motion to Dismiss based upon the definitions contained within the False Claims Act; the use of public information in Citynet's

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<sup>1</sup> Kelley Goes was subsequently voluntarily dismissed from the suit and is no longer a Defendant. Citynet's Motion references specific allegations as to Kelley Goes. Such allegations are dismissed and no longer at issue in the suit.

allegations; and doctrines of immunity, including qualified immunity.

The District Court cited to a dissenting opinion in its analysis denying the Motion to Dismiss based upon the definitions contained within the False Claims Act, despite the cited case's majority opinion holding in line with the arguments of the State Defendants. In fact, the issue before the Court on the definitions within the False Claims Act, and whether government officials are subject to suit has been previously been decided in favor of the State Defendants' arguments with only the 9<sup>th</sup> Circuit issuing an opinion in opposition to the same, notwithstanding the dissenting opinion relied upon by the District Court.

The District Court also denied the State Defendants' Motion to Dismiss on the grounds of qualified immunity. The District Court held that a factual determination was required to decide the level of scienter with which the State Employees acted in allegedly violating the FCA. Based upon the need for evidentiary development, the Court denied the State Defendant's Motion to Dismiss based on qualified immunity, with an understanding that the issue of qualified immunity could be raised again after a period of discovery.

## **ARGUMENT**

By failing to grant the State Defendant's Motion to Dismiss based upon qualified immunity, the District Court necessarily denied the same. There is no gray

area for government officials who are made to stand trial for official governmental functions and job duties.

Qualified immunity is an entitlement not to stand trial. “The entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985) (*emphasis in original*).

“Harlow and Mitchell make clear that the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery..., as ‘[i]nquiries of this kind can be peculiarly disruptive of effective government.’” Behrens v. Pelletier, 516 U.S. 299, 308, 116 S.Ct. 834, 839 (1996), *quoting Mitchell, supra*, at 526, 105 S.Ct., at 2815 (*emphasis in original*) (*internal quotations deleted*). *See also, Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2816 (1982).

The U.S. Supreme Court has previously held that policy concerns mandate qualified immunity for government officials in suits based upon their actions as government officials. In fact, the Court held that those policy concerns include “the need to preserve the official’s ability to perform their discretionary functions and to ensure that talented candidates not be deterred by the threat of damages suits from entering public service...” Syl. Pt. 2, Wyatt v. Cole, 504 U.S. 158, 112 S.Ct. 1827

(1992). “Underlying qualified immunity is the need to enable government officials to act decisively without undue fear of judicial second guessing.” Swanson v. Powers, 937 F.2d 965, 967 (4th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); Akers v. Caperton, 998 F.2d 220, 225-226 (4th Cir. 1993).

Thus, the case law makes clear that qualified immunity protects government officials from the suit as a whole and not just liability. Therefore, a failure to grant a Motion to Dismiss based upon qualified immunity, even without an express denial of the same, effectively denies the government official the protections made available by the qualified immunity doctrine. Requiring a government official to participate in discovery of matters for which that official is immune effectively denies said official the immunity.

Citynet’s Amended Complaint admits that, at the times relevant to the action, the State Defendants were employed as officials of the State of West Virginia. *See*, Complaint at ¶ 12 (“Since July 1, 2012, Given has been the West Virginia State Technology Officer”); and at ¶ 14 (“At all relevant time periods Gianato was the Director of the West Virginia Division of Homeland Security and Emergency Management”). Similarly, the Amended Complaint’s allegations against the State Defendants are not framed as allegations against the State Defendants in their individual capacities, and instead are framed as allegations against the State

Defendants in their official capacities. *See*, Complaint at ¶¶ 31 and 32 (making allegations as to “the State” via official representations allegedly made by Gianato); at ¶¶ 38-57, 63, 69-73, 123 (making specific allegations against the West Virginia Executive Office); and at ¶¶ 79, 94, 97, 100, 102, 108, 112, 114, 116, 119-122, (making allegations against State Defendants based on official decision making capacity).

Citynet’s Amended Complaint fails to make allegations sufficient to overcome the State Defendants’ qualified immunity defense. As highlighted above, the majority of Citynet’s allegations are actually made directly against the State of West Virginia and/or agencies of the State of West Virginia. Where allegations are made against the State Defendants, such allegations involve discretionary activities taken in the State Defendant’s official capacity, such as the drafting of grant bids and the review and/or approval of invoices.

Simply put, the Amended Complaint does not allege that the State Defendants acted outside of their official capacity to knowingly violate a clearly established statutory law. Instead, the Amended Complaint alleges that state government officials applied for federal grant monies, and that state government officials processed the payment of invoices pursuant to federal grant monies received by the State. These are precisely the types of activities that underpin the policy concerns upon which qualified



immunity is founded. If government officials are able to be sued for such simple acts as applying for grants and/or processing routine invoices, then many qualified candidates will be deterred from ever attempting to perform such duties and government operations will slow to a crawl as a result of the same.

Notwithstanding such policy considerations, it is the State Defendant's position that the District Court's finding that evidentiary development is necessary in this matter is itself in error. As stated above, and as will be further explored in the State Defendant's forthcoming appeal brief, Citynet's Amended Complaint fails to set forth allegations against the State Defendants that the State Defendants acted outside of their official capacity to knowingly violate a clearly established statutory law. The State Defendants are entitled to qualified immunity at the outset of this litigation because Citynet has made no allegations that overcome the initial analysis required by qualified immunity.

The District Court's Order denying the State Defendant's Motion to Dismiss is final and appealable in that it requires the named government officials to give up their qualified immunity from litigation in order to participate in evidentiary discovery based on a Complaint that does not allege that the State Defendants acted outside of their official capacity to knowingly violate a clearly established statutory law. The public policy underpinnings of the doctrine of qualified immunity require interlocutory

review of the District Court's Order in this unique circumstance, even if such review has not been previously mandated by a holding of this Court. This suit is unique in that the State Defendants are sued for simply performing their jobs by applying for grant money and processing invoices.

### CONCLUSION

For the foregoing reasons, Defendant-Appellants Jimmy Gianato and Gale Given, respectfully request that the Court Deny Citynet's Motion to Dismiss Appeal and allow the appeal to proceed as previously ordered.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this Response to Appellee's Motion to Dismiss Appeal is proportionately spaced and contains 1,397 words excluding parts of the document exempted by Rule 32(a)(7)(B)(iii).

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